

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

In the matter of an Appeal under and in terms
of Section 5C of the High Court of the
Provinces (Special Provisions) Act, No. 19 of
1990 as amended by Act, No. 54 of 2006.

1. Munasinghe Arachchige Theja Renuka
No. 127/30, Vinayalankara Mawatha,
Maradana, Colombo 10

2. Thanthirige Dona Mallika Swarnalatha
No. 127/3, Vinayalankara Mawatha,
Maradana, Colombo 10

Plaintiffs

SC Appeal No: 53/2019
SC/HCCA/LA No. 523/2016
WP/HCCA/Colombo/56/2009/F
DC Colombo No. 20539/L

Vs.

W.K. Jagath alias Mangala
No. 127/34, Vinayalankara Mawatha,
Maradana, Colombo 10.

Defendant

AND BETWEEN

W.K. Jagath alias Mangala
No. 127/34, Vinayalankara Mawatha,
Maradana, Colombo 10.

Defendant-Appellant

Vs.

1.Munasinghe Arachchige Theja Renuka
No. 127/30, Vinayalankara Mawatha,
Maradana, Colombo 10

2.Thanthirige Dona Mallika Swarnalatha
No. 127/3, Vinayalankara Mawatha,
Maradana, Colombo 10

Plaintiff-Respondents

AND NOW BETWEEN

1.Munasinghe Arachchige Theja Renuka
No. 127/30, Vinayalankara Mawatha,
Maradana, Colombo 10

2.Thanthirige Dona Mallika Swarnalatha
No. 127/3, Vinayalankara Mawatha,
Maradana, Colombo 10

Plaintiff-Respondent-Appellants

Vs.

W.K. Jagath alias Mangala
No. 127/34, Vinayalankara Mawatha,
Maradana, Colombo 10.

Defendant-Appellant-Respondent

Before: Chief Justice Jayantha Jayasuriya, PC
Justice A.L. Shiran Gooneratne
Justice Janak De Silva

Counsel: Anuruddha Dharmaratne with Indunil Piyadasa instructed by
Indika Jayaweera for the **Plaintiff-Respondent-Appellants.**

V. Thevasenathipathi with S. Roshanie for the **Defendant-
Appellant-Respondent.**

Argued on: 10/01/2024

Decided on: 05/04/2024

A.L. Shiran Gooneratne J.

By Plaint dated 08/11/2004, the 1st and 2nd Plaintiff-Respondent-Appellants (hereinafter sometimes referred to as the “Plaintiff-Appellants”) filed this action, D.C. Colombo No. 20539/L against the Defendant-Appellant-Respondent (“the Defendant-Respondent”), and sought a declaration that the Plaintiff-Appellants are entitled to Lots 6,8,9 and 10 of plan No. 1273 dated 16/05/1964 prepared by S. Jegatheesan, Licensed

Surveyor which are depicted morefully in the 2nd, 3rd and 4th schedules to the Plaintiff with the entitlement to commonly possess Lot 17, which is described in the 5th schedule to the Plaintiff. A further declaration was sought to eject the Defendant-Respondent from the said Lot 17 of plan No. 1273 and for an order directing the removal of all constructions therein, to ensure free and un-hindered access to the commonly possessed lavatory and bathing facilities enjoyed by the Plaintiff-Appellants.

According to paragraph 2 of the Plaintiff, the 1st Plaintiff-Appellant by Deed No. 7974 dated 01/09/1976, attested by V.S. Kodikara, Notary Public became entitled to Lot 6, of the said Plan No. 1273 bearing assessment No. 127/15 depicted in the 1st schedule to the Plaintiff.

Paragraph 3 of the said Plaintiff states that the 2nd Plaintiff-Appellant by Deed No. 1196 dated 13/06/1964 attested by T. Sri Ramanathan, Notary Public became entitled to Lots 8, 9, and 10 of plan No. 1273 dated 16/05/1964 prepared by S. Jegatheesan, Licensed Surveyor, bearing assessment Nos. 127/12, 127/11, and 127/10 depicted in the 2nd, 3rd, and 4th schedules respectively, to the Plaintiff.

In paragraph 4 of the Plaintiff, it is stated that the common lavatory and bathing facilities located on Lot 17 depicted in the 5th schedule to the Plaintiff is used by the residents of the respective assessment numbers to Lots 1 to 16 and 18 as depicted in the said plan No. 1273.

