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

In the matter of an application for Leave to 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 No. 77/2019
SC HC/CALA /10/2018
WP/HCCA/MT/08/15 (F)
D.C. Nugegoda Case No. 239/9//L

1. Nawalage Manel Mahendra Dias
   No. 76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

2. Nawalage Sampath Sanjeewa Dias
   76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

PLAINTIFFS

vs

1. Kankanamlage Premalatha
2. Viraj Kalhara Athale
3. Thalika Thamasi Athale
4. Surathi Udari Athale

All of No. 18/14, Walawwatte,
Gangodawila,
Nugegoda.

DEFENDANTS

AND BETWEEN

1. Kankanamlage Premalatha
2. Viraj Kalhara Athale
3. Thalika Thamasi Athale
4. Surathi Udari Athale

All of No. 18/14, Walawwatte,
Gangodawila,
Nugegoda.

DEFENDANTS– APPELLANTS

vs

1. Nawalage Manel Mahendra Dias
   No. 76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

2. Nawalage Sampath Sanjeewa Dias
   76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

PLAINTIFFS - RESPONDENTS

AND NOW BETWEEN

1. Nawalage Manel Mahendra Dias
   No. 76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

2. Nawalage Sampath Sanjeewa Dias
   76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

   In appearing through his Attorney
   Nawalage Manel Mahendra Dias of No.
   76/4, Wijayarama Road,
   Udahamulla, Nugegoda.

PLIANTIFFS-RESPONDENTS-PETITIONERS-APPELLANTS

vs

1. Kankanamlage Premalatha **(Deceased)**
1(a). Viraj Kalhara Athale
1(b). Surathi Udari Athale
1(c). Tudawa Dalugodage Yewin Nethuwara Athale (Minor)
1(d). Tudawa Dalugodage Ganga Prasad Ananda

2. Viraj Kalhara Athale

3. Thalika Thamasi Athale **(Deceased)**
3(a). Tudawa Dalugodage Ganga Prasad Ananda
3(b). Tudawa Dalugodage Yewin Nethuwara Athale (Minor)

4. Surathi Udari Athale

All of No. 18/14, Walawwatte,
Gangodawila,
Nugegoda.

DEFENDANTS-APPELLANTS-RESPONDENTS-RESPONDENTS

BEFORE : Mahinda Samayawardhena, J.
Sampath B. Abayakoon, J
M. Sampath K. B. Wijeratne J.

COUNSEL : Kamal Dissanayake with Sureni Amaratunga and Sajani Ranasinghe for the Plaintiffs-Respondents-Petitioners-Appellants.

W.Dayaratne, PC with Ranjika Jayawardene for the Defendants-Appellants-Respondents-Respondents.

ARGUED ON : 06.08.2025

DECIDED ON : 05.12.2025

M. Sampath K. B. Wijeratne J.

This appeal emanates from a judgment pronounced by the High Court of Civil Appeal of Mount Lavinia, wherein the learned Judges of the High Court set aside the judgment of the District Court which had granted the reliefs prayed for by the Plaintiffs-Respondents-Appellants (hereinafter referred to as the Plaintiffs-Appellants), and entered the judgment upholding prescriptive title in favour of the Defendants-Appellants-Respondents (hereinafter referred to as the Defendants-Respondents).

The facts, in brief, are as follows:

The land called ***"Kathreege Kanaththa"*** was the subject matter of a partition action bearing No. 1044/P in the District Court of Mount Lavinia. The preliminary plan prepared in that case, bearing No. 171 and made by E. Thanabalasingham, Licensed Surveyor, was marked and tendered in evidence by the Defendant-Respondent as 'V4'. The 1st Plaintiff-Appellant in the present action was the 2nd Defendant in the said partition case, while Dona Beeta Manchanayake, also known as Wickramarachchi Vitharanalage Podimanike Dias, the mother of the 1st Plaintiff-Appellant, was the 3rd Defendant therein. While the said action was pending, Beeta Manchanayake passed away on 15th November 1994. The case proceeded to judgment, and the land was thereafter partitioned according to the final partition plan bearing No. 959, marked 'V5', prepared by S. D. Ediriwickrema, Licensed Surveyor. The final decree was accordingly entered in that case, whereby the 1st Plaintiff-Appellant in the present action, who had been the 2nd Defendant in the partition case, was allotted Lot No. 4, subject to the life interest of Beeta Manchanayake. However, as at the date of the final decree, Beeta Manchanayake had already deceased.

