

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

In the matter of an Application for
Leave to Appeal under and in terms
of Section 5C(1) of the High Court of
the Provinces (Special Provisions)
Act (as amended by Act No. 54 of
2006) read with Article 127 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

SC/APPEAL/168/2016

SC/ HCCA/LA No.442/2015
SP/HCCA/RAT Appeal 11/2013[F]
D.C. Ratnapura Case 14769/ Land

And Now Between

G.W. Abeypala,
Kandewatte, Sinhalagoda
Medagalatura.

Defendant-Respondent-Appellant

Vs.

Weerakonda Arachchige Chammika
De Silva,
Keenagahawatta, Ambalangoda.

Presently at:

No. 118/10, Wathurawila Road,
Gonawala, Kelaniya.

Plaintiff-Appellant-Respondent

Before : Yasantha Kodagoda, PC, J.
A.L. Shiran Gooneratne, J.
Menaka Wijesundera, J.

Counsel : Shantha Jayawardena with Azra Basheer instructed by
Dinesh Vidanapathirana for Substituted-Defendant-
Respondent-Appellant.

Anuruddha Dharmaratne with Hasitha Ratnayake and
Zahra Hassim instructed by G.S. Kumudini for the
Plaintiff-Appellant-Respondent.

Written

Submissions : Written submissions on behalf of the Defendant-
Respondent-Appellant on the 31st October 2016.

Written submissions on behalf of the Plaintiff-
Appellant-Respondent on the 3rd May 2017.

Argued on : 25.05.2026

Decided on : 10.07.2026

MENAKA WIJESUNDERA J.

The instant appeal has been filed by the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant) to set aside the judgement dated 20.12.2012 of the Civil Appellate High Court of Ratnapura.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) has filed an action against the Defendant in the District Court of Ratnapura seeking a declaration of title to the land described in the third schedule to the plaint dated 27.08.1998, the ejectment of the Defendant from the said land described in the third schedule to the plaint, and damages accordingly.

The Plaintiff had subsequently amended the plaint and filed an amended plaint on 18.07.2003 seeking the same reliefs as mentioned above, and the damages claimed have been quantified.

The Defendant has filed his amended answer on 27.02.2004 pleading that he is the owner of the land described in Schedule “අ” (b) to the amended answer,

which he claims is part and parcel to the land described in the schedule “අ” (a) to the amended answer, called “*Monara Natana Hena alias Monara Lagina Hena*”, which the Defendant claims is part and parcel of the land “*Sinhalagoda Manannalage Panguwa alias Kandawatte Manannalage Panguwa*”. He has further claimed the dismissal of the Plaintiff’s action and a declaration of title in his favor.

Trial in the District Court had commenced and, upon the conclusion of the District Court case, the learned District Court Judge has dismissed the action of the Plaintiff and the claim-in-reconvention of the Defendant on the basis that both the Plaintiff and the Defendant had failed to identify the land in question, for the reason that there was no proper superimposition of Plan No.1930 dated 20.02.1927 by Licensed Surveyor A. Saundranayagam on Plan No.1717 dated 25.04.2000 by Surveyor Gamini Wijesinghe, and in the superimposed Plan No. 2191 dated 21.01.2003 prepared by Gamini Wijesinghe, the learned District Judge reasoned that the Plaintiff had failed to identify the portion in dispute, which is Lot 3 of Plan No. 1930.

If one may go into the facts of the case, the Plaintiff in the amended plaint has claimed a portion from a land in the extent of 49 acres and 30 perches by the name of Kandewattha Estate alias Mount Desmond Estate, and the initial owners thereof was Warushahennadige Simon Fernando. The said land had been described in the First schedule to the amended plaint, and the Second schedule to the amended plaint describes the land claimed by the Plaintiff.

The Plaintiff further claims that in 1977 the Defendant had forcibly started to occupy a portion of the said land, which had been described in the Third schedule to the amended plaint, and that on the said portion the Defendant had started a cinnamon plantation.

