

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

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

SC Appeal No:

Herbart Rodrigo,

197/2016

Shyamalie Motors,

No. 28/4, Vajira Road,

SC/HCCA/LA Application No:

Bambalapitiya,

229/2016

Colombo 04.

PLAINTIFF

WP/HCCA/Col No:

Vs.

206/2009(F)

1. Aaron Amarasing Noah **(Deceased)**

D.C. Colombo Case No:

1a. Dalerine Vinodhini Sundararaj (*nee*

19855/L

Noah)

1b. Melrose Subodhinie Noah

SUBSTITUTED 1st DEFENDANTS

2. Dilrukshan Samuel Manoharan
Noah

3. Sudarshan Yogarajah Noah

4. Abraham Roshan Noah

All of:

No. 90, Muhandiram Road,

Kollupitiya, Colombo 03.

DEFENDANTS

AND

1. Aaron Amarasing Noah **(Deceased)**

1a. Dalerine Vinodhini Sundararaj (*nee*
Noah)

1b. Melrose Subodhinie Noah

2. Dilrukshan Samuel Manoharan
Noah

3. Sudarshan Yogarajah Noah

4. Abraham Roshan Noah

All of:

No. 90, Muhandiram Road,

Kollupitiya, Colombo 03.

DEFENDANT-APPELLANTS

Vs.

Herbart Rodrigo,
Shyamalie Motors,
No. 28/4, Vajira Road,
Bambalapitiya, Colombo 04. **(Deceased)**

Lilani Priyankari Rodrigo,
Under Shehani's Reception Hall,
No. 443/2, Weralugashandiya,
Pelawatta, Pannipitiya.

SUBSTITUTED-PLAINTIFF-

RESPONDENT

AND NOW

Lilani Priyankari Rodrigo,
Under Shehani's Reception Hall,
No. 443/2, Weralugashandiya,
Pelawatta, Pannipitiya.

SUBSTITUTED PLAINTIFF-

RESPONDENT-APPELLANT

Vs.

1. Aaron Amarasing Noah **(Deceased)**

1a. Dalerine Vinodhini Sundararaj (*nee*
Noah)

Currently of Apartment:

Semanggi Lt 20 No. 20-03JI,
Jend. Gatot Subroto Kav 53B,
Jakarta Pusat 10260.

1b. Melrose Subodhinie Noah

Currently of:

No. 2, Secular House,
Bhagat Road, Taikal Wadi, Main,
Mumbai 400.

2. Dilrukshan Samuel Manoharan
Noah

Currently of:

No. 27/2, Samudrasanna Place,
Mount Lavinia.

3. Sudarshan Yogarajah Noah,
(Deceased)

Currently of:

No. 19/3, Camel Road,
Colombo 03.

3a. Dalerine Vinodhini Sundararaj (*nee*
Noah)

Currently of Apartment:

Semanggi Lt 20 No. 20-03JI,
Jend. Gatot Subroto Kav 53B,
Jakarta Pusat 10260.

3b. Melrose Subodhinie Noah

Currently of:

No. 2, Secular House,
Bhagat Road, Taikal Wadi, Main,
Mumbai 400.

3c. Dilrukshan Samuel Manoharan

Noah

Currently of:

No. 27/2, Samudrasanna Place,
Mount Lavinia.

3d. Abraham Roshan Noah

Currently of:

No. 12, Jambugasmulla Road,
Nugegoda.

SUBSTITED 3RD DEFENDANT-
APPELLANT-RESPONDENTS

4. Abraham Roshan Noah

Currently of:

No. 12, Jambugasmulla Road,

Nugegoda.

**DEFENDANT-APPELLANT-
RESPONDENT**

Before

: Janak De Silva, J.

: Menaka Wijesundera, J.

: Sampath B. Abayakoon, J.

Counsel

: Palitha Kumarasinghe, P.C. with Asanka Ranwala
instructed by Bushra Hashim for the Substituted
Plaintiff-Respondent-Appellant.