The 1st Plaintiff-Appellant, who had been declared entitled to Lot No. 4 depicted in Plan No. 959, subsequently subdivided the said lot into three

portions, namely Lots A, B, and C, as shown in Plan No. 1526 prepared by the same surveyor, S. D. Ediriwickrema, which was marked 'P7' at the trial. Upon such subdivision, the 1st Plaintiff-Appellant gifted Lot C in Plan No. 1526 to the 2nd Plaintiff-Appellant by Deed No. 29, dated October 6, 2001, attested by L. G. Chandrika P. Silva, Notary Public.

The 2nd Plaintiff-Appellant, together with the 1st Plaintiff-Appellant, instituted action in the District Court of Nugegoda bearing No. L/239/09, seeking a declaration that the 2nd Plaintiff-Appellant is the lawful owner of Lot No. 04, which had been re-surveyed and depicted as Lot C in Plan No. 1526 made by S. D. Ediriwickrema, Licensed Surveyor, subject to the life interest of the 1st Plaintiff-Appellant. The Plaintiffs-Appellants further sought the ejectment of the Defendants-Respondents from the said land and damages.

The Plaintiffs-Appellants further contended that the 1st Plaintiff-Appellant and her late husband, Gamini Athale, entered into the house situated on the *corpus* bearing assessment No. 18/2, presently 18/14, together with their children, the 2nd, 3rd, and 4th Defendants-Respondents with the leave and license of Beeta Manchanayake. After the demise of Beeta Manchanayake, they continued to occupy the said premises with the leave and license of the Plaintiffs-Appellants. Following the death of Gamini Athale, the Defendants-Respondents continued to occupy the house as licensees. The Plaintiffs-Appellants also asserted that the said license was formally terminated by notices marked 'P2' to 'P6'.

The Defendants-Respondents, while denying that they were licensees, contended that Gamini Athale entered into possession of the *corpus* upon an agreement with Beeta Manchanayake to purchase an extent of 30 perches, including the house bearing assessment No. 18/2, for a consideration of Rupees 240,000/-. It was further stated that the said extent was surveyed by E. D. Ediriwickrema, Licensed Surveyor, as depicted in Plan No. 1902, marked 'V2'. The Defendants-Respondents averred that a sum of Rupees 75,000/- was initially paid in 1984 as an advance, and the balance was settled in installments, which were completed by 1990. Accordingly, the Defendants-Respondents

claimed prescriptive title to the *corpus* and, in the alternative, sought recovery of a sum of Rupees 674,000/- representing the cost of improvements effected and the amounts paid as consideration in anticipation of the sale.

The *corpus* was not in dispute at the trial. It had been surveyed by L. C. B. Rajapakse, Licensed Surveyor, on a commission issued by Court and is depicted in his Plan No. 1233, marked 'P5' at the trial. The Commissioner had superimposed Lot C, as depicted in Plan No. 1526, onto his plan 'P5', thereby identifying the subject matter in relation to the claim of the Plaintiffs-Appellants.

The Defendants-Respondents too had obtained a commission issued to B. H. A. de Silva, Licensed Surveyor, who executed the same and tendered Plan No. 2672, marked 'V6' at the trial. In that plan, the Surveyor had superimposed Lot 4 in the final partition Plan No. 959, together with Plan No. 1902 ('V2') and Plan No. 2212 ('P3'). Both Plan No. 1233 and Plan No. 2672 were marked in evidence without objection. Upon examination of both plans and their respective reports, it is evident that the Defendants-Respondents are in possession of Lot C depicted in Plan No. 1526, which is a subdivided allotment carved out of Lot 4 in the final partition Plan No. 959. It is further apparent that the extent of 30 perches depicted in Plan No. 1902 substantially corresponds with the extent of Lot C in Plan No. 1526 and the land depicted in Plan No. 1233.

Hence, the identity of the *corpus* was not in issue at the trial. Furthermore, the second admission recorded at the commencement of the trial reads as follows:

1. පැමිණිල්ලේ 2 වන ඡේදයේ සඳහන් අයුරින් නඩුවට අදාළ දේපළ දෝන බීටා මංචනායක ගේ ජීවිත බුක්තියට යටත්ව 1 වන පැමිණිලිකරුට අයත් වූ බව පිළිගනී.