The Defendant has claimed title to the entirety of the land described in Plan No. 1717 dated 25.04.2000 which consists of Lots 1, 2 and 3, naming it as *Monara Natana Hena alias Monara Lagina Hena*. The claim of the defendant is that the above mentioned *Monara Natana Hena* is same as the land claimed by the Plaintiff in its entirety and is the *Paraveni* land of the Athugal Vihare. The learned District Judge and the Judges of the Civil Appellate High Court have held that the Defendant had not been able to prove his claim to the said land by way of a Plans or Deeds.

According to the case of the Plaintiff, the portion to which the Plaintiff has title had been initially superimposed by Plan No. 1717 dated 25.04.2000 on Plan No.

1930 dated 20.02.1927, by Surveyor Wijesinghe. There had been another plan subsequently prepared, namely Plan No. 2191 dated 21.01.2003.

The reason for the learned Trial Judge to hold that the Plaintiff had not adequately identified the land is because he has held that Lot 3 depicted in Plan No. 1930 had been superimposed on Plans Nos. 1717 and 2191 and that, in both these plans, the western boundary been named as *Monara Natana Hena* and eastern boundary named Dola had not been drawn physically depicted. Hence, the learned Trial Judge held that in both the plans of the Plaintiff, namely Plans Nos. 1717 and 2191, both boundaries had not been properly identified.

The learned High Court Judges held that in Plan No. 1717, the Dola had been clearly identified on the eastern boundary and, on the western boundary, although the *Monara Natana Hena* had not been physically identified, its name had been mentioned.

Further, in the surveyor's report relating to Plan No. 2191, he had specifically stated that Lot 3 in Plan No. 1930 had been carefully superimposed in Plan No. 1717 as Lot 2.

Therefore, the Judges of the High Court concluded that the surveyor, in his evidence in the trial, had stated that on the plans prepared by him he had identified the land in issue, which is Lot 3 in Plan No. 1930, and thereby demarcated it into Lots 1, 2 and 3 in Plans 2191 and 1717.

In his surveyor's report relating to Plan No. 1717, he had said that both the Plaintiff and the Defendant had shown him the land and that Lot 1 had been occupied by the Plaintiff, Lot 2 by the Defendant by force, where he observed cinnamon tree, and Lot 3 again by the Plaintiff where he observed a jungle in the said portion.

Hence, the learned Judges of the Civil Appellate High Court further stated that the failure to depict all the physical features of land in the plan doesn't mean that the corpus had been unidentified. Therefore, they had concluded that the land claimed by the Plaintiff had been identified, but the Defendant had failed to do so, although he had claimed the entirety of the land described in Schedule 1 to the amended plaint.

The appeal before the Civil Appellate High Court had been filed by the Plaintiff against the dismissal of his action, but the Defendant, although his counterclaim had also dismissed by the learned Trial Judge, did not exercise his right of appeal.

The Civil Appellate High Court held, as stated above, that the Plaintiff had proved his title to the land adequately and that the Defendant had not challenged it.

At the time leave to appeal was granted, this Court granted leave on the following questions of law set out in paragraphs 22 (d) and 22 (g) of the Petition dated 28.12.2015, which are as follows:

- Did the Provincial High Court of Sabaragamuwa Province, exercising its Civil Appellate Jurisdiction Holden in Ratnapura, err in law by failing to consider the case set out by the Defendant-Respondent-Petitioner?
- Did the Provincial High Court of Sabaragamuwa Province, exercising its Civil Appellate Jurisdiction holden in Ratnapura err in law by failing to appreciate that the Defendant-Respondent-Petitioner had established that he had acquired prescriptive title to the land?

Two other questions of law were also raised on behalf of the Plaintiff on 20.09.2016, as follows:

- a) In the absence of an application to the Civil Appellate High Court of Ratnapura to consider the Defendant's case, whether the Judges of the Civil Appellate High Court had a duty to consider the Defendant's case in claim-in-reconvention, which had been rejected by the District Court?
- b) In any event has the Defendant failed to establish their alleged counter claims as set out in the amended answer?