: S.A. Parthalingam, P.C. with Nishkan Parthalingam
and Upeka Sooriyapatabedige instructed by
Dimuthu Kuruppuarachchi for the 2nd Defendant-
Appellant-Respondent and for the 1a, 1b, 3a, 3b,
and 3c Substituted Defendant-Appellant-
Respondents.

: Rasika Dissanayake for the 4th Defendant-
Appellant-Respondent.

Argued on

: 28-04-2026

Written Submissions : 25-01-2017 (By the 1st, 2nd, and 3rd Defendant-Appellant-Respondents)

: 11-01-2017 (By the 4th Defendant-Appellant-Respondent)

: 30-11-2016 (By the Substituted Plaintiff-Respondent-Appellant)

Decided on : 22-09-2026

Sampath B. Abayakoon, J.

This is an appeal preferred by the substituted plaintiff-respondent-appellant (hereinafter referred to as the plaintiff) on being aggrieved of the judgment dated 31-03-2016 pronounced by the Provincial High Court of the Western Province holden in Colombo while exercising its civil appellate jurisdiction.

From the impugned judgment, the learned Judges of the High Court set aside the judgment pronounced by the learned Additional District Judge of Colombo on 26-06-2009, where the action was decided in favour of the plaintiff. Having set aside the judgment, the action of the plaintiff before the District Court was dismissed, holding that the defendants have proved prescription to the property.

When this matter was considered on 21-10-2016 for the purpose of granting leave to appeal from the impugned appellate judgment, this Court granted leave on the questions of law as set out in sub-paragraph (1) to (4) of paragraph 18 of the petition dated 11-05-2016.

The said questions of law read as follows,

1. Did the Civil Appellate High Court err in law holding that the petitioner has failed to prove the title of the petitioner to the said premises?

2. Did the Civil Appellate High Court err in law holding that the plaintiff's action is barred by provisions of section 545 of the Civil Procedure Code enacted by Act No. 14 of 1993 or section 547 of the Civil Procedure Code repealed by the Act No. 79 of 1988?
3. Did the Civil Appellate High Court err in holding that the respondents have acquired prescriptive rights to the property by commencing the adverse possession from 23-01-1989?
4. Did the Civil Appellate High Court err in law holding that the respondents have acquired prescriptive title to the property in suit, in the circumstances of this case?

At the hearing of this appeal, this Court heard the submissions of the learned President's Counsel who represented the plaintiff and also the submissions of the learned President's Counsel who represented the 2nd defendant-appellant-respondent and the 1a, 1b, 3a, 3b, and 3c substituted defendant-appellant-respondents (hereinafter collectively referred to as the defendants). This Court also heard the submissions of the learned Counsel for the 4th defendant-appellant-respondent, who is also the 3c substituted defendant-appellant-respondent.

At the conclusion of the hearing, the parties were allowed to submit the copies of the decided judgments relied on by the parties to substantiate their respective stands if they so wish, in addition to the written submissions already tendered.

The Facts

The now deceased original plaintiff of the action has initiated proceedings before the District Court of Colombo in the form of a *rei vindicatio* action seeking a declaration of title to the property morefully described in the schedule of the plaint and the ejectment of the defendants and anyone claiming under them from the property and the building standing thereon, for damages, and other reliefs as prayed for in the plaint.

The plaintiff has averred his cause of action on the basis that the defendants are his licensees, and they are now refusing to accept his title to the property and causing damages as pleaded. It has also been averred that the 1st defendant, having claimed tenancy under the plaintiff, is estopped from challenging the title of the plaintiff.

The original defendants named in the plaint have filed a common answer on 02-07-2003 denying the title claimed by the plaintiff, while claiming that they have acquired prescriptive title to the property by being in possession since 1944 without recognizing anyone's rights and independently to any claim. They have also claimed that the plaintiff is estopped from challenging the defendants' prescriptive rights.

The 2nd to 4th original defendants has claimed title to the property stating that the 1st defendant executed a deed of declaration bearing deed No. 803 dated 07-03-1991 asserting his rights to the property, and he transferred the said rights to them by deed No. 662 dated 08-04-2002. On the said premise, they have set up a counterclaim praying for a declaration that they are the owners of the property while seeking for a dismissal of the action.

At the trial, the parties have recorded three admissions; admitting the jurisdiction of the Court, the fact that the parties are residing within the said jurisdiction, and also the fact that the plaintiff previously filed and maintained action No. 5460/ZL, before the District Court.

The trial has proceeded on the basis of four issues settled by the plaintiff, and the 5th to 10th issue settled by the defendants.

The plaintiff, after having given evidence, has called some other witnesses as well in order to substantiate his case and has closed the case by reading the documents marked as P-01 to P-75.

The defendants have called the 3rd defendant and several other witnesses on their behalf and has closed their case by reading the documents marked as V-01 to V-85.

It needs to be noted that none of the documents marked by either party have been marked subject to proof, which means all the documents have been admitted as evidence in the case.

The learned Additional District Judge, pronouncing his judgment on 26-06-2009, has determined that the plaintiff has proved his title to the property mentioned in the schedule of the plaint through the evidence placed before the Court. After having considered the relevant law, where it stipulates that once a plaintiff in a *rei vindicatio* action proves his title to the property and the fact that the defendant is in possession of the same is also established, the burden shifts to the said defendant to prove that he has a better title than that of the plaintiff, the learned Additional District Judge has proceeded to consider the defendants' stand that they have acquired prescriptive title to the property.

Having considered the relevant mode of proof in relation to a claim of prescriptive title, the learned Additional District Judge has determined that none of the defendants have established the claimed prescriptive title for the reasons set out in the judgment.

Accordingly, having answered the issues in favour of the plaintiff, the learned Additional District Judge has proceeded to enter judgment in favour of the plaintiff, and thereby, granting the reliefs as prayed.

However, after having considered the appeal preferred by the defendants, the learned Judges of the High Court have decided to set aside the judgment of the learned Additional District Judge on the basis that the plaintiff has failed to prove his title to the property in question.

The learned Judges of the High Court have primarily considered the provisions of section 545 and 547 of the Civil Procedure Code and have determined that upon the death of the plaintiff's predecessor in title, namely Oswald Lionel Gomez, no steps have been taken to administer his estate as required, and therefore, the plaintiff cannot maintain any action for recovery

of any property without the administration of the estate of the said previous owner.

It has also been determined that the plaintiff's claimed title is doubtful, and he has failed to prove that the defendants are his licensees as claimed in the plaint or the fact that the defendants are holding the possession of the land and the building in any capacity under him.

It has been determined further that after the plaintiff was placed in possession of the building by the Fiscal of the Court on the strength of the judgment in the previous case bearing No. 5460/ZL, which was an action between the plaintiff and a person called Azaraiya (the document marked P-13e), the 1st defendant has entered the premises forcibly on 22-02-1989, and has thereby commenced possessing the building standing on the land adversely to whatever the rights claimed by the plaintiff. Accordingly, he had already acquired prescriptive title by the time the plaintiff initiated the present action in 2003.

The High Court has proceeded to set aside the judgment of the learned Additional District Judge, while allowing the appeal preferred by the defendants.

Consideration of The Questions of Law and The Conclusion

The 1st and 2nd Questions of Law: -

I will now proceed to consider the above two questions of law together as they are interrelated.

The action instituted by the plaintiff before the District Court was a vindicatory suit where he had prayed for a declaration of title to the land morefully described in the plaint and for the ejectment of the defendants from the premises situated therein.

In such a case, it is paramount on the plaintiff to identify the corpus in respect of which a declaration of title is sought and also to establish his title to the said property to the satisfaction of the Court upon balance of probabilities as required in a civil suit.

In the action under appeal, the identity of the corpus was never in dispute.

When considering the mode of proof of the title in a vindicatory suit, it was held in the case of **Luwis Singho and Others Vs. Ponnamparuma (1996) 2 SLR 320**, at page 324

“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;

- (i) The plaintiff is the owner of the land in question i.e. he has the dominium and,*
- (ii) 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 title is proved the right to possess it, is presumed.*

5. *For the Court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.*

6. *Once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them."*

In the case of **Dharmadasa Vs. Jayasena (1997) 3 SLR 327**, it was held that;

In a *rei vindicatio* action the burden is on the plaintiff to establish the title pleaded and relied on by him. The defendant need not prove anything. The grant relied upon by the plaintiff was invalid. Hence the plaintiff has failed to establish his title.

At page 330:

"The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie" per Macdonall C.J., De Silva v. Goonetilake (1931) 32 N.L.R. 217 at 219."

In the case of **Wanigaratne Vs. Juwanis Appuhamy (1962) 65 NLR 167**, considering the mode of proof in a *rei vindicatio* action, **Herat J.**, observed the following;

"The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."

It is clear from the judgment of the learned Additional District Judge that he was well possessed of the above-mentioned legal principles when he considered the evidence placed before the Court.

After having satisfied that the appellant has proved his title to the property in question, the learned Additional District Judge has proceeded to consider whether the defendants have proved their prescriptive title as claimed by them. It was only after having satisfied that the defendants had failed to prove

their claim as above, the learned Additional District Judge has proceeded to pronounce his judgment allowing reliefs as sought by the plaintiff.

The defendants while arguing this appeal relied on the judgment pronounced by the Court of Appeal in **Loku Manika and Others Vs. Gunasekare (1997) 2 SLR 281** to contend that the learned Additional District Judge has failed to appreciate that in an action of this nature, the plaintiff must strictly prove his title.

However, it needs to be noted that this Court has time and again interpreted the standard of proof in a vindicatory suit.

Mahinda Samayawardhena, J., in the case of **Bank of Ceylon Vs. A. C. Rajasingham S.C. Appeal No. 40/2014 decided on 04-07-2023 at page 11** having considered in detail the requirement of proof in a vindicatory suit and also having considered the meaning of the term ‘strict proof,’ held as follows;

“The term “strict proof of the plaintiff’s title” used here does not mean that the plaintiff in a rei vindicatio action shall prove title beyond a reasonable doubt or a very high degree of proof. The term “strict proof of the plaintiff’s title” was used here to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a rei vindicatio action proper based on ownership of the property. In a rei vindicatio action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

Professor G. L. Peiris, in his treatise Law of Property in Sri Lanka, Vol I makes it clear at page 304:

It must be emphasized, however, that the observations in these cases to the effect that the plaintiff’s title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition

actions. ... It is clear that a standard characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action."

The case of **Banda Vs. Soysa (1998) 1 SLR 255** was a case where title to a land was claimed by two competing parties and the question was whether the plaintiff has proved the claimed title.

It was held at **page 259**,

"In a case such as this, the true question that a court has to consider on the question of title is, who has the superior title? The answer has to be reached upon a consideration of the totality of the evidence led in the case."

However, when it comes to the appellate judgment of the High Court, having considered the title pleaded by the plaintiff and without coming to a determination that whether the title can be accepted or not, the learned Judges of the High Court appear to have proceeded to consider certain alleged deficiencies of the title taken up for the first time before the High Court at the appeal stage.

For matters of clarity, I would now reproduce the relevant portion of the judgment as it appears on page 3 (printed page 25 of the appeal brief).

"The defendant-appellants had referred to certain alleged deficiencies of this title. It is said that the last will refers to an Ossie Gomez not Oswald Lionel Gomez and there was no evidence except the assertion of the plaintiff himself that Ossie Gomez is Oswald Lionel Gomez. Not only that, it is alleged that Oswald Gomez died before the conclusion of case no. 813/P.O. The defendant-appellants also submit that the plaintiff had not produced any documents of the said case. It is submitted that the Administratrix who executed the conveyance, the said Agnes Fernando, was not a person mentioned in the capacity of an executor in the last will and neither her nor the children of Oswald Lionel Gomez are beneficiaries

of that will and Oswald Lionel Gomez having died on 21.10.1976, it was on 22.11.1985, which was 9 years thereafter the said testamentary case No. 4287 was instituted. However, deed Nos. 446 and 447 written in plaintiff's favour had been executed before that on 09.10.1985.”

