

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

In the matter of an appeal made in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5 (c) (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006.

SC / APPEAL / 186 / 2017

SC / HCCA / LA / 194 / 2016

SP / HCCA / KAG / 48 / 2013 / F

DC / Kegalle / 4510 / L

1. Mohammed Ali Mohammed

Sahabdeen,

(Deceased),

F 65, Madurupitiya,

Algama.

1a. Mohammed Sali Lebbe Nurul

Huseima,

F 65, Madurupitiya,

Algama.

1b. Mohammed Thabdeen Sansul

Inaya,

F 65, Madurupitiya,

Algama.

1c. Mohammed Thabdeen Mohammed

Naleem,

F 65, Madurupitiya,

Algama.

1d. Mohammed Thabdeen Thawjul

Huseima,

F 65, Madurupitiya,

Algama.

1e. Muhammadu Thabdeen

Mohammadu Fasair,

F 65, Madurupitiya,

Algama.

1f. Mohammed Thabdeen Mohammed

Siddeek,

F 65, Madurupitiya,

Algama.

PLAINTIFFS

-Vs-

**Napagoda Archchilage Nimal
Amaraweera,**

Kohumola,

Kanda Road,

Hedideniya,

Radawadunna.

DEFENDANT

AND THEN BETWEEN

**Napagoda Archchilage Nimal
Amaraweera,**

Kohumola,

Kanda Road,

Hedideniya,

Radawadunna.

DEFENDANT – APPELLANT

-Vs-

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1a. Mohammed Sali Lebbe Nurul

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PLAINTIFF – RESPONDENTS

AND NOW BETWEEN

1. Mohammed Ali Mohammed

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F 65, Madurupitiya,

Algama.

PLAINTIFF – RESPONDENT –
APPELLANTS

-Vs-

**Napagoda Archchilage Nimal
Amaraweera,**
Kohumola,
Kanda Road,
Hedideniya,
Radawadunna.

**DEFENDANT – APPELLANT -
RESPONDENT**

Before: A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J. &
K. Priyantha Fernando, J.

Counsel: Seevali Amitirigala, PC for the Plaintiff – Respondent – Appellants.

Sudarshani Coorey for the Defendant – Appellant – Respondent.

Argued on: 23.05.2025

Decided on: 30.04.2026

A.H.M.D. Nawaz, J.

1. The oft-recurring question whether a Plaintiff who seeks a larger relief may yet be granted a lesser once again arises for determination in this appeal. The original Plaintiff–Respondent–Appellant (hereinafter “the Plaintiff”) instituted this action seeking a declaration of title and the ejectment of the Defendant–Appellant–Respondent (hereinafter “the Defendant”), asserting that he is the sole owner of the land more fully described in the original plaint dated 9 October 1990 as amended by

an amended plaint dated 22 June 2001. The land in dispute, which extends to an extent of 1 Acre and 7 Perches, is not in controversy as to its identity. In proof of his title, the Plaintiff placed reliance on an amended decree entered in an earlier action bearing No. DC/7289 in the District Court of Kegalle between one Bamunugama Accige Peter (the Defendant's predecessor in title) and several Defendants therein, among whom were the Plaintiff's mother and his aunt.

2. In the said earlier action, bearing No. DC/7289, whether it be characterised as a partition action, as contended by the Plaintiff, or as a land action, as maintained by the Defendant, the Plaintiff's mother had been cited as the 8th Defendant and his aunt as the 7th Defendant, while the said Bamunugama Accige Peter (the predecessor of the Defendant in the instant case) was the Plaintiff in that action.
3. Since the Plaintiff predicates his claim to title upon the amended decree entered in the earlier action it becomes necessary to examine the terms of that decree in order to ascertain the devolution of title, if any, in his favour. The said amended decree, entered by the then District Judge of Kegalle J.G.L. Swaris, reflects that the subject matter of the earlier action depicted in Plan No.865 of one Aluvihare was divided into Lots 1 to 8. Of these, Lots 1, 2, 3 and 4 were allotted to the Plaintiff's mother and his aunt, while Lots 5, 6, 7 and 8 were allotted to the said Bamunugama Accige Peter, the predecessor in title of the Defendant.
4. The Plaintiff averred in his amended plaint that, of the four Lots allotted to his mother and aunt under the amended decree in the earlier action, Lots 1 and 4 were taken into possession by his mother pursuant to an amicable partition, while Lots 2 and 3 were taken over by his aunt. The Plaintiff further stated that his mother passed away in 1986, and that upon her death he, together with two of his brothers, succeeded as her heirs.