At the time this matter was taken up for argument, the main contention for the Counsel of the Defendant was that the Civil Appellate High Court had solely considered the issue of non-identification of the corpus by the Plaintiff and the Plaintiff's title, and that the learned Judges of the Civil Appellate High Court had failed to consider the Defendants' title as set out in the amended answer with regard to his long chain of title and his prescriptive title, which he claims to have established for over 50 years.

The Counsel for the Defendant conceded the fact that he had not exercised his statutory right when the learned District Judge had dismissed his claim in reconvention. He also conceded that he is not contesting the title declared by the Civil Appellate High Court of the Plaintiff, but that his grouse is that the learned

Judges of the High Court had failed to consider his prescriptive rights, in respect of which evidence had been led in the Trial Court.

He cited the case of ***Ratwatte v Gunasekera [1987] 2 SLR 260***, where the Defendant-Appellant sought to prevent the Plaintiff-Respondent from canvassing against the findings of the District Court Judge, where the Plaintiff-Respondent had not filed a cross-appeal for the want of notice in terms of Section 772 of the Civil Procedure Code. The former **Chief Justice Sharvananda** has held that:

“The provision does not bar the Court, in the exercise of its powers to do complete justice between the parties, from permitting him to object to the decree even though he had failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice.”

But the Counsel for the Plaintiff vehemently objected to this position and submitted to Court that, in the decision of the District Court, the learned Trial Judge dismissed the actions of both the Plaintiff and the Defendant, but the Plaintiff has appealed against the judgment of the District Court while the Defendant had not.

In the Civil Appellate High Court, the learned Judges had considered the position of the learned District Judge and concluded in favor of the Plaintiff, stating that the learned Trial Judge has been wrong in concluding that the land had not been identified by the Plaintiff on the two plans produced in the action, namely, Plans Nos. 1717 and 2191, in which the disputed portion had been rightfully identified by the Plaintiff through documents and evidence of the survey.

The learned Judges of the High Court held that the Defendant had failed to successfully challenge the evidence placed before the Plaintiff before the Trial Court. Therefore, it was held that the plaintiff had properly established title, on evidence admissible in law, to the land for which he is claiming a declaration of title. They further held that the Defendant, in his amended answer has made claims to Lots 1, 2 and 3 in Plan No. 1717, but had failed to prove that those lots formed part and parcel of Sinhalagoda Manannalage Panguwa alias Kandawatte Manannalage Panguwa depicted in Plan No. 1717.

Therefore, the Civil Appellate High Court has adjudicated upon the Plaintiff's title to the land described in the Third Schedule to the plaint, but the Defendant failed to make an application to the Civil Appellate High Court to the dismissal of his claim-of-reconvention.

Therefore, Counsel for the Plaintiff stated that the Defendant had not exercised his right of appeal in terms of Section 754(1) of the Civil Procedure Code, and therefore the Defendant had in fact, chosen to accept the findings of the learned Judge by failing to appeal against the dismissal of his claim.

The Counsel for the Defendant, conceding to all these factors, urged this court to consider this action under Section 772(1) of the Civil Procedure Code.

Section 772 of the CPC reads as follows:

(1) Any respondent, though he may not have appealed against any part of decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or to his registered attorney seven days' notice in writing of the objection.

(2) Such objection shall be in the form prescribed in paragraph (e) of section 758.

According to the above mentioned section cited by the Defendant, it gives him the right to resist a decree of a lower Court which he has failed to appeal, provided he has taken steps to file a written objection to the said decree. However, I see no such objection in writing which has been filed by the defendant.

Nevertheless, the Court sitting in appeal has the discretion to consider the objection and allow or refuse the same in the interest of justice even if the written objection has not been filed.

This has been well settled in the case cited by the Defendant and also in the case of **Parana Mannalage Amara Wijesinghe and others vs Sudu Hakuruge Sawrnalatha and others (SC Appeal No. 72/2012) by Prasanna Jayawardena PC. J.** which reads as follows:

“Thus where an appellant from a decree entered by an original Civil Court has filed an appeal seeking to set aside or vary the decree; the first limb of Section 772 recognizes the right of a respondent to that appeal to resist the appeal and support the decree on any grounds including those decided against him by the trial court, without filing a written objection under Section 772; and the 2nd limb of section 772 enables a respondent to the appeal who is dissatisfied with some specific finding in or aspect of the decree but has not filed an appeal to canvass it, to dispute that finding and to have it set

aside or varied or decided in his favour by the Appellate Court, provided he has filed a written objection under section 772.”

