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

In the matter of an Application for Leave to Appeal made in terms of 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

S.C. Appeal No: 166/2019
SC/HC/CALA No. 336/2016
WP/HCCA/COL/260/2009(F)
DC Colombo Case No: 20036/L

Sabeera Salee,
No. 24/198, Gothami Road,
Borella, Colombo 08.
PLAINTIFF

Vs.

Hasan Mohamed Samsun Nisa,
No.67/143, Kureishani Maulana Lane, Dematagoda,
Colombo 09.
DEFENDANT

AND

Hasan Mohamed Samsun Nisa,
No.67/143, Kureishani Maulana Lane, Dematagoda,
Colombo 09.
DEFENDANT-APPELLANT

Vs.

Sabeera Salee,
No.24/198, Gothami Road,
Borella, Colombo 08.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Sabeera Salee,
No.24/198, Gothami Road,
Borella, Colombo 08. **(Deceased)**
1A. Azeezur Rahuman Fathima
1B. Azeezur Rahuman Fathima Azfah
1C. Azeezur Rahuman Fathima Azreen
No. 254/N, Gothatuwa Road,
Gothatuwa.
PLAINTIFF-RESPONDENT-APPELLANTS
Vs.

Hasan Mohamed Samsun Nisa,
No.67/143, Kureishani Maulana Lane, Dematagoda,
Colombo 09.
DEFENDANT-APPELLANT-RESPONDENT

Before	: A.L. Shiran Gooneratne, J.
	: Achala Wengappuli, J.
	: Sampath B. Abayakoon, J.
Counsel	: Thisath Wijayagunawardena, P.C. with Gihan Liyanage instructed by Mr. M.R.M Dhailamy for the Plaintiff-Respondent-Appellants
	: Shiral Lakthilaka with H.D.C.D. Hathurusingha instructed by Anil Rajakaruna for the Defendant-Appellant-Respondent
Argued on	: 10-02-2025
Written Submissions	: 21-07-2020 (By the Plaintiff-Respondent-Appellants)
	: 06-07-2020 (Defendant-Appellant-Respondent)
Decided on	: 11-03-2025

Sampath B. Abayakoon, J.

The plaintiff-respondent-appellant (hereinafter referred to as the plaintiff) filed this appeal on the basis of being aggrieved by the judgment dated 06-06-2016, pronounced by the Provincial High Court of the Western Province holden in Colombo exercising its civil appellate jurisdiction.

From the impugned judgment, the judgment pronounced by the learned District Judge of Colombo on 04-12-2009, where a judgment was pronounced in favour of the appellant was set aside. While allowing the appeal preferred by the defendant-appellant-respondent (hereinafter referred to as the defendant), the action of the appellant initiated before the District Court of Colombo was dismissed.

When the application for leave to appeal from the impugned judgment was considered before this Court, leave to appeal was granted on 14-10-2019, based on sub-paragraphs (i) and (ii) of paragraph 9 of the petition dated 11-07-2016.

The said grounds of appeal read thus;

(i) Have the learned High Court Judges erred in law in holding that the petitioner had failed to establish her title to the property in suit.

(ii) Have the learned High Court Judges erred in law in holding that the provisions of section 545 of the Civil Procedure Code apply to the estate of the said Mohammed Ismail, and hence, the plaintiff has not become the owner of the said property by the said deed of transfer No. 912, as the said transfer effected by the said daughter and the widow of the said Mohammed Ismail without obtaining the letters of administration in respect of the estate of the said Ismail.

At the hearing of the appeal, this Court had the advantage of listening to the submissions of the learned President's Counsel who represented the appellant, as well as the learned Counsel who represented the defendant, and also the written submissions tendered by both parties as to their respective stands.

This is a matter where the appellant initiated proceedings before the District Court of Colombo in the form of a vindicatory suit, praying for a declaration of title for the property mentioned in the 1st schedule of the plaint, and also for an order to eject the defendant from the property morefully described in the 2nd schedule of the plaint, which is a portion of the property mentioned in the 1st schedule.

The case for the plaintiff had been that she became the owner of the property as per the chain of title pleaded in the plaint. It has also been stated that her

mother was the tenant of the property and upon her death, she succeeded to the tenancy of the premises before she became the owner of the property.

She has also pleaded that her sister, who is the defendant of this action, and one of their uncles, named, Fuard Thuan Yehiya, was also living in the property under the tenancy of their mother. It had been her position that after she became the owner of the property, she demanded the defendant to vacate the property, and notwithstanding the said demand, the defendant kept on occupying the portion of the land morefully described in the 2nd schedule of the plaint. It was on that basis she has pleaded for the reliefs as prayed in the plaint.

