

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

In the matter of an appeal in terms
of Section 5 (c) (1) of the High Court
of the Provinces (Special Provisions)
(Amendment) Act No. 54 of 2006.

SC / APPEAL / 242 / 2016

SC / HCCA / LA / 442 / 2016

WP / HCCA / COL / 112 / 2012 (F)

DC Kaduwela: 248 / L

Denis Crystal Mary Peterson,

369, Mahara,

Kadawatha.

PLAINTIFF

-Vs-

Sara Weerasinghe Alias

Jayanthi Thirimawathana,

20, Keels Housing Scheme,

Jalthara,

Ranala.

DEFENDANT

AND THEN BETWEEN

Sara Weerasinghe Alias

Jayanthi Thirimawathana,

20, Keels Housing Scheme,

Jalthara,

Ranala.

DEFENDANT - APPELLANT

-Vs-

Denis Crystal Mary Peterson,

369, Mahara,

Kadawatha.

PLAINTIFF - RESPONDENT

AND NOW BETWEEN

Denis Crystal Mary Peterson,

369, Mahara,

Kadawatha.

**PLAINTIFF - RESPONDENT –
APPELLANT**

-Vs-

**Sara Weerasinghe Alias Jayanthi
Thirimawathana,**

20, Keels Housing Scheme,

Jalthara,

Ranala.

**DEFENDANT - APPELLANT -
RESPONDENT**

Before: S. Thurairaja, PC, J.

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

A.L. Shiran Gooneratne, J.

Counsel: Bhagya Herath with Sajeevi Jayasinghe for the Plaintiff – Respondent
– Appellant.

Chathura Galhen with Dharani Weerasinghe for the Defendant –
Appellant – Respondent.

Argued on: 03.04.2024

Decided on: 19.03.2026

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

1. The question that falls for determination in this appeal is one that recurs with some regularity in our Courts. The Plaintiff permits the Defendant to occupy her property; the Defendant, when faced with an action in *rei vindicatio*, resists it by invoking prescription. While the legal issues raised are neither novel nor unsettled, their application is acutely dependent on the factual context. The present appeal, though doctrinally familiar, is marked by facts that impart to it a character of its own.
2. Quite appropriately, the question of law that this Court has formulated for disposal correctly reflects the issue before court;

Did their Lordships of the Civil Appellate High Court err in law by their failure to appreciate that, in a rei vindicatio action, having paper title of the Petitioner and the fact that the Respondent entered the subject property with the express authority of the Petitioner being admitted, the Respondent cannot acquire prescriptive title to the subject property unless she produces evidence of an event or an overt act that manifests the intention to occupy the subject property as the owner as against the Petitioner?

3. The Plaintiff – Respondent – Appellant (“*the Plaintiff*”), who is vested with paper title to the premises in suit, instituted this action against the daughter-in-law of her former husband (the Defendant – Appellant – Respondent, hereinafter referred to as “*the Defendant*”) seeking a declaration of title and ejectment. The learned District Judge of *Kaduwela* entered judgment in favour

of the Plaintiff and granted the reliefs prayed for. On appeal, the learned Judges of the Civil Appellate High Court reversed that determination. Aggrieved thereby, the Plaintiff has invoked the appellate jurisdiction of this Court.

4. At the outset, let me set out the material facts. The Plaintiff married the father of the Defendant's husband after he had divorced his first wife. The Defendant was married to a son born of that earlier marriage. The evidence discloses that the Plaintiff maintained cordial relations with her husband's family and, at one stage, even established a household in Dubai together with members of that family, including the Defendant. In the course of these arrangements, the Plaintiff permitted the Defendant to reside in the house belonging to the Plaintiff. It is this premises that has since become the subject matter of the present action.
5. It is worth noting that in the course of the trial an admission was recorded to the effect that the Defendant entered the premises as a licensee of the Plaintiff in 1995.
6. Section 58 of the Evidence Ordinance embodies the principle relating to formal admissions. In terms of that provision, a fact admitted by a party or by his or her agent, whether before or at the hearing, or in the course of any proceeding in force at the time such admission is made, need not be proved. This position is reinforced by Section 8 (1) of the Evidence (Special Provisions) Act, No.14 of 1995, which similarly dispenses with proof of facts admitted by the opposing party. These provisions must be read together.
7. This formal admission absolves the Plaintiff from proving her permission granted to the Defendant and the Plaintiff cannot resile from an admission of fact recorded as such. It is axiomatic that formal or judicial admissions are

fully binding on the party who makes them. They constitute a waiver of proof and can be made the foundation of the rights of parties to the suit.