This admission also encompasses the title of the 1st Plaintiff-Appellant to the *corpus*.

The entire case proceeded on the issue of whether the Defendants-Respondents and their predecessor, Gamini Athale, had acquired prescriptive title by adverse possession as a result of entering of the final decree in Case No. 1044/P. The Defendants-Respondents based their claim *ut dominus* on the strength of an alleged agreement to purchase the said land.

The learned District Judge, by his judgment, granted the reliefs prayed for in paragraphs (ඍ), (ඎ), and (ඏ) of the prayer to the plaint. However, the Defendants-Respondents were awarded a sum of Rs. 22,717.50, together with legal interest, for the improvements effected on the property.

In appeal to the High Court of Civil Appellate of Mount Lavinia, the learned Judges set aside the judgment of the District Court and upheld the Defendants-Respondents' claim of prescriptive title.

The Plaintiffs-Appellants, having been successful in their application for leave to appeal, proceeded to argument, at which stage Counsel for both parties agreed that this Court could consider and determine the following question of law, in place of the several questions upon which leave to appeal had been granted on April 03, 2019. The question of law reads as follows:

"Did the High Court of Civil Appeal err in fact and law by upholding the prescriptive claim of the Defendant-Appellant-Respondent?"

Onus of Proof on the part of the Appellants

The initial burden of proof in establishing the identity of the *corpus* and title rests upon the Plaintiffs-Appellants. It was held in ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor and Another***[1] that, in a vindicatory action, the identity of the *corpus* must be established by the plaintiff. At page 378, Saleem Marsoof, J., observed as follows: "*the identity of the subject matter is of*

[1] [2010] 2 Sri.L.R. 333.

paramount importance in rei vindicatio action because the object of such an action is to determine the ownership of the property, which objective cannot be achieved without the property being clearly identified".

In the present case, the identity of the subject matter of the action, being Lot C depicted in Plan No. 1526, was admitted. In addition to this admission, as stated above, the plans made for the case 'P3' by the Plaintiffs-Appellants and 'V6' by the Defendants-Respondents, clearly demonstrate that the disputed land is Lot C in Plan No. 1526.

The title to the *corpus*, insofar as it relates to the 1st Plaintiff-Appellant, was also expressly admitted. Section 58 of the Evidence Ordinance provides as follows:

"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Section 184(1) of the Civil Procedure Code provides that a judgment shall be based on the facts admitted and the evidence adduced. It reads as follows:

> *184(1). "The Court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel or registered attorneys (or recognized agents),shall after consultation with the assessors (if any), pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial."*

The Plaintiffs-Appellants marked and tendered Deed No. 29 dated October 6, 2001, whereby the 1st Plaintiff-Appellant gifted the *corpus* in suit to the 2nd Plaintiff-Appellant, subject to her life interest. Hence, title to the *corpus* was sufficiently proved. Accordingly, the second essential element required to be established in a vindicatory action has been satisfactorily proved. **(*De Silva et al. vs Goonetileke* et al.,** (1931) 32 NLR 217**; *Pathirana vs Jayasundara*,** 58 NLR 169**; *Wanigaratne vs Juwanis Appuhamy*,** 65 NLR 167**; *Prasanth and Another v. Devarajan and Another*,** (2021) 2 Sri L.R. 419).

It is common ground that the Defendants-Respondents are in possession of the subject matter of the action.

Accordingly, the principal ingredients that the Plaintiffs-Appellants were required to establish have been sufficiently proved to justify the entering of judgment in their favour**.**

Granting of License

The Plaintiffs-Appellants contended that the Defendants-Respondents were in possession of the land as licensees. In ***Ahriff vs Razik***[2], the Court of Appeal took the view that, in an action instituted against a defendant on the basis that the latter is a licensee, the grant of the license must be proved. In that case, the action was based entirely on the footing that the defendant was a licensee. G. P. S. De Silva, J., affirmed the judgment of the District Court, which dismissed the action on the ground that the plaintiffs had failed to establish both the grant of the license and its termination. However, it must be noted that the said case was not a vindicatory action, as is the case at hand.