The position taken up by the defendant in her answer had been that neither their mother nor their grandmother had occupied this property as a tenant of the original owners, and the property was owned by their uncle, the earlier mentioned Thuan Yehiya, by long and uninterrupted prescriptive possession. She has claimed that the said Yehiya, who became the owner of the property through prescription, gifted the same to her by way of the deed pleaded in her answer, and she is now the owner of the property.

In her answer, she has also pleaded that the claimed original owner as stated by the plaintiff, namely Mohammed Mohideen Mohammed Ismail, had no rights to the property as the said property was transferred to his father by him, and thereafter, the said father has transferred the property to one of his other sons on 10-11-1959 by the deed No. 868. Accordingly, she has pleaded for the dismissal of the plaintiff's action and to give her the possession of the property claimed by the plaintiff, as well as several other reliefs as prayed for in her answer.

However, when the matter was taken up for trial, it appears from the issues raised by the defendant that she has mainly relied on her claim that her uncle acquired prescriptive title to the property and he transferred his rights to her, and therefore, the plaintiff or her claimed predecessors in title never had any title to the property. Her issues have been on the basis that it is she who

acquired prescriptive title to the property based on her uncle's gift, as well as her possession of the property.

It is quite clear from the evidence led before the trial Court that although the plaintiff has been questioned as to her predecessors in title on the basis that Mohammed Mohideen Mohammed Ismail did not have title for his wife and daughter to inherit the property upon his death, as he has transferred his right to his father, and thereafter, his father has transferred his right to one of his other sons, it needs to be noted that, it was never an issue raised before the District Court. It appears that the plaintiff has led evidence to counter the position taken up in the answer of the defendant, although it was not an issue taken up before the trial Court.

It is well settled law that once the issues are settled before a trial Court, the pleadings recede to the background, and it is based on the issues raised, that the matter should be decided by a trial Judge.

It was held in the case of **Cellate International Company Vs. Turner Steiner East Asia Ltd. (S.C. Appeal No. 17/98, SC minute dated 21-06-2001, BASL Newsletter October 2001 page 05)** that although in an answer, there is a denial of a particular matter pleaded in plaint, unless that matter is put in issue at the trial, such denial is deemed to have been waived.

It was also held in the case of **Dharmasiri Vs. Wickramathunge (2002) 2 SLR 2018** that, once issues are framed and accepted, pleadings recede to the background.

It is quite apparent from the judgment of the learned District Judge that the matter has been decided purely on the issues raised before the Court to be determined, and not based on other extraneous matters that need not be considered in the judgment.

It has been determined that the original owners of the land, namely Mohammed Mohideen, Mohammed Ismail, Mohammed Kaleed and Mohammed Naheem, gifted the property by the deed No. 552 dated 09-03-1931 to Mohammed Ismail (deed marked P-01). The said Mohammed Ismail has died without leaving an estate which needs administration, and

accordingly, his widow Useiya Ismail and daughter Farzana have become owners of the said property.

They have also executed the deed of declaration No. 749 dated 16-03-1999 (the deed marked P-03) to assert their rights. Subsequently, they have transferred their rights to the property by deed No. 912 dated 21-06-2001 to the plaintiff (deed marked P-04), and thereby, the plaintiff has become the owner of the property.

As correctly observed by the learned District Judge, none of the above title deeds have been disputed at the trial, and therefore, the said documents can be accepted without further proof. The Notary Public, who attested the deeds marked P-03 and P-04, has also given evidence at the trial.

The learned District Judge in the process of evaluating evidence has well considered the claim that one of the plaintiffs' predecessors in title, namely, Mohammed Ismail, has in fact transferred his right to his father and the said father has transferred it to one of his other brothers in 1959, in order to find out whether it has any effect on the title of the plaintiff. The evidence led before the trial Court has clearly established that the mentioned brother, namely Mohideed Sadoon, has in fact instituted an action before the District Court claiming that he is only holding the property in question on trust on behalf of his brother Mohammed Ismail, which establishes that upon Ismail's death, the property had been inherited by his wife and daughter, who has then transferred the said property to the plaintiff.

It is therefore abundantly clear that the plaintiff has proven her paper title to the property under litigation as pleaded by her in the plaint. The identity of the property had never been in dispute.

In the case of **Luwis Singho and Others Vs. Ponnamperuma (1996) 2 SLR 320**, it was held;

> *"Actions for declaration of title and ejectment (as in this case) and vindicatory actions are brought for the same purpose of recovery of property. In Rei Vindicatio action, the course of action is based on the sole*

ground of the violation of the right of ownership and in such an action proof is required that,

1. *The plaintiff is the owner of the land in question i.e. he has the dominium and,*
2. *That the land is in the possession of the defendant.*

Even if an owner never had possession, it would not be a bar to a vindicatory action."

In the case of **Leisa and Another Vs. Simon and Another (2002) 1 SLR 148**, the plaintiff-appellants instituted an action seeking a declaration of title and ejectment of the defendants from the premises in question. The defendants claimed prescriptive rights. The plaintiff's action was dismissed.