5. As the story unfolded, among the three brothers there was an amicable partition and Lot 1 was taken over by the Plaintiff's two brothers, while the Plaintiff occupied Lot 4. Since the mother of the Plaintiff passed away in 1986, there is a finding by the Additional District Judge of Kegalle that Lot 4 was occupied by the Plaintiff, while Lot 1 was in the possession of his two brothers.
6. It would thus appear that it was Lot 4 of the previous plan bearing No. 865 that subsequently became the subject matter of this action when the Plaintiff filed this *rei vindicatio* action by his original plaint dated 9 October 1990. The cause of action that led to the *rei vindicatio* action appears to be the alleged disturbance frequently caused by the Defendant to the peaceable possession of the land by the Plaintiff *post* the death of his mother.
7. The crux of the Plaintiff's case was the encroachment by the Defendant into Lot 4 and that he should be declared the owner of Lot 4. In other words, the plaint was structured on the basis that Lot 4 belonged to the Plaintiff in its entirety.
8. In his answer the Defendant Nimal Amaraweera sought a dismissal of the Plaintiff's action while staking his claim to Lot 4 by virtue of a deed bearing No.6353 by which he alleged his predecessor in title Peter had transferred Lot 4 in his favour. This deed of sale bearing No 6353 is dated 15 September 1964 connoting that the transfer took place immediately after the decree in the earlier case had been entered.
9. The Defendant also raised a prescriptive plea to Lot 4. There was thus a counter claim that the Defendant made for a declaration of title to Lot 4. It has to be highlighted at this stage that the surveyor who was commissioned to draw up a plan during the course of the District Court proceedings in this case observes in his report dated 16 October 2000 that nobody, least of all the Defendant was ever present on the land when he repaired to the land for survey on 01 October 2000.

10. The evidence on prescription if at all was elicited from mere general statements of witnesses and the learned District Judge was quite correct in holding that the evidence so led was insufficient to establish prescription-see *Sirajudeen and Others v. Abbas*¹ which emphasized that mere general statements of witnesses are not sufficient and that possession must be adverse to the owner's title.²
11. The finding of the learned Additional District Judge of Kegalle against prescription has not been challenged by a cross appeal before this Court nor has a question of law on prescription been raised before this Court. In the circumstances, by what superior title did the Defendant seek to defeat the title of the Plaintiff which remained proved by virtue of the amended decree?
12. The only foundation upon which the Defendant could seek to rest his claim to title is the deed of transfer executed in his favour by the said Bamunugama Accige Peter, who is asserted to be his predecessor in title. However, a patent infirmity is disclosed on the face of that transaction. By virtue of the amended decree in the earlier action, Lot 4 had been allotted not to the said Peter, but to the Plaintiff's mother and aunt. In these circumstances, the deed of transfer bearing No. 6353 dated 15 September 1964 was incapable of conveying any right, title or interest in Lot 4 to the Defendant, for the transferor himself possessed none - *nemo dat quod non habet*.

The *Rei Vindicatio*

13. I need not labour the quotidian point, which is now trite. The requisites of a vindicatory action consist of two elements, namely; (a) that the Plaintiff must be the owner of the property; and (b) that the property is in the possession of the Defendant. It is incumbent upon a Plaintiff who asserts title to establish the same to the satisfaction of Court. Once such a title is established, the evidentiary burden shifts to the Defendant in possession to justify his continued occupation by demonstrating

¹ (1994) 2 Sri.L.R. 365

² See also *M. Rasiah v. Somapala* [2008 BLR 226]

a better title or some other lawful basis for retention. Failing such proof, the Plaintiff is entitled to vindication.