In the present case, although it was alleged that the Defendants-Respondents were in possession of the subject matter of the action as licensees, the 1st Plaintiff-Appellant, in her evidence, stated that Gamini Athale entered into occupa-

[2] [1985] 1 Sri.L.R. 162.

tion as a tenant. A statement to that effect had also been made by the 1st Plaintiff-Appellant to the police, which was marked 'V1'. Accordingly, it appears that the contention of the Plaintiffs-Appellants that the Defendants-Respondents were licensees cannot be reasonably accepted.

Does this contradictory position effect the Plaintiffs-Appellants claim in a vindicatory action?

In ***Pathirana vs Jayasundara***[3], the plaintiff instituted action against the defendant on the basis that the defendant was an over-holding lessee, but later amended the plaint seeking a declaration of title and ejectment, on the ground that his rights of ownership had been violated. Gratiaen, J**.**, held as follows:

> *"In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.*
>
> (…)
>
> *It is therefore quite apparent that the action as originally constituted was not a rei vindicatio action proper in which any issues as to rights of ownership could properly arise for adjudication. Nothing that the defendant has since alleged by way of defence can by itself alter the scope of the real issues relevant to the granting of the relief prayed for in the plaint."*

On the same reasoning, minor inconsistencies in the statement of the original plaintiff do not vitiate the foundation of a *rei vindicatio* action, although they may bear upon the credibility of the witness.

---

[3] 58 NLR 169 at 172 and 174.

In the case of ***M.M.M. Ashar vs T.H. Kareem***[4] (S.C.), it was held that:

> "*Even if this is a rei vindicatio action proper, there is no necessity to prove the title of the plaintiff exactly in the same manner which the plaintiff has pleaded in the plaint. For instance, if the plaintiff in the plaint pleads title relying on one deed but at the trial marks several other deeds and documents (duly listed) to fortify his case, the* ***Court should not disregard such deeds/documents and mechanically dismiss the plaintiff's action on the basis that the plaintiff in a rei vindicatio action must prove title strictly in the same manner which he has pleaded in the plaint***." [*empasis added*]

Once the plaintiff proves that he is the owner of the property, the onus shifts to the defendant to establish a right to continue possession against the owner.
In ***Theivandran vs Ramanathan Chettiar***[5] (S.C.), Sharvananda C.J. observed:

> "*In a vindicatory action the claimant needs merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent.* ***Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession****." [emphasis added]*

In the present instance, this Court has already determined that the Defendants-Respondents' claim is without merit. Therefore, upon proof of title, the Plaintiffs-Appellants are entitled to the relief claimed**.**

---

[4] SC/APPEAL No.171/2019 SC Minutes of 22.05.2023.
[5] [1986] 2 Sri LR 219 at 222.

In ***Beebi Johara vs Warusavithana***[6] (S.C.), G. P. S. de Silva C.J. held that the onus of proof shifts to the defence to establish any right on their part to possess where the title of the plaintiff is either admitted or established**.** I shall set out his words as referred to in the judgment.

> *"In the present case, the burden was clearly on the defendant to establish that his possession of the premises was lawful. For this purpose, the defendant relied largely on 'V1'. The Court of Appeal correctly held that 'V1' was inadequate to establish the case for the defendant. The necessary consequence, is that the defence set up at the trial has failed. The plaintiff having discharged the burden that lay upon her, was entitled to judgment."*

In ***Wimaladasa Mathagaweera vs M. K. Pantis***[7], it was held that, in a vindicatory action, the plaintiff bears only the onus of proving title and that the defendant is in possession. The same principle was laid down in ***Leisa and Another vs Simon and Another*** **(2002) 1 Sri L.R. 148;** ***Wijetunge vs Thangarajah*** **(1999) 1 Sri L.R. 53; and** ***Banda vs Soysa*** **(1998) 1 Sri L.R. 255.** Mahinda Samayawardhena, J., in ***Siriniwasan Prasanth vs Dewarajan*** (supra), made the following observation:

> *"In a vindicatory action, the initial burden is on the Plaintiff to prove title to the property. If he fails to prove title, the Plaintiff's action shall fail no matter how weak the case of the Defendant, However, once the paper title to the property is accepted by the Defendant or proved by the Plaintiff, the burden shifts to the Defendant to prove on what right he is in possession of the property.*
>
> *Let me add this for clarity. The right to possession and the right to recover possession are essential attributes of ownership of immovable property."*

---

[6] [1998] 3 Sri. L.R. 227.
[7] C.A Appeal No.876/98(f)

In the instant case, the learned District Judge, having evaluated the evidence, inferred that the Defendants-Respondents, having entered into an agreement to purchase the land, are not entitled to claim adverse possession. In other words, the inference drawn appears to be that the Defendants-Respondents, as prospective purchasers, are in fact in possession as licensees.