It is clear from the proceedings before the District Court that the defendants have never challenged the title pleaded by the plaintiff. In fact, none of the documents marked from 37-01 to 37-75 by the plaintiff have been marked subject to proof. The said documents include the relevant proceedings in two testamentary cases linked with the title pleaded by the plaintiff. Even at the stage of cross-examination, no questions have been asked in relation to any deficiencies in the testamentary proceedings or in relation to the names of the parties in those proceedings.

The issues raised by the defendants before the trial Court had been based on the premise that no cause of action has been revealed against the defendants, and on the basis that the plaintiff is estopped from challenging the defendants' rights, apart from claiming that the defendants have acquired prescriptive rights to the property.

It is well settled law that although a pure question of law can be taken up for the first time in appeal, if the said question of law is a question of fact and law combined, which cannot be determined without having considered the evidence, such a question cannot be taken up for the first time in appeal.

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

“A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, 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. Jayawickrema and Others Vs. A. David Silva 76 NLR 427**, it was determined that;

“A pure question of law can be raised in appeal for the first 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.”

I find that the learned Judges of the High Court have relied on the submissions of the defendants made before the High Court for the first time in appeal. Based on such, the High Court has considered the provisions of sections 545 and 547 of the Civil Procedure Code in detail by going on a voyage of discovery to determine that the plaintiff cannot maintain the action because there was no proper evidence before the District Court to the effect that the estate of the plaintiff's predecessor in title was properly administered under testamentary proceedings.

As I have stated previously, this was never a question or an issue raised before the District Court. The plaintiff has produced evidence to show that the estates of the relevant predecessors in title have in fact been administered. However, it is true that the plaintiff has not produced the full set of Court proceedings in that regard. It is my view that since there was no challenge on the basis that the estate was not administered or not properly administered before a competent Court, there was no necessity for the plaintiff to adduce evidence more than that has been adduced before the trial Court.

The name of the plaintiff's predecessor in title or his aliases was never a disputed fact. Establishing the value of the estate that should require mandatory administration under testamentary proceedings is a must if the defendants intended to maintain an objection that the estate should have been administered, since estates of all the persons who die intestate need not be administered.

All of the above are factual matters where there should be evidence placed before the trial Court for the High Court to consider the administration of an estate after the death of a person as a question of law. I am of the view that the learned Judges of the High Court were misdirected as to the relevant law when the High Court used such a basis to determine that the plaintiff has failed to prove the title.

Moreover, it is abundantly clear that the plaintiff has proved his title to the property in question. The evidence placed before the trial Court has established that the property in suit was originally owned by one Honnantharage Charles Gomez by way of a Fiscal's Conveyance dated 06-11-1964, and the fact that he died leaving a last will naming Honnantharage Ossie Gomez as the executor of the will and leaving all rest residuals of his estate to the said Ossie Gomez. The Administrator's Conveyance marked P-10 establishes that the said estate was duly administered in the District Court of Colombo and the probate was issued to Ossie Gomez who was also known as Honnantharage Lionel Oswald Gomez.

During the pendency of the testamentary proceedings, the said Ossie Gomez had passed away leaving as heirs, his widow Agnes Fernando and two children, and the said Agnes Fernando has thereafter obtained Letters of Administration with the last will annexed in the said testamentary proceedings. After the conclusion of the administration of the estate, the estate had been devolved on the widow of Ossie Gomez and his two children. The said Ossie Gomez's intestate estate has also been duly administered before the District Court of Kalutara and the Letter of Administration has been issued to the earlier mentioned Agnes Fernando, the widow of the said deceased.

The evidence led before the trial Court has provided abundant proof that both the estates of Charles Gomez and Ossie Gomez have been duly administered, and the heirs of Ossie Gomez have transferred and conveyed the property in suit to the plaintiff of the action.

For the reasons I have considered above, I am of the view that the learned Judges of the High Court had no basis whatsoever to conclude that the plaintiff has failed to prove his title while relying on something that was never in issue before the trial Court. I find that they were totally misdirected as to the facts as well as the relevant law when such a conclusion was reached.