14. The whole basis of an action *rei vindicatio* is the title, or rather superior title of the Plaintiff and a denial of that title or an interference with the Plaintiff's rights under it by the Defendant. No person has a right to trespass on or deprive the rights of a legal owner of possessing the land to which he has the title. Fundamentally, the Plaintiff must have title when he asks for declaration to ascertain that title - see the definition of vindication by Voet;

“From this right of ownership springs the vindication of a thing, that is to say, an action in rem by which we sue for a thing which is ours but in the possession of another. It is otherwise called a" special action in rem".³

15. The quote defining *rei vindicatio* as an "action in rem by which we sue for a thing which is ours but in the possession of another" is also from Johannes Voet's *Commentarius ad Pandectas* (6.1.1).⁴ This has been consistently articulated in South African cases such as in *re Bennett and Green and Bank of Africa, Ltd*⁵ and *Chetty v Naidoo*⁶, where the Court relied on this exact definition to explain that an owner need only prove ownership and that the Defendant is in possession - also see *Goudini Chrome (Pty) Ltd. v. Entabeni Ventures (Pty) Ltd*⁷ - another in the slew of South African cases discussing the nature of ownership and the right to recover property. Some of the South African cases on *rei vindicatio* that repay attention would be *Gien v. Gien*⁸; *Hefer v. Van Greuning*⁹; *Jeena v. Minister of Lands*¹⁰;

³ See the reference to vindicatory actions as *actions in rem* by Inst. 4, 6, 15.

⁴ See *The Selective Voet being the Commentary on the Pandects of Johannes Voet* (1647-1713) as translated by Percival Gane Volume II at p 211.

⁵ (1901) 22 N.L.R 404 (Natal Law Reports).

⁶ 1974 (3) SA 13 (A)

⁷ 1993 (1) SA 77 (A)

⁸ 1979 (2) SA 1113 (T)

⁹ 1979 (4) SA 952 (A)

¹⁰ 1955 (2) SA 380 (A)

*Oakland Nominees (Pty) Ltd v. Gelria Mining & Investment Co (Pty) Ltd*¹¹; *Matador Buildings (Pty) Ltd v. Harman*¹²; *Dreyer NNO and Another v. AXZS Industries (Pty) Ltd*¹³. So much for Roman-Dutch Law jurisprudence from the South African Courts.

16. Equally, Roman-Dutch Law jurists articulate the same foundational principles on vindicatory action. Professor George Wille's states;

*"To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration."*¹⁴

17. *Maasdorp* states the following;

*"The fact that the property in question was in the possession of the defendant at the time when the cause of action accrued is of the very essence of the action, and it is, therefore, necessary for the plaintiff to allege such possession in his declaration and to establish it by evidence."*¹⁵

18. I should think that Voets' description of a vindicatory action as an *action in rem* needs a passing reference to Bryan A. Garner's Black's Law Dictionary that delineates it as

¹¹ 1976 (1) SA 441 (A)

¹² 1971 (2) SA 21 (C)

¹³ 2006 (5) SA 548 (SCA)

¹⁴ See Wille's *Principles of South African Laws*, 9th Ed. (2007) pp. 539-540

¹⁵ *Institutes of South African Law Vol. II 5th Ed. Vol. II, p. 101*

*an action to determine the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action.*¹⁶

19. Let me recapitulate the pith and substance thus far dealt with. The basic principle of *rei vindicatio* action is that the Plaintiff must have title to the land in dispute. Without a proper title, he cannot ask for a declaration. It is, therefore, to be borne in mind that the burden is on the party who claims title to a property must adduce evidence to prove his title to the satisfaction of the Court. If he has no title, the Court cannot declare him entitled to the property.