Claim of Prescriptive Title

As noted above, the Defendants-Respondents claim prescriptive title on the basis that their possession was not permissive but as owners having entered into an agreement to purchase.

Upon examination of the evidence, it appears that the Defendants-Respondents have failed to establish a clear agreement to purchase or payment of consideration.

The Defendants-Respondents contended that Beeta Manchanayake, having agreed to sell an extent of 30 perches, together with the house bearing assessment No. 18/2, had caused the preparation of the plan marked 'V2'. The said Plan 'V2', bearing No. 1902, was prepared on 6th February 1984, approximately the period during which the 1st Defendant-Respondent, in her evidence, alleged that the sales agreement was entered into. The plan 'V2' was, however, marked subject to proof. The Defendants-Respondents failed to summon the surveyor to prove the contents of the plan.

It appears that Plan 'V2' was prepared by the same surveyor who prepared the final partition Plan No. 959 and the subsequent subdivision Plan No. 1526. It is settled law that the Court is not bound to reject a document solely because the opposing party has put it to proof at the time of production in evidence. In ***Niyakulage Dilruk Sanjeewa Fernando v. Diyagama Vidanelage Somawathie Perera*** (S.C. Appeal No. 1/2025; Minutes dated 10.02.2025), it was observed that:

"(...) documents marked "subject to proof" but not technically proved should not be automatically rejected. For instance, when a document is marked by the author himself, and the opposite party moves to have it marked subject to proof, the document need not be rejected on the basis that it was not proved by calling witnesses. The determination of whether a document has been proved, its admissibility in evidence, and the extent of its admissibility should be made at the conclusion of the trial, based on the unique facts and circumstances of each case."

Accordingly, the final decision as to the admissibility of evidence rests with the trial judge in delivering judgment. The learned District Judge appears to have rejected Plan 'V2' on the basis that its authenticity was not proved. The plan was produced through the 1st Defendant-Respondent, who testified that the plan was made pursuant to an agreement for sale. Therefore, it appears that the 1st Defendant-Respondent's evidence, to the effect that they entered into possession based on an agreement to purchase, could be accepted.

It was contended on behalf of the Plaintiffs-Appellants that such an agreement, without being reduced into a formal document in compliance with Section 2 of the Prevention of Frauds Ordinance, could not be admitted in evidence. The learned President's Counsel for the Defendants-Respondents relied on the judgment in ***Dissanayakage Malini vs Mohamed Sabur***[8], in which the plaintiff had transferred the land in suit to the 1st Defendant for a sum of Rupees 6,000/-. The 1st Defendant-Respondent, in return, had by an informal writing agreed to re-transfer the same upon payment of consideration within a period of four years. G. P. S. De Silva C.J. held that, although the informal agreement offended Section 2 of the Prevention of Frauds Ordinance, it could not be allowed to be used to perpetrate a fraud. Accordingly, the plaintiff in that case was granted judgment directing re-conveyance**.**

[8] [1999] 2 Sri.L.R. 4.

It appears to me that the principle laid down in ***Dissanayakage Malini*** has no application to the present case. It is not clear from the judgment whether the action of the plaintiffs in that case was for conveyance based on a trust. However, in the present action, the Defendants-Respondents have relied on the alleged agreement for sale to support their claim for prescriptive title and to justify *ut dominus*, and not for the purpose of a conveyance.

The 1st Defendant-Respondent, in her evidence, alleged that a sum of Rs. 75,000/- was paid as an advance, and the balance of Rs. 165,000/- was paid in installments, completed by 1990. She further stated that a written informal agreement had been entered into but was misplaced. In support of her contention, she called a niece of Beeta Manchanayake, who testified that she had written a receipt at the request of Beeta Manchanayake for the payment of the initial advance. However, the witness was not aware whether any sum was actually paid pursuant to the receipt. Accordingly, the evidence of this witness neither establishes the existence of a written informal contract nor supports the Defendants-Respondents' claim of having paid any sum of money.