On appeal, it was held:

1. *"The contest is between the right of dominium of the plaintiffs and the declaration of adverse possession amounting to prescription by the defendants.*
2. *The moment the title is proved the right to possess it is presumed.*
3. *For the Court to have come to its decision as to whether the plaintiff had dominium the proving of paper title is sufficient.*
4. *Once the paper title becomes undisputed, the burden shifts to the defendant to show that they had independent rights in the form of prescription as claimed by them."*

It is clear from the judgment of the learned District Judge that after having satisfied that the appellant has proved her title to the property in question, his attention has been shifted to consider whether the defendant has proved the prescription she has claimed for the same property to the satisfaction of the Court.

Her prescriptive title has been primarily based on the claimed prescriptive title of her uncle Yehiya, who has admittedly lived in the same property while the plaintiff's mother was the tenant of the property. The defendant's claim has been that it was Yehiya who had uninterrupted and undisturbed

possession of the property, and therefore, he acquired prescriptive title to it. The defendant has relied on deed No. 3482 dated 15-09-1992 marked V-02, to assert that the said Yehiya gifted the property to her and she also has a deed of declaration in that regard in the form of deed No. 3477 dated 04-09-1992 marked V-03. She has claimed prescriptive title for the property based on the above deeds, as well as her possession from 1992.

Accordingly, the learned District Judge has looked into the evidence led in order to find out whether there is evidence on the balance of probability that the defendant's alleged predecessor in title, namely Yehiya, has in fact acquired prescriptive title to the property. In this process, the learned District Judge has looked whether there was evidence before the Court to conclude that he has possessed the property as against the property rights of the plaintiff and her predecessors in title.

Having considered the evidence placed before the trial Court, the learned District Judge has correctly come to a conclusion that the claimed predecessor in title of the defendant, namely Yehiya, had lived in the property, but he had lived there only under the tenancy rights of the mother of both the plaintiff and the defendant. It has also been determined that the documentary evidence tendered by both parties at the trial, has established that the mentioned Yehiya had been living in a separate address during 1990, 1991 and 1992. Even the defendant herself has admitted that during the time the deed of declaration was executed, Yehiya was not living in the property.

The learned District Judge has also considered the admission by the defendant in her evidence given on 01-06-2008 that it was Mohammed Ismail, the plaintiff's predecessor of title, who owned the property. The fact of the defendant's admission that their mother was the tenant of the property and their uncle Yehiya under whom the defendant is claiming prescription to the property lived under the tenancy of their mother has also been considered relevant. It has also been considered the fact that the claimed predecessor of the title of the defendant, namely, Yehiya's failure to substantiate the prescriptive rights of the defendant as relevant as well.

For the matters considered as above, I have no reason to disagree with the learned District Judge that the defendant has failed to prove her claimed prescriptive title as against the proved title of the plaintiff, and thereby, granting reliefs to the plaintiff as sought for in the prayer of the plaint.

When the matter was appealed against to the Provincial High Court of the Western Province holden in Colombo exercising its civil appellate jurisdiction, it appears that the learned High Court Judges who pronounced the judgment has considered matters that were not in the issues settled before the trial Court.

The fact whether the property upon which this action was based upon is a property that required administration in terms of section 545 of the Civil Procedure Code was never at issue during the trial before the District Court.

The learned Counsel who represented the defendant, who was the appellant before the Provincial High Court of Western Province holden in Colombo exercising its civil appellate jurisdiction, has taken up this question for the 1st time in his written submissions tendered to the High Court. Therefore, it is abundantly clear that this was a matter the learned District Judge of Colombo was never required to address his mind when pronouncing his judgement.

The said section of the Civil Procedure Code as it stood before the section was repealed by Civil Procedure Code (Amendment) Act No. 11 of 2010 and replaced by a new section, reads as follows;

545. No person shall –

a. Maintain any action for the recovery of any property,

b. Effect any transfer of any property,

movable or immovable, in Sri Lanka, belonging to, or included in, the estate or effects of any person dying testate or intestate in or out of Sri Lanka within 20 years prior to

the institution of the action or the effecting of the transfer, unless the grant of probate has been issued in the case of a person dying testate or letters of administration or certification of heirships have been issued, in the case of a person dying intestate and leaving an estate amounting to or exceeding Rs. 500 000/- in value.

Since the plaintiff's predecessor in title, namely Ufaifa Ismail and Fathima Farzana Ismail, has transferred their rights to the plaintiff on the basis of inheritance from Mohammed Mohideen Mohammed Ismail, the argument that the said Ismail died leaving an estate which requires administration in terms of the provisions of the Civil Procedure Code, is a mixed question of facts and law as correctly pointed out by the learned President's Counsel on behalf of the plaintiff.