20. Our Courts have always resonated with the spirit and requirements of the vindicatory action and I would do a trawling of the cases but a sample of them - see *Wanigaratne v. Juwanis Appuhamy*¹⁷; *Theivendran v. Ramanathan Chetty*¹⁸; *Punchihamy v. Arnolis*¹⁹; *Allis Appu v. Endiris Hamy*²⁰; *De Silva v. Goonetilleke*²¹; *Siyaneris v. Jayasinghe Udenis De Silva*²²; *Dharmadasa v Jayasena*²³; *Loku Menika and Others v Gunasekare*.²⁴

21. *Siyaneris* was followed in *Luckmanjee v. Dias*,²⁵ where the District Court had failed to consider the 4th admission recorded as;

“The Plaintiff was the owner of the subject matter of the action prior to 13 January, 1974”.

¹⁶ See 12th Edition at page 37; Also termed (in Roman law) *actio in rem*:

¹⁷ 65 N.L.R. 67

¹⁸ 1986 (2) Sri L.R. 219

¹⁹ (1883) 5 S.C.C. 160

²⁰ (1894) 3 S.C.C. 87

²¹ (1931) 32 N.L.R. 217

²² (1951) 52 N.L.R. 289 (P.C.)

²³ (1997) 3 Sri.L.R 327

²⁴ (1997) 2 Sri.LR 281.

²⁵ 2013 (1) Sri L.R. 18

The Court of Appeal in setting aside this judgement held that;

“In the teeth of the admission of ownership the plaintiff is entitled to obtain a declaration that she sought”.

22. In ***Mansil v. Devaya***²⁶, G.P.S. De Silva J. stated thus;

“In a rei vindicatio action, ownership is of the essence of the action; the action is founded on ownership.”

23. In ***Abdul Latheef v. Mohamed Mansoor***,²⁷ Marsoof J. held that;

“An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title”.

24. In the present case, the Plaintiff has established his title through the amended decree in the earlier action. The Defendant, on the other hand, has failed to demonstrate any lawful basis for his possession. His claim founded on the impugned deed is untenable in view of the absence of title in his predecessor, and his plea of prescriptive title was rightly rejected by the learned Additional District Judge and it appears that the argument advanced before the learned Judges of the Civil Appellate High Court on behalf of the Defendant does not appear to have been focused so much on prescription as on the dismissal of the Plaintiff's case. That explains as to why there was no cross appeal before this Court nor was any question of law raised on prescription at the time of leave.

²⁶ 1985 (2) Sri L.R. 46

²⁷ 2010 (3) Sri L.R. 333

Judgement of the Civil Appellate High Court

25. In the judgement of the Civil Appellate High Court dated 17 March 2016, a salient feature stands out. The Civil Appellate High Court holden in Kegalle held that the Plaintiff was not the sole owner of Lot 4. Upon the demise of his mother in 1986, though he claimed to have possessed Lot 4, he had not prescribed Lot 4 when he filed his case in 1990. Admittedly, he has two other brothers and it is undeniable therefore that he held only one third of Lot 4. This finding of the Civil Appellate High Court is unmistakable and unerring, and I entertain no misgiving about this finding.

26. What troubles this Court is the conclusion reached thereon. The Civil Appellate High Court relied on the judgement of *Hariette v Pathmasiri*²⁸ and proceeded to dismiss the action of the Plaintiff as he had sued *qua* a sole owner. Striking is the following dicta of S.N.Silva J (as His Lordship then was), to which the learned Civil Appellate High Court Judge drew attention:

“In this case the plaintiff is not seeking a declaration of title to her undivided share in the land described in schedule 1 and for ejectment of the defendant from that land. She has pleaded that she possessed the land described in schedule 2 for and lieu of her undivided share and seeks the ejectment of the defendant from that Land. Therefore, the case for the plaintiff cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2.”

27. *Hariette* found resonance with the learned High Court Judge of the Civil Appellate High Court as the Plaintiff in the instant case too had claimed as a sole owner and this led the High Court to dismiss the action of the Plaintiff.