I find it difficult to accept the 1st Defendant-Respondent's assertion that Rs. 240,000/- was paid in installments. It is hardly credible that a person would agree to purchase a property from someone who held only a life interest. Other than the payment of Rs. 75,000/-, the 1st Defendant-Respondent could not specify when or where the balance installments were paid, or the amounts so paid. In my view, this raises serious doubt as to whether any further sum was paid at all. This fact indicates that the Defendants-Respondents remained merely prospective buyers.

Further, if the full sum had been paid by 1990, it is unclear why the Defendants-Respondents did not take any action to obtain a formal conveyance in accordance with judicial precedents clarifying Section 66 of the Partition Law, particularly as Beeta Manchanayake was alive at that time. Moreover, the fact that the Defendants-Respondents failed to respond to the notices to quit marked

'P2' to 'P6' undermines their claim of having paid any sum of money to purchase the land. (***The Colombo Electric Tramways and Lighting Co., Ltd v. Pereira***, 25 NLR 193; ***Saravanamuttu vs De Mel***, R.A., 49 NLR 529; ***Seneviratne and Another vs Lanka Orix Leasing Company Ltd***, (2006) 1 Sri L.R. 230).

In ***Lintotage Patrick Reginald Fernando vs Uswatte Liyanage Pabilis Thisera*** (S.C. Appeal No. 156/97; Minutes dated 15.07.2004), it was held that a defendant's default in responding to a letter terminating a license supports the plaintiff's claim**.**

Hence, I am of the view that the Defendants-Respondents' failure to respond to the letters marked 'P2' to 'P6' defeats their claim of having paid any sum of money under an alleged agreement to sell and, consequently, their claim for prescriptive title.

Accordingly, the Defendants-Respondents' occupation remains permissive, as they were merely prospective buyers.

In ***Lebbe Marikar vs Sainu et al***[9]., it was held that the possession of a prospective buyer does not amount to adverse possession, and that such possession is permissive only.

In ***Prasanth and Others vs Dewarajan and Another*** (supra), Samayawardhena J. further discussed permissive possession and the circumstances in which it may ripen into adverse possession, as follows:

> *"Permissive possession, however long it may be, is not prescriptive possession. For permissive possession to become adverse possession in order to claim prescriptive possession, there shall be cogent evidence. The Defendants who entered into possession of the property in a subordinate character as licensees are not entitled to*

[9] 10 NLR 339.

commence adverse possession against the owner by forming a secret intention in mind unaccompanied by an overt act of ouster. The Defendants must establish a clear starting point known to the owner in order for the former to claim prescriptive possession against the latter. The prescriptive period of ten years begins to run only from that point and not from the date the Defendants came into possession. ***(Sirajudeen v. Abbas*** *[1994] 2 Sri LR 365,* ***Reginald Fernando v. Pabilinahamy*** *[2005] 1 Sri LR 31 at 37,* ***Chelliah Vs. Wijenathan*** *(1951) 54 NLR 337 at 342,* ***Mitrapala v. Tikonis Singho*** *[2005] 1 Sri LR 206 at 211-212,* ***Seeman v. David*** *[2000] 3 Sri LR 23 at 26,* ***Madunawala v. Ekneligoda*** *(1898) 3 NLR 213,* ***Navaratne v. Jayatunga*** *(1943) 44 NLR 517,* ***De Soysa v. Fonseka*** *(1957) 58 NLR 501)"*

The Defendants-Respondents, being licensees, bear the onus of establishing an overt act to succeed in a claim for prescriptive title. It is settled law that a person who enters into possession in a defeasible character is presumed to be in possession in that character until and unless an overt act is proved (***Navaratne vs Jayatunge***, 44 NLR 517). Accordingly, in ***Sopinona vs Pitipanaarachchi and Two Others***[10], it was held that if the possession of a defendant was originally not adverse**,** the onus is on the defendant to prove the point at which it became adverse (***Siyaneris vs Jayasinghe Udenis De Silva***, 52 NLR 289; ***Odris et al. vs Mendis et al.***, 13 NLR 309; ***Prasanth and Others vs Dewarajan and Another*** (supra)).