In paragraph 6 of the Plaintiff, it is further contended that the Defendant-Respondent has illegally constructed a two storied building impeding the free access and enjoyment of the common facilities located on the said Lot 17 by the Plaintiff-Appellant.

The Defendant-Respondent by answer dated 17/03/2005, denies any encroachment to the said Lot 17 and upon Deed of Gift No. 09 dated 04/02/2004 attested by S. Sriyani, Notary Public, claims entitlement to premises bearing assessment No. 127/34, depicted as Lot No.2 in Plan No. 215 dated 28/11/2003 prepared by B.B. Prematillake, Licensed Surveyor.

According to paragraph 4 and 5 of the answer the Defendant-Respondent claims that his uncle, A.V.K. Indrawansa lived in the said premises until his death in the year 2001. The Defendant-Respondent claims that together with him, his mother and wife were residents in the said premises since 1998.

In paragraph 9 and 10 of the answer the Defendant-Respondent states that when he became entitled to the said premises, it consisted only of a ground floor, he states that construction of an upper floor to the existing building was concluded in August 2004. Further submits that presently he is engaged in the sale of motor vehicle spare parts in the said premises. The Defendant-Respondent by the said Deed of Gift No. 09 claims prescription to the said Lot No. 2, for a period over 30 years.

The Defendant-Respondent prayed for a dismissal of the Plaintiff.

At the conclusion of the trial, the Additional District Judge by Judgment dated 20/02/2009, held inter alia, that the Plaintiff-Appellants have established their title to the respective allotments of land and their common rights to use the facilities on Lot 17 of Plan No. 1273 and entered judgment accordingly.

Being aggrieved by the said Judgment, the Defendant-Respondent by Petition of Appeal dated 20/04/2009, appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Colombo (“Civil Appeal Court”). The Civil Appeal Court, after having considered the question of incursion any hindrance or obstruction caused to the use of common facilities, the prescriptive rights, possession acquired by the Defendant-Respondent to the building and the land appurtenant, as in the District Court, by Judgment dated 22/09/2016 held in favor of the Defendant-Respondent and set aside the Judgment of the Additional District Judge, dated 20/02/2009.

The Plaintiff-Appellants, by Petition dated 27/10/2016 is before this Court, to set aside the said Judgment dated 22/09/2016, delivered by the Civil Appeal Court.

By Order dated 21/02/2019, this Court permitted the Plaintiff-Appellants to proceed with the said application.

When this case was taken up for hearing on 10/01/2024, with leave of Court, the Plaintiff-Appellant confined this appeal to the following questions of law, as set out below.

- (i) Have the learned Judges of the High Court of Civil Appeals erred in law by arriving at the finding that the Defendant has acquired prescriptive title to the said Lot 17 of Plan No. 1273 dated 16/05/1964 prepared by S. Jegatheesan, Licensed Surveyor?
- (ii) Have the Learned judges of the High Court of Civil Appeals erred in law by holding that there is no acceptable evidence to arrive at a finding that the Defendant had exclusive and uninterrupted possession in Lot 17 of Plan No. 1273 dated 16/05/1964 prepared by S. Jegatheesan, Licensed Surveyor which is a mandatory requirement in the acquisition of prescriptive title?
- (iii) Have the Learned Judges of the High Court of Civil Appeals erred in law by failing to appreciate and consider that the Plaintiffs are entitled to the reliefs prayed for in the Plaint?
- (iv) Have the Learned Judges of the High Court of Civil Appeals erred in law by failing to appreciate and consider that the Learned trial judge has arrived at a correct finding in his said Judgment and has correctly answered the issues raised at the trial?

In the District Court, the trial commenced on 21/03/2006, with both parties admitting only to the jurisdiction of court. During the examination in chief of the 1st Plaintiff-

Appellant, further admissions by the parties numbered (ii), (iii) and (iv) were recorded as given below;

- (ii) The Plaintiffs are the owners of Lots 6,8, 9 and 10 of Plan No. 1273 dated 16/05/1964 and that a certified copy of the said plan has been prepared by Anil Pieris, Licensed Surveyor;
- (iii) the Defendant is in possession of a portion of Lot 17 of the said Plan and that the Defendant has constructed a building thereon;
- (iv) the Defendant has not duly obtained an approved plan or a certificate of conformity from the Colombo Municipal Council with regard to the said construction on the said Lot 17.