It is well settled law that although a pure question of law can be taken up for the 1st time in an appeal, if the said question is a question of fact and law combined, such a position cannot be taken up for the 1st time in an appeal.

In the case of **Setha Vs. Weerakoon 49 NLR 225**, it was held,

> *"A new point which was not raised in the issues or in the course of the trial cannot be raised for the 1st time in appeal, unless such point might have been raised at the trial under one of the issues raised, and the Court of Appeal has before it all the requisite material for deciding the point or the question is one of law and nothing more."*

In the case of **H.E.A Jayawickrama and Another Vs. A. David Silva 76 NLR 427**, it was determined that,

> *"A pure question of law can be raised in appeal for the 1st time but if it is a mixed question of fact and law, it cannot be so done. The facts elicited in the original Court on this point are not sufficient to decide the question of law raised in appeal."*

In the case of **Rev. Pallegama Gnanarathana Vs. Rev. Galkiriyaagama Soratha (1998) 1 SLR 99** at page 121, it was observed,

> *"The Court of Appeal also appears to have taken the view that a custom whereby the chief priest of a temple could be appointed by the laity is contrary to the Buddhist ecclesiastical law. Its judgment, however, contains no exposition of the relevant ecclesiastical law. It has also held that the contents of the ecclesiastical law on a particular matter is a pure question of law and, as such, it could be raised in first time in appeal. I do not agree with the view of the Court of Appeal. As pointed out by the learned President's Counsel what the Buddhist ecclesiastical law on any matter is has to be established on evidence as a matter of fact. It is not a pure question of law but of fact and law. Apart from those disputed questions of Buddhist ecclesiastical law which have already been settled by judicial decisions, other questions such as the one under consideration involving as they do questions of fact have to be established in evidence adduced at the trial like any other fact. As such I hold that the Court of Appeal erred in permitting the respondent in spite of the objections thereto, to raise this point for the first time in appeal as a pure question of law."*

Similarly, as pointed out correctly by the learned President's Counsel, there is no basis to consider the said position raised based on the question whether the estate of the plaintiff's predecessor in title should have been administered or not, as a pure question of law. For an estate to be administered under the provisions of the Civil Procedure Code, there must be evidence to show that the person who died intestate left an estate amounting to or exceeding Rs. 500,000/- in value as per the provisions of the Civil Procedure Code applicable before the relevant section was repealed and amended.

As this was never an issue before the trial Court, there had been no evidence placed either by the plaintiff or by the defendant to show that the relevant estate of the deceased person had a value of Rs. 500,000/- or more, which is

a primary fact that needs to be established to take up an issue of this nature. None of the deeds produced by either party has mentioned a value more than Rs. 100,000/-. Hence, I find no basis to presume as to the value of the estate of the deceased person.

I find that the learned judges of the Provincial High Court of Western Province holden in Colombo while exercising the civil appellate jurisdiction has taken up the argument raised on behalf of the defendant for the 1st time in appeal without considering whether such an argument can be raised in such a manner, without it being taken up before the trial Court.

It is clear that for such a ground of appeal to qualify for the 1st time in appeal, there must be clear evidence before the trial Court to show that the estate of the deceased person had a value of Rs. 500,000/- or more. There was no such evidence as there was no such issue. It is clear that the said question is not a pure question of law, but a question that needs consideration of facts for a determination. Hence, I am in full agreement with the contention that the learned Judges of the Provincial High Court of the Western Province holden in Colombo while exercising its civil appellate jurisdiction were erred in law when deciding the appeal preferred by the defendant on such a basis.

The next matter that needs to be considered is whether there was a basis to hold that the plaintiff has failed to establish her title to the property in suit. As I have considered in detail previously, it is the considered view of this Court that in fact, the plaintiff has proved her title to the property, and once the title is proved, the right to possess is presumed, and the burden shifts to the defendant who claims independent rights to the property in the form of prescription to establish that fact as against the rights of the plaintiff to the satisfaction of the Court.

I find no basis to conclude that the title pleaded by the plaintiff was not clear as determined by the learned High Court Judges of the Provincial High Court of the Western Province holden in Colombo while exercising the civil appellate jurisdiction. On the contrary, I find that the plaintiff's title has been proved to the satisfaction of the trial Court.

For the reasons as considered above, I answer the two questions of law considered in the affirmative.

Accordingly, I set aside the appellate judgment pronounced on 06-06-2016 by the learned Judges of the Provincial High Court of the Western Province holden in Colombo exercising its appellate jurisdiction as it cannot be allowed to stand, and affirm the judgment dated 04-12-2009 pronounced by the learned District Judge of Colombo.

The appeal is allowed. There will be no costs of the appeal.

Judge of the Supreme Court

A.L. Shiran Goonaratne, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court