²⁸ (1996) 1 Sri.L.R 358

28. It must be recalled that by the time the High Court judgement was pronounced on 17 March 2016, much water had flowed down under the bridge and this Court had begun to recognize the salutary principle that even if the greater relief cannot be granted as formulated by the plaintiff, the solatium of a lesser relief was available to the Plaintiff. The Supreme Court signified the paradigm shift in *Attanayake v. Ramyawathie*.²⁹
29. The facts of *Attanayake* bear attention. The original Plaintiff instituted action in the District Court of Badulla for a declaration of title to the land described in Schedule B to the plaint (approximately 1 Acre, being Lot 63 in Plan No. S/13800, forming part of the larger allotment '*Kamathgodawatta*' in Schedule A) and for ejectment of the Defendant. Crucially, the Plaintiff did not describe herself as a co-owner anywhere in her plaint. She relied on a purchase deed (P1) and a Land Settlement Order (P4), but those two documents themselves described different fractional shares of the allotment.
30. The Land Settlement Order showed that Lots 63 and 64 were settled in undivided one-quarter shares among seven claimants, the Plaintiff being the first. The Defendant denied title and asserted an independent chain of title. While the District Court dismissed the Plaintiff's action, the Court of Appeal affirmed. The Supreme Court (Bandaranayake J., S.N. Silva CJ. and Yapa J.) likewise dismissed the appeal. But there was this gladsome development.
31. The Court, through Bandaranayake J., went further than *Hariette* in one important respect: it held, as a matter of principle, that a co-owner who sues as the sole owner is not thereby barred from obtaining relief - a claim for greater relief than is warranted does not prevent the Court from granting the lesser relief to which the Plaintiff is entitled. However, there remains an irreducible burden on the Plaintiff to

²⁹ [2003] 1 Sri L.R. 401

adduce evidence of ownership to the extent claimed. Since the Plaintiff in **Attanayake** wholly failed to discharge that burden, the appeal was dismissed.

32. In **Attanayake**, the Plaintiff's pleading was materially different. She did not refer to herself as a co-owner at all. She pleaded as though she were the sole and exclusive owner, relying on a purchase deed and a Land Settlement Order. But she lost the case because she could not establish her title. The Court further observed that the Defendant in the case remained a licensee. However, the Court laid down a more liberal statement of principle: that a co-owner who sues as sole owner is not *ipso facto* precluded from relief. The Court acknowledged that in law, a plaintiff's claim for greater relief than she is entitled to should not prevent the Court from granting the lesser relief which is due. This proposition was however not discussed in **Hariette**, where the Plaintiff's own framing of the case had made it necessary to prove exclusive possession. It is not as if our Courts were not alive to granting the lesser relief - see Asoka De Z Gunawardana, J. in **Allis v. Seneviratne and Others**³⁰ - *non debet, cui plus licet, quod minus est non licere* - compendiously referred to as *omne majus continet in se minus* - the greater includes the lesser.³¹ U De Z Gunawardana, J. used the maxim in the case of **Somindra v. Surasena & Others**³² to indicate that revision was available despite the fact leave to appeal was not available. *He to whom the greater is lawful ought not to be debarred from the less as unlawful.*

33. In **Attanayake**, Bandaranayake J. applied **Hevawitarane v. Dangan Rubber Co. Ltd.**³³ more expansively. The Court affirmed that the principle is good law, that a co-owner may sue even without joining other co-owners, and that a co-owner who sues as the sole owner is not thereby barred from relief. **Hevawitarane** was used in

³⁰ (1989) 2 Sri.L.R 335

³¹ See Nawaz, J. in **Anthonidura Pushpa De Soysa and Others v. Meera Maar Beach Hotel Co. Ltd and Others** - CA / 1118 / 1999 (CA minutes 05.12.2017)

³² 2000 3 Sri.L.R 159

³³ 17 N.L.R 49

Attanayake to support the more liberal reading of co-ownership rights; Moreover, in *Punchiappuhamy v Dingiribanda*³⁴, Eva Wanasundera, PC, J. adopted the principle - “*the fact that an appellant has asked for greater relief than he is entitled to should not prevent him from getting the lesser relief which he is entitled to*”.