8. The admission recorded in the present case is a formal admission within the contemplation of Section 58 of the Evidence Ordinance and is to be clearly distinguished from an admission falling within Section 17 of the same Ordinance. An admission under Section 58 constitutes an **admitted fact** and, as such, dispenses with the need for proof. By contrast, admissions under Section 17 are extra-curial in character, being statements made outside court and reiterated in the course of judicial proceedings. The effect of an informal admission is given in Section 31 which states;

Admissions are not conclusive proof of the matters admitted, but they operate as estoppels under Sections 115 to 117.

9. Section 31 of the Evidence Ordinance recognizes the inconclusive character of extra-curial admissions. A party against whom such an admission is sought to be proved is entitled to lead evidence to show that the statement was erroneous, mistaken, or untrue. That provision, however, has no application to a formal admission made in court. A formal admission, once recorded, establishes the truth of its contents for the purposes of the proceedings and cannot thereafter be resiled from.
10. There is, nonetheless, a limited commonality between formal and informal admissions, in that both originate as voluntary acknowledgments made by a party; Formal admissions are made in the circumstances specified in Section 58 such as in court but an informal admission is always made outside court long before proceedings in court begin.
11. Sections 115 to 117 which deal with estoppel apply alike to both formal and informal admissions. The fact that the Defendant admitted at the trial that

her occupation of the Plaintiff's premises began in a subordinate character is also reinforced by provisions on estoppel and the relevant provision applicable to the situation we encounter in the case is Section 116 – see **A.C.M.Mukthar v. A.R.Haniffa**¹. In an illuminating judgment **Ruberu and Another v. Wijesooriya**² U. De Z. Gunawardana, J set out the law;

(1) Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (Defendant – Respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff – Appellant without whose permission he would not have got it.

(2) The effect of Section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation, he must first quit the land. The fact that the licensee or the lessee obtained possession from the Plaintiff – Respondent is perforce an admission of the fact that the title resides in the Plaintiff.

12.I would add that even in the absence of a formal admission, the facts as disclosed would attract the operation of Section 116 of the Evidence Ordinance. The evidence establishes that the Plaintiff permitted her husband, in or about 1995, to occupy the premises and that it was through him that the Defendant was brought into possession. A person who enters possession through one deriving title or authority from the owner is estopped, under Section 116, from denying the title of that owner so long as such possession continues. In the present case, the Defendant's own admission that she entered the premises with the permission of the Plaintiff serves only to reinforce the permissive and

¹ CA 572/1999 Decided on 25.07.2018

² (1998) 1 Sri.L.R 58

subordinate character of her possession. Thus, the operation of Section 116 is quite independent and distinct from Section 58 but yet complementary.

13. Having thus indulged in this nexus between Sections 58 and 116, let me advert to the Roman-Dutch law principles on the nature of *precarious* possession before I move on to the resolution of the cardinal issue in the case – *whether the prescriptive plea of the Defendant should prevail over the title of the Plaintiff?*

Roman-Dutch principles on *precarious* possession

14. Roman-Dutch Law lays down that a *precarious* tenure is one in which a party petitioning for it is permitted to enjoy the use and occupation of property so long as he who grants him permission suffers him to do so. The essential feature of *precario*, therefore, is that it has its origin in permission from the owner and ceases to operate when that permission is withdrawn, which may be done when the owner pleases. The common factor in all cases of *precarious* possession is that it is enjoyed “on sufferance” or “during pleasure until revoked” implying that the right to possession is only a temporary one. Hence, a right enjoyed during the pleasure of the grantor cannot be prescribed; “*si autem (seisina) precaria fuerit et de gratia quae tempestive revocari posit et intempestive ex longa tempore non acquiritur jus*”.³ A faithful translation of the Latin maxim goes as follows;

“If possession is precarious, that is, held by grace or permission which may be revoked at a fitting time, then no right is acquired even through the lapse of a long period of time.”

³ See Voet, *Commentarius ad Pandectas*, Lib. 43, Tit. 26.