Accordingly, I answer the 1st and 2nd questions of law under which this appeal was considered in the affirmative

The 3rd and 4th Questions of Law: -

The above two questions of law relate to the determination of the High Court that the defendants have proved their alleged prescriptive rights to the property by commencing an adverse possession from 23-01-1989.

As I have stated earlier, once a plaintiff in a vindicatory suit proves his title and the fact that the defendant is in possession of the corpus, the burden shifts to the defendant to prove that he or she has a better title than that of the plaintiff. It is clear from the issues raised by the defendants of the action that they have maintained two positions claiming that the plaintiff's action should be dismissed.

In the 6th issue raised, they have claimed that in accordance with paragraph 7 of their answer, the plaintiff is estopped from disputing the rights of the defendants to the corpus. In the said paragraph, the defendants have claimed that the plaintiff made an application to the District Court in terms of section 325 of the Civil Procedure Code to oust the first defendant from the property on the strength of a judgment obtained by him in the District Court Case No. 5460/ZL against one A. V. Azaraiya, and the said application was dismissed by the Court.

The 7th issue relates to the claim that the defendants have acquired prescriptive title to the property in question by possessing it adversely since 1944. They have also raised issues on the basis that the plaintiff's cause of action has been prescribed by operation of law and also on the basis that the

2nd, 3rd and 4th defendants are owners of the property, by way of the title deeds mentioned in paragraphs 11 and 12 of their answer.

A careful reading of the judgment of the learned Additional District Judge clearly demonstrates that the defendants' issues had been well considered in relation to the evidence placed before the Court.

It has been determined that from the documents marked P-35 to P-41 and also from P-57 to P-59, which are electoral registers relating to the house situated in the property, one Victor Azaraiya has been the principal resident of the property, while the defendants had been named under him.

The 3rd defendant, who has given evidence in the case, had admitted that the said Azaraiya was her uncle and he passed away about 10 years ago. The documents marked P-33 and P-34 have established the fact that the said Victor Azaraiya has deposited rent from 1985 to 1988 as a tenant under the plaintiff. The learned Additional District Judge has considered the previous action filed by the plaintiff against Victor Azaraiya, namely, the District Court of Colombo Case No. 5460/ZL. The answer filed by Azaraiya has been tendered as P-13ඇ at the trial. In the answer, while admitting the ownership of the plaintiff, he has claimed that he is a tenant under him.

The prosecution has also marked the petition that has been tendered by the 1st defendant of this action in the said case as P-13ඈ, and the affidavits filed by the 1st defendant of this action as P-13ඉ and P-13ඊ. Throughout the aforementioned documents, the 1st defendant maintains his status as a tenant on the property.

It has been determined by the learned Additional District Judge that since the earlier-mentioned Azaraiya has been a tenant under the plaintiff, the 1st defendant cannot claim any independent right as he has also been living there under the earlier-mentioned tenant. It has also been correctly determined that accordingly, the 1st defendant has no basis to execute a deed of declaration claiming rights to the property and she has no basis to transfer any rights that she does not possess to the other defendants.

It is trite law that it is up to a person who claims prescription in terms of section 3 of the Prescription Ordinance to establish a starting point of his alleged prescriptive claim, and the burden of proof is entirely on the claimant of the prescriptive rights.

It was held in the case of **Sirajudeen and Two Others Vs. Abbas (1994) 2 SLR 365 at Page 370**;

“There is another relevant aspect of the plea of prescriptive title which was overlooked by the trial Judge. That principle is best stated in the words of Gratiaen, J. in Chelliah v. Wijenathan 54 NLR 337 at 342, “where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.””

I find that the learned Additional District Judge, after well considering the evidence as to the claimed estoppel, and also the prescriptive and paper title claimed by the defendants, has rightly determined that the defendants have failed to establish any of the rights claimed by them, which includes the alleged prescriptive claims to the property.

However, the learned Judges of the High Court have come to an entirely different conclusion in this regard.