34. The sum total of the position today is that a co-owner of a land who sues a trespasser for a declaration of title and ejection is entitled to maintain the action if he institutes the action as the sole owner of the premises.

35. Having indulged in the above discussion, I take the view that even though the learned High Court Judges alluded to *Hariette*, they did not take into account the latter decisions and as a result, they fell into an error when they reached the conclusion as they did.

36. The learned High Court Judges, having correctly found that the Plaintiff was a co-owner of Lot 4, proceeded to dismiss his action. So long as there is a finding that the Plaintiff is a co-owner of Lot 4, he is entitled to a declaration that he is a co-owner. Even if he has claimed ownership to the entire land, the lesser relief declaring that he is only a co-owner should have been granted by Court. Now that the Defendant has been proved to be a trespasser the Plaintiff is entitled to eject the Defendant from the whole land as he is a co-owner. The *ratio decidendi* of *Hevawitarane v. Dangan Rubber Co. Ltd.* (supra) is that “*one out of several co-owners may without joining any other co-owner in the action sue a trespasser for a declaration of his undivided share, ejection and damages*”.

³⁴ SC / APPEAL / 04 / 2010 (SC minutes of 2 November 2015)

37. In the circumstances, the Plaintiff should be declared a co-owner to the undivided share and is entitled to eject the trespasser from the whole land.

38. Before I part with this judgement, I must advert to a question of law that has been raised on behalf of the Defendant - Appellant - Respondent (the Defendant);

Under Section 337 of the Civil Procedure Code, has the Plaintiff no rights in the corpus in the dispute?

39. This question of law was raised on the assumption that the Plaintiff had failed to execute the writ under Section 337(1) of the Civil Procedure Code within ten years of the decree. On that basis, it was argued that the Plaintiff's appeal ought to be dismissed.

40. This Court observes that the said question of law was not raised before the Civil Appellate High Court. It is further noteworthy that the Defendant himself, both in the course of his evidence and in the framing of issues, proceeded upon the assumption that the case before the Court was a partition action.

41. Be that as it may, even upon the assumption that this was a land case, the application of Section 337(1) as amended by Act No. 53 of 1980 would have no bearing whatsoever on the amended decree in question, which came into existence long before that amendment took effect. The settled position in law is that the said amendment does not operate retrospectively. This was authoritatively pronounced by the Supreme Court in *Haji Omar v. Bodhidasa*³⁵, and subsequently affirmed in *Rajadurai v.*

³⁵ [1994] 2 Sri.L.R 191

*Emerson*³⁶, wherein it was held that the ten-year limitation prescribed by Act No. 53 of 1980 has no application to decrees in respect of immovable property that were made prior to the coming into force of that Act.

42. Therefore, the question of law that was raised by the learned counsel for the Defendant – Appellant – Respondent is answered in the negative.

43. Let me reiterate the questions of law raised on behalf of the Plaintiff in this appeal.

1. *Have the learned High Court Judges erred in law by not appreciating the legal principle that a claim for a greater relief than entitled to by a party should not prevent him from getting judgement for a lesser relief?*

2. *Have the learned High Court Judges erred in law by deciding that the Plaintiff was a co-owner and thereafter by not granting the reliefs sought in the plaint?*

3. *Have the learned High Court Judges erred in law by not considering the legal principle that an owner of an undivided share of land is entitled to sue a trespasser in order to get a declaration to his undivided share and the ejection of the trespasser?*

³⁶ [1995] 2 Sri.L.R 30

44. For the foregoing reasons I have discussed above the aforesaid questions of law are answered in favour of the Plaintiff. Accordingly, the Plaintiff is entitled to a declaration that he is a co-owner to Lot 4 and he is entitled to eject the Defendant from Lot 4. The judgement of the learned District Judge 6 November 2012 is affirmed and the judgement of the Civil Appellate High Court of Kegalle dated 17 March 2016 is set aside. The appeal of the Plaintiff – Respondent – Appellants is allowed.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

Judge of the Supreme Court

I agree.

K. Priyantha Fernando, J.

Judge of the Supreme Court

I agree.