In the present case, no overt act was established by the Defendants-Respondents. Therefore, I am of the view that the Defendants-Respondents' claim for prescriptive title must fail**.**

[10] [2010] 1 Sri. LR 87.

Section 52 and Section 52 A of Partition Law

The learned President's Counsel for the Defendants-Respondents contended that the Plaintiffs-Appellants are not entitled to institute a vindicatory action where an alternative remedy was available under Sections 52 and 52A of the Partition Law. These sections read as follows:

> 52 (1) *Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land:*
>
> *provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.*
>
> *(2)(a) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant ,such application shall be made by petition to which such person in occupation shall be made respondent ,setting out the material facts entitling the applicant to such order.*
>
> *(b) After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application;*

Otherwise, it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue.

Section 52 A (1) Any person –

(a) who has been declared entitled to any land by any final decree entered under this Law; of

(b) who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by Court ; or

(b) who has derived tittle from a person referred to in paragraph (a),or paragraph (b) and whose possession has been, or is interfered with or who has been dispossessed ,shall ,if such interference or dispossession occurs within ten years off the date of the final decree of partition or the entering of the certificate of sale, as the case may be ,be entitled to make application, in the same action ,by way of petition for restoration of possession ,within twelve months of the date of such interference or dispossession, as the case may be.

The mechanism contained in Sections 52 and 52A**,** quoted above, is not an accepted defence in a vindicatory action, nor does it bar such an action**.** In ***Prasanth vs Dewarajan*** *(supra),* Mahinda Samayawardhena J. held that an owner of property has the right to vindicate his title in a regular action**.** While a person who receives title to a divided allotment in a partition action may have a speedier remedy under Sections 52 and 52A of the Partition Law, he cannot be compelled to resort solely to that remedy**.**

However, in the present case, the notice of termination of license was sent after the lapse of ten years as provided for in Section 52A. The Defendants-Respondents were in possession within the ten-year period as licensees.

Therefore, I am unable to accept the argument of the learned President's Counsel for the Defendants-Respondents on this point.

Compensation for Improvements

The Defendants-Respondents, as an alternative to their claim for prescriptive title, counter-sued in their answer for a refund of Rs. 240,000/-, being the amount allegedly paid under the purported contract of sale. However, as I have observed and stated above, the alleged payment of this sum was not established.

The Defendants-Respondents, in their answer, have claimed, as an alternative to the claim of prescriptive title, compensation for improvements. The learned District Judge evaluated the evidence and granted a sum of Rs. 22,717.50, being the cost of improvements with accrued interest. It appears to me that the learned District Judge had correctly arrived at the conclusion regarding compensation for improvements, based on the evidence led. Therefore, the Defendants-Respondents are entitled to the said sum.

Further, in my view, the Defendants-Respondents' possession had the required qualification, and they are entitled to the right of retention. However, the right of retention does not entitle the Defendants-Respondents to legal interest on the cost of improvements. Therefore, the judgment of the District Judge granting the relief in paragraph (ඉෑ) as it is of the answer cannot stand. Accordingly, I vary and set aside the portion of the judgment granting accrued interest.

In light of the above analysis, I grant only the reliefs prayed for in paragraphs (ඉ) and (ඉඅ) of the prayer to the plaint, namely: declaration of title to the land in suit; and ejectment of the Defendants-Respondents therefrom, subject to the payment of compensation for improvements as aforesaid.

Conclusion

Accordingly, the question of law framed is answered in the affirmative**.**

Consequently, the judgment of the learned Judges of the High Court of Civil Appeals is set aside**,** and the judgment of the learned District Judge is affirmed**,** subject to variation granting only the reliefs prayed for in paragraphs (ඌ) and (ඌට) of the plaint**.**

Further, the legal interest awarded on the sum of Rs. 22,717.50/- in respect of the counterclaim of the Defendants-Respondents is set aside**.**

The appeal is allowed**.** The parties shall bear their own costs in the District Court, the High Court of Civil Appeals**,** and in this Court**.**

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J.

I Agree.

JUDGE OF THE SUPREME COURT

Sampath B. Abayakoon, J.

I Agree.

JUDGE OF THE SUPREME COURT