Both the Plaintiff-Appellants giving evidence before the trial court have clearly stated that there are obstructions created to their use of the common baths and lavatories. Deed Nos. 7974 marked P1 and 1196 marked P3, referred to above, in proof of legal title to the respective allotments and their entitlement to commonly possess the facilities on Lot 17 of Plan No. 1273 marked P2 by the 1st and 2nd Plaintiff Appellants respectively, are not in dispute. The recitals and the indenture of the said Deeds, refer to the ownership of the said Lots by the Plaintiff-Appellants and the disposition is by notarial attestation.

The Defendant-Respondent admits to the fact that he is in possession of a part of Lot 17 of the said plan bearing No. 1273 and that he has constructed a building thereon. This fact is further emphasized by the superimposed plan No. 9189 dated 05/09/2006 marked P4, made by Ranathunga Wengappulige Sinharaja Saliya Wickramasinghe, Licensed Surveyor, when he refers to an unauthorized construction on the said Lot 17 in the Commission Report marked P4(a).

In these proceedings the Defendant-Respondent never disputed the Plaintiff-Appellants' claim to the existence of a legal right to a servitude over the said Lot 17. The servitude was given to the Plaintiff-Appellants on entitlement to the said Lots as

an accessory of the allotments. In such instance, once the Plaintiff-Appellants set up their legal right to the servitude, then the Defendant-Respondent must establish either an abandonment by the Plaintiff-Appellants of their right or the loss of it by non-user [*Silva vs. Fernando (1944) 45 NLR 100*].

In proceedings before the learned Additional District Judge, the Defendant-Respondent did not challenge the legal right to the servitude based on an abandonment or that of a non-user, instead, a stand on legal title on prescription based upon Deed of Gift No. 09 dated 04/02/2004 to premises bearing assessment No. 127/34 in Lot No.2 (0.32P in extent) of Plan No. 215 dated 28/11/2003 prepared by B.B. Prematillake, Licensed Surveyor.

The Plaintiff-Appellants were never challenged under cross examination that they do not have a legal right to common amenities as set out in Deed of Gift No. 7974 and Deed No. 1196. The servitude of right was created by notarial agreement. In the said context Somawansa J. in *Munidasa Silva vs. Lasantha Fernando [2003] 3 SLR 196 CA* cited with approval, *R. W. Lee's acclaimed text "Introduction to Roman Dutch Law" (5th Edition Chapter 3 page 144)* identifying Prescription as one of the modes of extinction of ownership of any corporeal thing - immovable property.

The Defendant-Respondent stated that he has been in occupation of premises No. 127/34 since his childhood. The case for the Defendant-Respondent was that he and prior to him his mother had possessed the disputed portion of land for well over the prescriptive period and has thus acquired a prescriptive title thereto. The Defendant-Respondent however has not clearly testified to a starting point of an undisturbed and uninterrupted adverse possession.

The substantial basis of the Defendant-Respondent's legal title to premises bearing assessment No. 127/34 is based on Deed of Gift No. 09 dated 04/02/2004 marked V1. The Defendant's position is that his mother gifted him the disputed land by virtue of the said Deed of Gift. The recital to the said Deed of Gift sets out that the Defendant-

Respondent's mother acquired title to the said land by virtue of purported Deed No. 08 dated 20/01/2004. These Deeds have been executed 8 to 9 months prior to the institution of this action. According to the Defendant-Respondent's evidence, the said Deed No. 08 (which was not produced in evidence) is a Deed of declaration executed based on long-term adverse possession. The learned Additional District Judge observed that, the said Deed marked V1 under which the Defendant claims legal title do not show the existence of any right over the Plaintiff's land and therefore has failed to prove any entitlement, by prescription over the said land. Since the court was satisfied that the Defendant-Respondent did not succeed in establishing prescription by legal title, the court then proceeded to decide the question of entitlement by virtue of undisturbed, and uninterrupted adverse possession.

The Defendant-Respondent stated that in 1998 he came into permanent residence of the said premises and thereafter had developed the existing construction in mid-2004. Apart from the said Deed of Gift No.09, (attested 8 months prior to the institution of these proceedings) the Defendant-Respondent led in evidence the birth certificates of his three children who were born while he was in residence of the said premises in 1997, 1999 and 2002 marked V3, V4 and V5 respectively, as valid proof to establish prescriptive possession. The Defendant-Appellant also relied on document marked V6 (a document which remain subject to proof) termed as a second copy of the receipt No. 9548 dated 25/03/1973, issued by the Colombo Municipal Council indicating the address of the said premise.

The testimony given by the Defendant-Respondent's mother was that she and her brother was in occupation of premises No, 127/34, since 1980 and after the death of her brother in the year 2000, the premises were given to the Defendant-Respondent. However, she did not testify to the existence of the said Deed of declaration No. 09 on which the Defendant-Respondent has relied on to establish long term legal title.

Saliya Wickramasinghe, Licensed Surveyor, in his evidence before the trial court states that the two storied construction built by the Defendant-Respondent protrudes to Lot

17 which contains the common amenities. Relying on the Superimposed Plan No. 9189 marked P4 and the Commission Report marked P4(a), the Surveyor confirms that a part of the house in which the Defendant-Respondent resides has an upstairs which is on top of the common facilities in the said Lot 17 of plan No. 1273. The surveyor had not been required to or report on to ascertain whether the Defendant had encroached on to the Plaintiffs land by superimposing Plan No.215 marked V2 with that of the Plaintiff-Appellants' plan.

The learned Additional District Judge has given due consideration to the Deed of Gift No. 7974 dated 01/09/1976 marked P1 and the Deed No. 1196 dated 13/06/1964 marked P3, Plan No. 9189 and the Commission Report made by Saliya Wickramasinghe Licensed Surveyor, in proof of legal title of the Plaintiff-Appellants to their respective allotments and their use of common facilities on Lot 17 of plan No. 1273 and rejected the Defendant-Respondent's assertion to prescriptive rights over the said Lot 17.

The Civil Appeal Court in the said Judgment has primarily taken into consideration the testimony of the 2nd Plaintiff-Appellant under cross examination, where it has been stated that the Defendant-Respondent commenced the illegal construction on 29/10/1995.

Based on the said testimony the Civil Appeal Court held that;

“Therefore, it appears that on a balance of probabilities the defendant has, although as per the 2nd Plaintiff constructed the house on 29.10.1995, lived in Lot 17 from at least 1989 and he was possessing and occupying adversely well before 10 years of this action.... The evidence in this case shows that the defendant has possessed and occupied the land in which he is presently living for at least 15 years prior to the institution of this action”

Accordingly, the Court was of the view that;

“As evidence shows and the 2nd Plaintiff too has admitted, as aforesaid, the present house was there from at least 1995 and as the plaintiffs have not complained about any obstruction until year 2004, there is no cause of action in respect of lot 17 accrued to the plaintiffs”

Taking into consideration the birth certificates of the three children born in 1997, 1999 and 2002, the Civil Appeal Court also came to a finding that;

“the birth certificates show that the possession of the Defendant which is actually occupation in this disputed allotment which commenced with his uncle in 1980’s had continued uninterrupted.”

As noted earlier the Civil Appeal Court based their findings taking into consideration the 2nd Plaintiff’s testimony admitting that the Defendant-Respondent constructed the house on 29/10/1995. The Counsel for the Plaintiff-Appellant in his oral submissions before this Court and in the written submissions filed of record has reiterated that the recording of the 2nd Plaintiff-Appellants answer, that the date of the illegal construction of the house was on 29/10/1995 is clearly an error in the proceedings. The learned Counsel has drawn the attention of this Court to the numerical similarity of the said date of commencement of the unlawful construction to that of the date the 2nd Plaintiff-Appellant lodged her complaint to the Police i.e. 29/10/2004. Having considered the said purported error in recorded proceedings, the Civil Appeal Court did not rule on the lapse of 10 years since the date of institution of this action in the District Court was 09/11/2004. However, the Court placed much reliance on the evidence given by the Defendant-Respondent and his mother to comprehensively conclude that the Defendant-Respondent had lived in the said premises from 1980’s.

The evidence in which the Plaintiff-Appellants claim soil rights to Lots 6, 8, 9, and 10, and the entitlement to commonly possess the lavatory and bathing facilities located in the said Lot 17 with the owners/residents of Lots 1 to 16 and 18 is supported by Deed Nos. 7974 and 1196. The authenticity of these Deeds were never challenged. By the

said Deeds, it is established that the Plaintiff-Appellants own the soil rights to Lots 6, 8, 9 and 10 and a right of servitude over Lot 17. Once the Plaintiff-Appellants have established the soil rights to the respective Lots and the free and full use of the common amenities on Lot 17, the burden is on the Defendant-Respondent to justify the obstruction caused to Lot 17 by prescription.