Hence, it is settled law that, even though a respondent-defendant who has not duly filed a written objection is unable to claim his statutory right to a decree as an entitlement, the Court sitting in appeal has the discretion, by virtue of its inherent jurisdiction, to permit such objection in the interest of justice. An exception to the aforesaid general rule has been identified in several notable decisions of Sri Lankan and Indian Courts.

The supreme court of India in ***Mahant Dhangir and another v Madan (1988) AIR 54, 1988 SCR (1) 679*** has held as:

“It is only by way of exception to this general rule that one respondent may urge objection as against the other respondent. The type of such exceptional cases is also very much limited. We may just think of one or two such cases. For instance, when the appeal by some of the parties cannot effectively be disposed of without opening of the matter as between the respondent’s interest. Or in a case where the objections are common as against the appellant and co-respondent.”

Driberg J. in ***Doloswela Rubber & Tea estate Co. v Swaris Appu (1928) 31 NLR 60*** made a similar observation that;

“It has been held that, section "772 is not available to a respondent who wishes to question the decree in favour of other respondents; if he wishes to do so he must appeal in which the possibility of certain exceptions was recognized; an exception may be allowed in cases where there is an identity of interests between the appellant and the respondent against whom the statement of objections is directed, but in this case there is no such identity of interests, for the second intervenient respondent claims his share adversely to the appellant and the plaintiff-respondent.”

In the instant matter, the Defendant has not preferred an appeal against the dismissal of the cross claim, and for the 1st time in this Court he submits that since the paper title of the Plaintiff has been upheld to be proven by the Civil Appellate High Court, the burden shifts to the Defendant to establish independent rights in the form of prescription, which he claims was established before the District Court through evidence showing that he had been in possession of the land in dispute for over 50 years.

However, I find that he has not pleaded such a claim in his pleadings in the Trial Court, nor has he taken up the issue before Civil Appellate High Court. In that scenario, the next question to be decided is whether the Judges of the Civil Appellate High Court were obligated to consider a plea of prescription based on facts, even though it was not expressly pleaded.

When considering the plea of prescription, it can be divided into two categories that is, Acquisitive Prescription and Extinctive Prescription. Acquisitive prescription operates to acquire a right on a person, whereas Extinctive prescription is to extinguish a right. In both these categories, a defendant who wishes to rely on the plea of prescription must do so at the earliest opportunity available to him, that is, in his answer before the District Court and must raise it as an issue.

The Defendant cannot take up the plea of prescription for the first time on appeal. Similarly, the judges cannot take up the plea of prescription on their own because a party may take up an objection to the same.

In the well-known case of ***Brampy Appuhamy v Gunasekere (1948) 50 NLR 253 Basnayake J. held:***

“Where the effect of the Prescription Ordinance is merely to limit, the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence”

Therefore, in the instant matter, the Defendant has waived his right to lodge an appeal against the dismissal of his cross-claim before the Civil Appellate High Court and has instead invoked Section 772(1) to object to the findings of the Civil Appellate High Court, against which the appeal was lodged by the Plaintiff.

In view of the facts and the law stated above, I am of the opinion that he is not entitled to relief under Section 772(1) of the CPC. He has failed to exercise his statutory right before the Civil Appellate High Court and thereafter he has taken refuge in the plea of prescription on appeal before this court. He may have placed before the District Court evidence that he has been in occupation of the dispute land for nearly 50 years, but if the plea of prescription is to be considered, as stated above, it has to be expressly pleaded and raised at the first opportunity, as analyzed above.

Lofty statements from the Bar table and evidence led before Court by accident will not establish a plea of prescription. Therefore, I see no merit in the instant

appeal and, while answering all the questions of law in the negative, I am compelled to dismiss the instant appeal without costs.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT