

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

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

SC Appeal No. 29/2021
SC/HCCA/LA/503/2019
WP/HCCA/Col/216/2015 (F)
District Court Col Case No.21547/L

1. Hussain Saad Hashim
"Alhambra"
No. 96, R.A. De Mel Mawatha,
Colombo 03.
2. Mohamed Macky Hashim
No. 47, Reservoir Road,
Colombo 10.
3. Mohamed Faizer Hashim
No. 410/6, Galle Road,
Colombo 03.

Plaintiffs

Vs.

1. Fathima Nilam
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,
Colombo 12.
2. Inaya Thulba
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,
Colombo 12.

3. Mohamed Thulba Mohamed
Iqbal
No. 23, Messenger Street,
Colombo 12.

Defendants

AND BETWEEN

Mohamed Thulba Mohamed
Iqbal
No. 23, Messenger Street,
Colombo 12.

3rd Defendant-Appellant

Vs.

1. Hussain Saad Hashim
"Alhambra"
No. 96, R.A. De Mel Mawatha,
Colombo 03.
2. Mohamed Macky Hashim
No. 47, Reservoir Road,
Colombo 10.
3. Mohamed Faizer Hashim
No. 410/6, Galle Road,
Colombo 03.

Plaintiffs-Respondent

1. Fathima Nilam
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,
Colombo 12.
2. Inaya Thulba
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,

Colombo 12.

1st and 2nd Defendants
-Respondents

AND NOW BETWEEN

1. Hussain Saad Hashim
"Alhambra"
No. 96, R.A. De Mel Mawatha,
Colombo 03.
2. Mohamed Macky Hashim
No. 47, Reservoir Road,
Colombo 10.
3. Mohamed Faizer Hashim
No. 410/6, Galle Road,
Colombo 03.

Plaintiffs-Respondents
-Appellants

Vs.

1. Fathima Nilam
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,
Colombo 12.
2. Inaya Thulba
No. 23 (Part) also known as No.
23A, M.J.M Laffir Mawatha,
Colombo 12.

1st and 2nd Defendants
-Respondents-Respondents

Mohamed Thulba Mohamed Iqbal
No. 23, Messenger Street,
Colombo 12.

3rd Defendant-Appellant
-Respondent

Before : A. L. Shiran Gooneratne, J.
Dr. Sobhitha Rajakaruna, J.
Menaka Wijesundera, J.

Counsel : Saumya Amarasekere, PC with Dhammika Welagedara
instructed by Paul Ratnayeke Associates for the Plaintiff-
Respondent-Appellants.

Chandrasiri De Silva with Nadeera Weerasinghe
instructed by J.K.D. Dilani Jayaneththi for the 3rd
Defendant-Appellant-Respondent.

Written
Submissions : Written submissions on behalf of the 3rd Defendant-
Appellant-Respondent filed on the 6th of January, 2026

Written submissions on behalf of the Plaintiffs
-Respondents-Appellants filed on 26th January, 2026.

Argued on : 18.11.2025

Decided on : 20.03.2026

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 11.11.2019 of the Civil Appellate High Court of Colombo.

The plaintiff-respondents-appellants (herein after referred to as the “plaintiffs”) instituted an action in the District Court of Colombo for a declaration of title and ejectment of the 1st and the 2nd defendants-respondents-respondents (hereinafter referred to as the “defendants”) and for recovery of damages for wrongful occupation.

The plaintiff has sought the declaration for the entirety of the property situated at 23, M. J. M. Laffir Mawatha, Colombo 12 but the ejectment of the defendants from only part of the premises as the rest of the premises which the defendants had been in occupation.

The plaintiffs claim that the defendants have been in occupation of the said premises since their purchase and that, even thereafter, the plaintiffs permitted the defendants to remain in occupation rent-free as licensees of the plaintiffs.

But at one point the plaintiffs had given a written notice for the defendants to vacate the premises but they have not done so.

As such, when action was originally filed in 2007 the 3rd defendant had intervened saying that the 1st and the 2nd defendants were occupying the premises under his leave and license.

At the trial, the defendants while denying the plaintiffs title challenged deed no. 2728 dated 5th January, 1979 and attested by Attorney at law and Notary Public, Upali Jayasooriya (hereinafter referred to as the “the Notary”).

Thus, the defendants raised two issues at the trial as to the validity of the deed that is,

- 1) Whether the notary of deed no. 2728 has been properly notarially executed as per the provisions of the Notaries Ordinance,
- 2) Hence, whether the plaintiffs derived title on the said deed.

The learned trial judge had held with the plaintiffs and being aggrieved by the said judgment the defendants had challenged the said judgment of the trial due in the Civil Appellate High Court and the learned High Court Judge had held with the defendants on the basis that the Notary had not signed in any of the copies to the alleged deed and thereof there was no properly executed deed under the Notaries Ordinance.

Hence, the plaintiffs being aggrieved by the said judgment had filed the instant appeal.

At the time this matter was supported for leave to proceed on 04.03.2021, this Court has granted leave on the following questions of law,

1. Do the copies of Deed No. 2782 produced in court marked P3, P3(q), P11 & 3V1 satisfy the requirements of Section 2 of the Prevention of Fraud Ordinance,
2. Does noncompliance with Section 31 of the Notary's Ordinance invalidate a deed?
3. Can the High Court arrive at a finding of fact when the said fact was not challenged by the Defendant at the trial or in appeal?

The plaintiff had given evidence and according to the said evidence, it has been admitted that the original copy of the deed from which the plaintiff is claiming title by deed no. 2728 has been lost and the plaintiff has produced P3 and P11, which are both photocopies.

P3 has been a photocopy of the protocol copy of the notary, submitted to the Land Registry. P11, also produced by the plaintiff, was obtained from a certified copy of the document from the land registry but the official seal affixed to P3 and P11 are different and the plaintiff has acknowledged the difference.

P11 contains the notary's signature but the certified copy, obtained by the defendants, marked and produced in cross-examination as 3V1, doesn't contain the notary's signature.

According to the plaintiff, P11 is the photocopy he got from the notary when he inquired for a copy of the deed no. 2728.

According to evidence, P11 and 3V1 are photocopies of deed no. 2728 which does not have the signature of the notary at the place where he has to duly sign, after the witnesses have signed and P3, which is a photocopy of the protocol, which also does not have the notaries signature below the witness's signature.

The Notary stated in evidence that, when the plaintiff requested the original copy of the deed, he attended the Land Registry and was informed that only the second copy was available. Upon obtaining that copy, it was observed that his signature was not present. This was marked as "3V1".

Then he had taken a copy of the second copy available in the Land registry and had placed his signature and seal and had resubmitted which had been accepted

and that had been in 1990.02.10 and the request made by him had been marked as P12.

A copy of the corrected copy is P11.

P3 and P3a are his protocol book and the corresponding protocol copy, respectively, in which the seal was affixed in 2010. However, the seal appearing in P11 is different.

Accordingly, he was extensively cross-examined on his failure to sign and attest the deed after the parties had executed it, as required to render it a duly attested deed.

The first copy is misplaced. The second copy, his protocol copy, and the protocol book do not bear his signature, despite the fact that the relevant parties had signed to certify that the document had been duly attested.

He had admitted that fact during cross-examination at pages 290 onwards.

Therefore, upon an analysis of the foregoing evidence, this Court gathers that the Notary in Deed No. 2728 is unable to produce the first copy and that the second copy was not duly signed or sealed by him. The same omission is observed in the protocol book and his protocol copy.

Then the question arises whether the deed no. 2728 is a duly attested deed under the Notaries Ordinance and the Prevention of Frauds Ordinance because all three copies had not been signed at the same time and the seal also has not been affixed at the same time.

He had taken steps to correct it according to P12 but the seal he affixed is different to the seal in 3V1.

Therefore, upon perusal of the entirety of the Notary's evidence, this Court finds his professional conduct to be atrocious. The question that inevitably arises is whether a deed attested under such circumstances can be regarded as duly attested.

In the case **SC Appeal 56/2020** decided on the 20th of May 2022, his Lordship Justice Mahinda Samayawardhena had to consider whether the impugned deed in the case has been properly executed in accordance with S.2 of the Prevention of Frauds (Amendment) Act, No. 4 of 2024. In the said Judgment he has held that,

“To prove the due execution of a deed, this section requires proof of four matters

- a) The deed was signed by the executant
- b) It was signed in the presence of a licensed notary public and one or two witnesses
- c) The notary public and the witnesses were present at the same time
- d) The execution of the deed was duly attested by the notary and the witnesses”

Justice Samayawardhena further goes onto differentiate between the execution and attestation of a deed and in my opinion, correctly points out the nexus between Section 2 of the PFO and the Notaries Ordinance when analysing whether a deed has been duly attested. He correctly surmised that non-compliance of a provision in the Notaries Ordinance by and in itself does not render a deed invalid. In order to determine whether a deed has been duly attested, according to Section 2 of the PFO, it has to be read in conjunction with Section 31(12) of the Notaries Ordinance. An extract from his Lordship, Justice Samayawardhena’s judgement has been reproduced below which clearly outlines as to what amounts to a duly attested deed, by referencing Section 2 of the PFO and Section 31(12) of the Notaries Ordinance.

“Let me now turn to the word “attest” as contemplated in section 2 of the Prevention of Frauds Ordinance. Following the ordinary dictionary meaning of “attest” which is “to bear witness to”, a person who sees the document signed by the executant is a witness to it; if he subscribes as a witness, he becomes an attesting witness. Black’s Law Dictionary (11th edition) defines “attesting witness” as “someone who vouches for the authenticity of another’s signature by signing an instrument that the other has signed.”

A word of caution: although section 2 of the Prevention of Frauds Ordinance does not require the witnesses and the notary to attest the deed before the executant, this section requires the execution of the deed to be “duly attested” by the notary and the two witnesses. The word “duly” here is not without significance. How is a deed considered to be duly attested? In this context, section 2 of the Prevention of Frauds Ordinance needs to be read with section 31(12) of the Notaries Ordinance which runs as follows:

[The notary] shall not authenticate or attest any deed or instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in 10 the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses.

Although compliance with the Rules contained in section 31 is not mandatory as explained above, it was held in Emalia Fernando v. Caroline Fernando (1958) 59 NLR 341 that an instrument which is required by section 2 of the Prevention of Frauds Ordinance to be notorially attested must be signed by the notary and the witnesses at the same time as the maker and in his presence. This conclusion was reached giving due regard to the expression “duly attested” found in section 2 of the Prevention of Frauds Ordinance. I am in complete agreement with this interpretation, for otherwise the Prevention of Frauds Ordinance which was enacted to prevent fraud can be misused to cover fraud on the basis that section 2 of the Prevention of Frauds Ordinance does not require the notary and witnesses to sign the deed before the executant in the presence of one another. At page 344 Basnayake C.J. held:

“Learned counsel for the appellant contended that the requirement of the Notaries Ordinance in regard to the attestation of documents is not relevant to a consideration of the true meaning of the section. I am unable to agree that the provisions of the Notaries Ordinance are irrelevant to a consideration of the meaning of section 2 of the Prevention of Frauds Ordinance. I think in giving effect to the word “duly” we should take into account provisions of law which regulate the execution of documents required to be notorially attested. Section 31(12) of the Notaries Ordinance provides that a notary “shall not authenticate or attest any deed or 11 instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses.” Section 31(20) requires the notary to state in his attestation that the deed was signed by the party making it and the witnesses in his presence and in the presence of one another. The view I have expressed above is in accord with the decision of this Court in the case of Punchi Baba v. Ekanayake (4 S.C. C. 119), in which this Court expressed the view that section 2 of the Prevention of Frauds Ordinance required that the notary and the witnesses should sign in the presence of the maker and at the same time and that a deed not so signed was not valid.””

In their submissions, the defendants have drawn the attention of this Court to Section 31(12) of the Notaries Ordinance, contending that the Notary, in his cross-examination, admitted that he never affixed his signature on the duplicate

or in the protocol in the presence of the witnesses. The Court, however, was not afforded an opportunity to ascertain whether the signature was placed on the original copy, as it was never produced.

Therefore, the respondents have contended that the Notary has clearly violated the aforementioned provisions of the Notaries Ordinance. The notary's own evidence demonstrates that he did not affix his signature on the duplicate or the protocol copies of the alleged deed. In view of the proviso to Section 33 of the Notaries Ordinance, he cannot claim protection under that section, which reads as follows:

“No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form:

Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.”

At this point the respondents have urged that section 2 of the Prevention of Frauds Ordinance come in to play which mandates that any contract for the sale, purchase, transfer, mortgage or other disposition of land or immovable property must be in writing, signed by the party or their authorized agent and attested by a Notary public and at least two witnesses present simultaneously to have any legal force or effect.

At this juncture I would like to quote **Hilda Jayasinghe vs. Francis Samarawickrema (1982) 1 SLR 249** by Marsoof J, where his Lordship has quoted *Tambiah J* examining section 2 of the Prevention of Frauds Ordinance along with section 68 of Evidence Ordinance in view of decisions such as in **Kiri Banda vs Ukkuwa (1982) 1 SLR 216** and **Somananther vs Sinnethamby (1889) 1 Thambaih 38** and **Seneviratne vs Mendis 6 CWR 211** and concluded as a rule the notary before whom a deed is executed is an attesting witness and is competent to prove the due execution of the deed provided the grantor was personally known to him, which very clearly shows the burden cast on the Notary when executing a deed.

In view of the sections cited above and upon careful analysis of the law, it is quite evident to this Court that the Notary failed to comply with the provisions of the Notaries Ordinance and the Prevention of Frauds Ordinance. The documents produced before the trial court were all photocopies, and the Notary's own evidence demonstrates that he did not attest or duly certify even the duplicate

and protocol copies as required under the Notaries Ordinance. Moreover, no evidence has been placed by the plaintiff to show that the original document was duly attested by the Notary, as the original was never produced before the Court.

Therefore, I am of the opinion that the learned trial judge had no evidence upon which to conclude that Deed No. 2782 was duly attested or valid in law, and consequently, that it transferred title to the plaintiff.

The plaintiff instituted a *rei vindicatio* action against the defendant in the trial court. In such proceedings, the onus rests upon the plaintiff to prove that he held title to the property in dispute. In the present matter, however, it cannot be concluded, on a balance of probabilities, that the plaintiff had title to the property in question, particularly in view of Deed No. 2782.

In view of the facts and the law stated above, I see no merit in the submissions of the plaintiffs and as such, I answer the first and the second questions of law in the negative. The third question of law is answered in the affirmative, as the defendants raised the issue of the validity of the deed in their petition of appeal to the Provincial High Court and they have raised it in the District Court (Page 234 of the brief).

As such, the instant appeal is dismissed and the judgement of the Civil Appellate High Court is hereby affirmed.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT

Dr. Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE SUPREME COURT