The case of *Dayawathie vs. Dias and others BALR [2013] Vol. XX 20* was decided on somewhat similar circumstances. In that case the Substituted Appellant instituted action against the 1st to 4th Respondents seeking inter-alia, for a declaration that the deceased Plaintiff is entitled to commonly possess lot A3 together with other owners of that property, for an order directing the removal of all constructions to the lot A3 and for a permanent injunction restraining the respondents from temporary and permanent structures within the said roadway. Shiranee Thilakawardena J. held that;

“Servitude may be created by grant and in determining the nature and extend of real rights created by transfer, the provisions of the Deed are decisive.... A servitude or right of way acquired through notarial grant, as distinguished from one created by verbal agreement or use through prescription, could only be abandoned if such abandonment was deliberate and intentional.”

In the course of the Judgment the Court also made reference to the case of *Jayasekara Hamine Vs. Agida Hamine [1994] 46 NLR 38* where Krester J. commented;

“the question was not whether the dominant owner could wiggle through the contrivance, but whether she had the full and free use of the path. That she has not, and the obstruction must be removed.”

In *Nagamani vs. Vinyagamoorthy [1923] 24 NLR 438*, de Sampayo J. said;

“there is no doubt about the right (of servitude) created by the Deed, and it can only be lost by some means known to the law, such as an adverse right created in favour of a servient tenant against the dominant tenant, by means, for instance, of prescriptive possession.”

In *Sirajudeen vs. Abbas* [1994] 2 SLR 365 G.P.S. De Silva C.J. cited with approval the following passage from *Walter Pereira's Laws of Ceylon, 2nd Edition, page 396*,

“As regards the mode of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses speak to specific facts, and the question of possession has to be decided thereupon by court”.

The Commission Plan No. 9189 depicts the illegal construction of the Defendant-Respondent projecting on top of the common facilities on the said Lot 17. This fact is further established by the evidence of the 2nd Plaintiff-Appellant. The Defendant-Respondent has denied the existence of an obtrusive construction over the common amenities and disputes the findings of the Licensed Surveyor, however has failed to sufficiently identify the portion of land claimed on prescriptive title. The Defendant-Respondent claims to have rights over the said Lot 17. No commission was sought by the Defendant-Respondent to identify the said portion of land that he alleged to have prescribed to. If the Defendant-Respondent is seeking a right contemplated by section 3 of the Prescription Ordinance then he must necessarily establish that right over a defined and identifiable area of land, which he has failed to do.

It is also observed that the Defendant-Respondent's and his mother's evidence before the trial court lacks clarity as to the starting point of possessing, and occupying the premises adversely. The mother of the Defendant-Respondent makes a vague statement that the house was constructed in 29/10/1995 and the Defendant-Respondent possessed the land in dispute from at least 1989. To establish soil rights by prescription, it is necessary that the witnesses speak to clearly defined and distinct facts which would enable the court to arrive at a finding of uninterrupted and adverse possession. General statements which lack coherence do not carry any probative value in support of prescriptive title. In the instant case, there is no sound evidence before us in regard to the period of possession of the portion of land by the Defendant-Respondent and this

inevitably creates an uncertainty to the starting point of adverse possession of the premises in suit.

Even though the Civil Appeal Court scrutinized the lack of clarity and credibility of the testimony of the Defendant-Respondent and his witnesses, the reluctance on the part of the court to act upon it is obvious when it decided that; *“therefore it appears that on a balance of probability the defendant has, although as per the 2nd plaintiff he constructed the house on 29/10/1995, lived in lot 17 from at least 1989 (the last year of 1980s) and he was possessing and occupying adversely well before 10 years of this action”*.

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 squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights (*Chelliah vs. Wijenathan 54 NLR 337, Solomon Dias vs. William Singho and others [2015] 1 SLR 277*). It is also within the realm of well settled law that such claim to establish adverse possession should be supported by consistent and credible evidence and not by mere statements of a witness. (*Hassan vs. Romanishamy 66 CLW 112*)

In *Sirajudeen vs. Abbas (Supra)* G.P.S. De Silva C.J. cited the case of *Peynis vs. Pedro 3 SCC 125* and concurred with the findings in that case to stress upon the fact that it is necessary that the witnesses should speak to specific facts on the question of possession as would entitle a Defendant to a decree in his favor and insufficiency of general statements made by witnesses of title or possession would defeat an action brought in terms of section 3 of the Prescription Ordinance.

