

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

In the matter of an appeal made in terms of Section 5 (C) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC / APPEAL / 81 / 2022

SC / HCCA / LA / 17 / 2022

CP / HCCA Kandy / FA / 233 / 2019

DC Nuwara Eliya: L / 1038

Rathnahalugedra Engalthina,

Katumana,

Nuwara Eliya.

PLAINTIFF

-Vs-

R.G. Wilson,

Katumana,

Nuwara Eliya.

(Deceased)

DEFENDANT

1. Chandralatha Weerasinghe,
Katumana,
Nuwara Eliya.

2. R.G. Sarath Kumara,
Katumana,
Nuwara Eliya.

3. R.G. Sriyani Padmalatha,
Katumana,
Nuwara Eliya.

4. R.G. Kalyani Kusumalatha,
Katumana,
Nuwara Eliya.

1ST TO 4TH SUBSTITUTED DEFENDANTS

AND THEN BETWEEN

Chandralatha Weerasinghe,
Katumana,
Nuwara Eliya.

1ST SUBSTITUTED DEFENDANT –
APPELLANT

-Vs-

2. R.G. Sarath Kumara,

Katumana,

Nuwara Eliya.

3. R.G. Sriyani Padmalatha,

Katumana,

Nuwara Eliya.

4. R.G. Kalyani Kusumalatha,

Katumana,

Nuwara Eliya.

2ND TO 4TH SUBSTITUTED DEFENDANTS
- RESPONDENTS

Rathnahalugedra Engalthina,

Katumana,

Nuwara Eliya.

PLAINTIFF - RESPONDENT

AND NOW BETWEEN

Chandralatha Weerasinghe,

Katumana,
Nuwara Eliya.

1ST SUBSTITUTED DEFENDANT –
APPELLANT – APPELLANT

-Vs-

- 2. R.G. Sarath Kumara,**
Katumana,
Nuwara Eliya.

Presently at,
74/174, Katumana,
Nuwara Eliya.

- 3. R.G. Sriyani Padmalatha,**
Katumana,
Nuwara Eliya.

Presently at,
2/8/A, Kalawala,
Madugalla.

- 4. R.G. Kalyani Kusumalatha,**
Katumana,
Nuwara Eliya.

Presently at,
240, Ihalawaththa,
Moragolla,
Hunupola,
Nikadalupotha.

2ND TO 4TH SUBSTITUTED DEFENDANTS
- RESPONDENTS - RESPONDENTS

Rathnahalugedra Engalthina,
Katumana,
Nuwara Eliya.

PLAINTIFF – RESPONDENT –
RESPONDENT

Before: A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J. &
Dr. Sobitha Rajakaruna, J.

Counsel: Upul Ranjan Hewage with Kaushali Samarathunga for the 1st Substituted
Defendant – Appellant – Appellant.
Kaushali Samarathunga for the 2nd – 4th Respondents – Respondents.
Nuwan Bopage with Lahiru Welgama for the Plaintiff – Respondent –
Respondent.

Argued on: 28.04.2025

Decided on: 30.03.2026

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

1. This case raises an interesting aspect of the Land Development Ordinance (LDO) and devolution of title under the said Ordinance. As happens in most of these cases, the *dramatis personae* are a sister who asserts title to the subject matter in the action and an elder brother who disaffirms her title as nonexistent. Let me unpack the facts.
2. The sister in the case Engalthina, who is the Plaintiff – Respondent – Respondent (hereinafter referred to as “the Plaintiff” or *Engalthina*), instituted this action against Wilson her elder brother – the original Defendant for a declaration that she is the grantee or owner of the holding as depicted in the 1st Schedule to the plaint.
3. She alleged in her plaint that Wilson entered her land illegally from the western side in 2004 and occupied a portion of her land which is depicted in the 2nd Schedule to the plaint.
4. The plaint dated 24 February 2004 also prayed for an enjoining order, interim injunction and permanent injunction in addition to a prayer for ejection. Thus, the fact in issue in the case is whether Engalthina – the Plaintiff had title to the property depicted in Schedule 1 to the plaint. In the case of a permit, a permit holder under the Land Development Ordinance enjoys a sufficient title to enable her to maintain vindicatory action against a trespasser – see *Palisena v. Perera*¹ and the affirmation of this principle in *Seenithamby v. Ahamadulebbe*² and *Kassim Hameedu Lebbe v. Sultan Samoon*³; see also *David Mary v. Elakakuttu*

¹ 56 N.L.R. 407

² 74 N.L.R. 222

³ 71 N.L.R. 452

*Pechchimuthu*⁴ where Udalagama J. with Dissanayake J. and Somawansa J. agreeing held that a permit holder can sue a trespasser for ejectment. Apposite is also the holding in *Bandaranayake v. Karunawathi*⁵ that a permit holder under the LDO enjoys sufficient title to enable her to maintain a vindicatory action against a trespasser. However, in the case of a grant holder he has absolute title and a *rei vindicatio* action is *ipso facto* available to a grant holder by virtue of the grant.