It has been determined that the 1st defendant has commenced an adverse possession of the building with effect from 23-01-1989 and since the present action was instituted in 2003, the 10-year continuous adverse possession as required in terms of section 3 of the Prescription Ordinance has been established.

It appears that the above starting point of the alleged adverse possession has been determined based on the proceedings in the previous action No. 5460/ZL, where the plaintiff has filed an application in terms of section 325

of the Civil Procedure Code. It has been alleged that after the execution of the writ in relation to that case and handing over the property to the plaintiff by the Court Fiscal, the 1st defendant entered the building forcibly and illegally on 23-01-1989.

It has been determined that although there was an admission by the 1st defendant in the document marked P-13e accepting the plaintiff as his landlord, since the plaintiff has admitted that the said 1st defendant entered the premises forcibly on 23-01-1989, and it is an indication that the said defendant has not recognized the plaintiff as his landlord since that date.

It is my considered view that this was a totally erroneous conclusion. The defendants have never maintained the position that their starting point of the prescriptive claim as the date determined by the learned Judges of the High Court. They have consistently maintained the position that since 1944, they have been in possession of the property, which goes on to show that their claimed starting point has been the year 1944. In the deed of declaration dated 07-03-1991 marked V-77 at the trial, the 1st defendant had declared that he had been in uninterrupted possession for a period of 45 years, suggesting a title adverse and independent to all the others.

As pointed out correctly by the learned President's Counsel on behalf of the plaintiff that other than claiming that the 1st defendant is the tenant of the plaintiff in the earlier mentioned District Court action, the statement of rent payment to the Colombo Municipal Council marked as P-33 goes on to establish that the 1st defendant has deposited rent to the relevant premises before the Municipal Council, (the authorized person under section 21 of the Rent Act) in the name of the plaintiff up to June 1991. This was a document that was never challenged before the District Court.

This clearly establishes the fact that there was no basis for the High Court to consider 23-01-1989 as a starting point of an overt act by the 1st defendant.

The facts and circumstances of this case clearly demonstrate that the 1st defendant and the other defendants have maintained the position that the 1st defendant was a tenant under the plaintiff. In such circumstances, it is my view that the provisions of section 116 of the Evidence Ordinance shall operate as an estoppel against the defendants.

The said section 116 reads as follows -

116. No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and

no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

It was held in the case of **Sirajudeen and Two Others Vs. Abbas (*supra*)** that;

“As regards the mode of proof 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 should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.”

For the aforesaid reasons considered I am of the firm view that the defendants have no basis to claim prescriptive title from the year 1944 as claimed by them in this action, and that there was no basis to consider the date of adverse possession as 23-01-1989 as determined by the learned Judges of the High Court. If the defendants intended to rely on a date other than the year 1944 as claimed by them for all intended purposes, such a date should only have been after the 1st defendant stopped depositing rent in the name of the plaintiff after June 1991.

However, there cannot be any secret intentions or acts in that regard. There must be clear evidence to show that the defendants possessed the building adversely to the title of its owner, the plaintiff. Executing a deed of declaration behind the back of the owner of the property claiming prescriptive rights cannot be considered as an overt act. Similarly, the fact of after having deposited rent with the authorized person, namely the Municipal Council of Colombo until June 1991 and not depositing rent thereafter, cannot be considered as an overt act against the proprietary rights of the plaintiff.

In the case of **Maduanwala Vs. Ekneligoda 3 NLR 213**, the Supreme Court held that;

“A person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation.”

For the reasons as considered above, I hold that the High Court erred when it was determined that the defendants’ alleged prescriptive rights to the property commenced by way of an adverse possession from 23-01-1989, and they have acquired prescriptive title to the property in question.

Accordingly, I answer the 3rd and 4th questions of law under which this appeal was considered also in the affirmative.

The appeal is allowed. The appellate judgment dated 31-03-2016 is hereby set aside and the judgment dated 26-06-2009 pronounced by the learned Additional District Judge of Colombo is affirmed.

There will be no costs of this appeal.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court