The Counsel for the Defendant-Respondent has drawn attention of Court to the birth certificates of his children marked V3 to V5, in order to prove that the Defendant-Respondent was in possession of premises bearing No. 127/34 before the construction of the upper floor. On this issue I am in agreement with the submissions made by the learned Counsel for the Plaintiff-Appellants that birth certificates do not establish

possession of the property, but limited to the information pertaining to the place, date of birth and the details of the informant of the birth. In deliberating over the probative value of birth certificates, Soertsz J. in *Silva vs. Silva* (43 NLR 572, 574) (affirmed in *Clarice Fonseka and others vs. Winifred Perera and others* 59 NLR 364) pronounced that;

“It seems to me; they have twofold value. Inasmuch as they are statements occurring in registers, that the law required to be kept by a public officer, they afford prima facie proof of the fact of the birth, and of the date of birth, and of the place of birth, and of the identity of the person registering the births, for the principal upon these entries are received is that it is the public duty of the person who keeps the register to make such entries after satisfying himself of their truth inasmuch as the declaration of parentage is made by the father, they have a genealogical value under section 32 (5) of the Evidence Act.”

The Defendant-Respondent also relied on document marked V6 to establish that the premises No. 127/34 has a separate municipal assessment number and the premises in suit is lawfully assessed by the Colombo Municipal Council. This position was never postulated in evidence by the Defendant-Respondent and as observed earlier in this Judgment, V6 remains a document subject to proof. Notwithstanding the said infirmity, it is observed that payment of rates to a municipality by itself does not establish possession for the purposes of section 3 of the Prescription Ordinance. (*Hassan vs. Romanishamy* (Supra), *Thilak Perera and others vs. Nurun Hanifa* [2014-1] ABH LR 89 SC, *Sirajudeen vs. Abbas* (Supra))

Even though the Defendant-Respondent does not challenge the Plaintiff-Appellants’ assertion to the right to a servitude based on an abandonment of such right, or has raised an issue to that effect, questions were put to the 1st Plaintiff-Appellant in cross examination, that the common lavatories and the bathing facilities had not been made use for some time or to the effect that it was not used regularly. Thus, the question to be established is whether such is actionable on the basis of abandonment of a right to a

servitude. In *Dayawathie vs. Dias and others (Supra)*, Shiranee Thilakawardena J. answered this question with much certitude when Her Ladyship held that;

“in order for the right to be abandoned, the abandonment should be continuous, rather than from time to time, and according to Roman Dutch Law, non-user or abandonment of the right should be for a third of a hundred years, i.e. 33 years and 1/3 years.”

The Defendant-Respondent admitted that he is in possession of a portion of the disputed Lot 17. He has also admitted that a building was constructed thereon and that he has not obtained an approved plan or a certificate of conformity from the Colombo Municipal Council regarding the said construction. The Plaintiff-Appellants were never challenged under cross examination that they do not have a right to use the common amenities in the said Lot 17. The Defendant-Respondent who seeks a right contemplated by section 3 of the Prescription Ordinance must establish his right with clear and precise evidence over a defined and an identifiable portion of land, which the Defendant-Respondent has failed to achieve. In all the above circumstances, I find that the Defendant-Respondent has not established his right to the disputed portion of land by virtue of legal title or by undisturbed, and uninterrupted adverse possession for a period over 10 years in order to fortify his claim on prescription and therefore I declare that all such encroachments to Lot 17 as illegal.

I take the view that the High Court of Civil Appeal came to an erroneous finding that the Defendant-Appellant has acquired prescriptive title to the said Lot 17 of Plan No. 1273 dated 16/05/1964. Accordingly, the Plaintiff-Appellants are entitled to safe and unhindered access to the common amenities located in the said Lot 17 and all temporary and permanent obstructions created by the Defendant-Respondent inhibiting the full and free use of such right must be removed forthwith.

Accordingly, I answer Nos. (i) and (ii) questions of law on which leave to appeal has been granted in the affirmative and therefore necessarily answer the questions of law Nos. (iii) and (iv) also in the affirmative.

For these reasons, this Appeal is allowed; the Judgement of the Civil Appeal High Court is set aside; and the Judgment of the District Court is affirmed. No order for costs.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ.

I agree.

Chief Justice

Janak De Silva, J.

I agree.

Judge of the Supreme Court