5. At this stage it is not altogether irrelevant to note the quotidian observations made by G.P.S de Silva C.J. in *Dharmadasa v. Jayasena*⁶ to the effect that in a *rei vindicatio* action, the burden is on the Plaintiff to establish the title pleaded and relied on by him.
6. In this action for declaration of title to the land depicted in the 1st Schedule to the plaint, the Plaintiff relied for her title on a grant dated 27 May 1998 issued to her for the land by the Divisional Secretary, Nuwara Eliya.
7. Her elder brother Wilson – the Defendant in his answer dated 6 July 2006 sought a dismissal of the plaint and claimed that it was on a different land he resided. Consequently, a Court commission was sought to survey both lands. It has to be pointed out that the answer did not impeach the validity of **P5** – a grant in favour of Engalthina that transferred the ownership of the land to her – the Plaintiff in the case by the Divisional Secretary, Nuwara Eliya.
8. In what should be paragraph 6 of the answer which is erroneously numbered as paragraph 5, the Defendants who had by now taken the place of Wilson as the substituted Defendants averred that prior to the transfer of the ownership of the

⁴ BASL News 07.04.2004 (CA No 508/93F) D.C.Trincomalee 1539/L the basis of the plaintiff's claim for a declaration of title was a permit issued under the provisions of the Land Development Ordinance No 16 of 1969 as amended

⁵ [2003] 3 Sri.L.R. 295

⁶ [1997] 3 Sri.L.R. 327

holding to the Plaintiff, there had been an agreement between Kudahenaya (the original grantee who was also the father of both Engalthina and Wilson) and the daughter Engalthina on 28 September 1992. In other words, the Defendants admitted in their answer that Kudahenaya – the predecessor in title to the land agreed with Engalthina in 1992 that once he received title from the State to the land, he would pass it on to the daughter Engalthina – the Plaintiff.

9. I must at this stage advert to this agreement which both the Plaintiff and the Defendants admit to have taken place between the father Kudahenaya and the daughter Engalthina – the Plaintiff.

Agreement of 28 September 1992

10. The predecessor in title to the land Kudahenaya received a grant in respect of this land only on 10 November 1995. However, 3 years prior to this acquisition of title, the *pater familias* Kudahenaya made an undertaking to his daughter in an agreement reached with her on 28 September 1992 that in the event that he obtained a grant in respect of the land, he would transfer the holding to her.
11. This agreement was set forth in a document executed by an Attorney-at-law who also testified on behalf of the Plaintiff as to the background that led to the execution of the promissory agreement. According to her, it was Wilbert – one of the Plaintiff's brothers – who coordinated the reduction of their father's wishes into a formal document in favour of his sister, Engalthina, she being the sibling of both Wilbert and Wilson (the original Defendant).
12. According to the testimony on record, Wilson – the original Defendant was nowhere near the father or family so to speak, when these transactions took place. In the testimony of the Plaintiff, Wilson the original Defendant had long left the neck of the woods and returned home in 2004 only to disturb her possession and perch himself

on the land which is depicted in the 2nd Schedule to the plaint. As I observed before, an Attorney-at-law and a notary one D.S. Gunasekara had set forth the agreement in writing with two witnesses appending their signatures thereto, though this document **(P2)** was not notarially executed. This promissory document speaks for itself. Though it had no enforceability at the instance of Engalthina as it did not comply with Section 2 of the Prevention of Frauds Ordinance, it manifested an unambiguous intention of the father as to who should succeed to the holding, in the event he obtained a grant to the land. He subsequently received the grant on 10 November 1995.

13. It appears that the Plaintiff had two brothers namely Wilson – the original Defendant and Wilbert – the brother who organized the execution of this promissory document on behalf of their father. According to the notary, Wilbert had been known to her as a school going friend and it was Wilbert who took her to the executant of the document Kudahenaya.
14. The contents of the agreement demonstrate that the predecessor in title, Kudahenaya, was in no doubt as to who should inherit his title. The agreement made clear as clear as it could be that it was the Plaintiff and no other person that the father had in mind for succession to his title.

The grant dated 10 November 1995 in favour of Kudahenaya

15. The grant made in favour of the Plaintiff's father – Kudahenaya had a 7th condition which stipulated that the land granted to the grantee could only be transferred with the prior written approval of the Divisional Secretary. It is quite clear that the original grant made in favour of the father – Kudahenaya is in conformity with Regulation No.8 made by the Minister on 26 November 1981 by virtue of Sections 155, 156 and 157 of the Land Development Ordinance.