15. A series of South African cases have reiterated this definition and the locus *classicus* is undoubtedly the judgment of Watermeyer C.J. in ***Malan v. Nabygelegen Estate***⁴ - a seminal South African case establishing that 30 years of uninterrupted occupation (*nec vi, nec clam, nec precario*) does not automatically grant ownership if the possession was not adverse to the owner (e.g., if it was based on a contract like lease or consent).
16. Sri Lankan cases have adopted this principle into our law. 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 by which he manifests his intention of occupying it in another capacity. No secret act will avail to change the nature of his occupation – see ***Madunawela v. Ekneligoda***.⁵
17. In ***Orloff v. Grebe***,⁶ where a person enters into occupation of property belonging to another with the latter's consent and permission, he cannot acquire title by prescription to such property, **unless he gets rid of the character in which he commenced to occupy by doing some overt act showing an intention to possess adversely to the owner** – see the judgment of the Privy Council in ***Naguda Marikar vs. Mohammodu***,⁷ that was followed.
18. In ***Siyaneris v. De Silva***,⁸ in an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant. If a person goes into possession of a land as agent of another, the Privy Council held that

⁴ 1946 AD 562

⁵ (1898) 3 N.L.R. 213

⁶ (1907) 10 N.L.R. 183

⁷ (1903) 7 N.L.R. 91

⁸ (1951) 52 N.L.R. 289

prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.

19. Learned counsel for the Defendant, Mr. Chatura Galhena, submitted with some ingenuity that the divorce between the Plaintiff and her husband in 1998 marked the point at which the license came to an end and that possession thereafter became adverse. I am unable to accept this contention. The evidence discloses that, notwithstanding the dissolution of the marriage, the Plaintiff permitted her former husband to continue to reside in the premises and, through him, allowed the Defendant to remain in occupation. It is neither uncommon nor legally incongruous for a former spouse to permit such continued occupation even after the severance of marital ties. Such conduct cannot, without more, be construed as an overt ouster of the Plaintiff or as a repudiation of her title. The divorce may have terminated the marital relationship, but it did not, in and of itself, terminate the juridical relationship of licensor and licensee.

20. Mr. Chatura Galhena drew attention to the evidence of the Plaintiff that she had not known that her ex-husband was living in the house. In the absence of evidence to show an identifiable point at which the *precarious* possession turned hostile, a secretive occupation that seeks comfort in the residence of an overseas houseowner cannot be put forward as ouster nor will it signify itself as an act of hostile possession.

21. This Court posed a question in the course of the hearing whether the Defendant could avail herself of prescription in the face of Section 13 of Prescription Ordinance which places an embargo on prescription against owners of land living overseas. A Sri Lankan living overseas does not run the risk of losing his home owing to prescription as a result of the existence of Section 13 of the Prescription Ordinance whose tenor repays attention.

22. With regard to a claim of adverse possession, Section 13 of the Prescription Ordinance refers to certain disabilities by which the adverse possession becomes unattainable. The disabilities that are mentioned in Section 13 disentitle the possessor to own the property so long as the disabilities continue to be in existence.

Section 13 enacts;

“Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say –

(a) infancy,

(b) idiocy,

(c) unsoundness of mind,

(d) lunacy, or

*(e) **absence beyond the seas,***

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by Section 3 of the Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person”.

23. Between 1998 and 2009, when this action was instituted, the mere effluxion of ten years does not, without more, disclose the point at which prescription

commenced. I rule out 1998 - the *annus horribilis* as the starting point, because notwithstanding the marital discord of that year, the Defendant was permitted to continue in occupation of the premises. Equally, the year of divorce was, in a juridical sense, her *annus mirabilis*. She had no abode to lay her harried head but the residence of the Plaintiff provided her a safe haven. In such times she could not have become a trespasser who could hitch her stars to prescription. In the circumstances the doctrine of the continuity of *precarium*, as articulated by Voet, applies to the Defendant with full force.⁹

24. In the end the questions of law that was formulated on behalf of the Plaintiff – Appellant are answered the affirmative. Cumulatively the following question of law which substantially represents all other question of law is reproduced for easy reference;

“Rei vindicatio action, having the paper title of the Petitioner (Appellant) and the fact that the Respondent (Defendant) entered the subject matter with the express authority of the Petitioner being admitted, the Respondent (Defendant) cannot acquire prescriptive right to the subject property unless he produces of an event or an overt act that manifest her intention to occupy the property as the owner as against the Petitioner (Appellant).”

25. The appeal of the Plaintiff is accordingly allowed. The judgment of the Civil Appellate High Court is set aside, and the judgment of the District Court is affirmed. All reliefs prayed for by the Plaintiff are granted.

⁹ See fn 3; Voet’s doctrine of the continuity of *precarium*, which, being possession ex gratia and revocable at will, is incapable of maturing into prescriptive title (Voet, *Commentarius ad Pandectas*, Lib. 43, Tit. 26).

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court