16. The Defendant Wilson impeached the grant in favour of his sister and one of the arguments that was raised as to the validity of the grant in favour of the sister was that the grant was in violation of Section 72 of the Land Development Ordinance which reads as follows;

If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.

17. It is to be remembered that though the answer of the original Defendant did not plead the infringement of Section 72 in the alienation of the land, it appears that an issue was indeed raised by the Defendant in the course of the trial as to the invalidity of the grant made by the District Secretary, Nuwara Eliya.

18. In my view the answer to the question of the validity or otherwise of the grant given in the name of the Plaintiff, one way or the other, will dispose of the substantive appeal before this Court. If I were to unpack the import of the issue raised by the Defendant, the Defendant was questioning the validity of the grant in favour of the sister on the ground that he was the *eldest male descendant* who should succeed to the land held by the father. The fact that the father effected an agreement in favour of his daughter would not per se transfer the land to her for several reasons. First, at the time of the agreement the father had only a contingent interest in the land.

Second, the agreement was not notarially executed. If at all, the agreement manifested the unequivocal and unambiguous intention of the father to alienate the land to the daughter. However, the father passed away and by the document marked **P5** produced at the trial, the Divisional Secretary, Nuwara Eliya transferred the land to the Plaintiff recognizing her as the successor. It is this alienation that is impeached by the Defendant as violative of Section 72 of the Land Development Ordinance.

19. Both the learned District Judge of Nuwara Eliya and the Civil Appellate High Court Judges in Kandy by their respective judgements dated 31 January 2019 and 17 December 2021 held that since the transfer in favour of the Plaintiff by way of **P5** was an administrative act, the District Court could not pronounce upon its legality and that it could only be challenged by way of a writ. I would quote the pronouncement of learned Judge of the Civil Appellate High Court verbatim;

*“It was admitted by the Defendant – Appellant on the other hand that she had never, sought to question in any forum as to its legality of **P5** by invoking writ jurisdiction or, otherwise for, approval of **P5** is solely, an administrative act performed on the part of the Divisional Secretary of Nuwara Eliya”.*

20. I must state that the Defendant – Appellant referred to by the Civil Appellate High Court Judges described wife of Wilson who had since become the substituted Defendant – Appellant before the High Court. Her plea of invalidity of the grant in favour of the Plaintiff was rejected on the basis that she should have challenged the grant in judicial review proceedings.

21. I must state that the learned Civil Appellate High Court Judge fell into an error when he made such a statement to which the other learned Judge of the Civil Appellate High Court concurred.

22. It has to be emphasized that the validity of a grant, though impeachable in writ proceedings as *ultra vires*, is also capable of being challenged even in regular civil actions, if the validity of the grant is put forward by a Plaintiff. This was one such case.

23. This was a regular action where the Plaintiff was putting forward the validity of the grant as the foundation upon which she pleaded a *rei vindicatio* action. In such a situation, it is open to the Defendant to raise the invalidity of the grant by way of a defence in the civil action. I must once again point out that this was only raised as an issue though not pleaded in the answer. However, this is permissible in civil actions and is known as a collateral attack and such an attack is not constrained by any time limitation. This has to be contrasted with a direct attack which could have taken place in judicial review proceedings. The failure to invoke the writ jurisdiction does not foreclose the original Defendant from raising the *vires* of the grant in the regular action. The original Defendant Wilson was free to raise the invalidity of the grant by way of a defence in civil proceedings and set at naught the validity of the grant.

24. I had occasion to allude to collateral attack in civil proceedings in the case of ***Da-ella Arachchige Don Hilda Mayadunne v. R. R. P. W. Chandrasekera***⁷. I made my observations about the availability of a collateral attack by way of a defence in the following tenor;

“In fact, this would amount to an ultra vires act of this public official who was unavailable to explain the basis upon which the name of the Plaintiff came to be inserted and the Defendant was in effect making a collateral attack on the permit and raising the question of nullity of permit in favour of the Plaintiff. A person who wishes to challenge a decision may do so directly or collaterally. A collateral attack

⁷ CA Case No 296/2000 (F) DC Polonnaruwa 5465 / L Decided on 10.12.2018.

occurs when a decision is challenged indirectly, such as by way of a defence of invalidity of the act of Ramani Gunawardane to a declaratory action based on a permit. Where is the authority of Ramani Gunawardane to insert the name of the Plaintiff when there is no evidence of a prior request from the original permit holder-Punchi Banda? The officer who gave evidence was not able to speak to a written request on the part of the original permit holder to re-nominate the Plaintiff as the nominee.

*A collateral attack based on a public law defence of an ultra vires act is permitted in civil cases and the English case of **Wandsworth London Borough Council v. Winder**⁸ exemplifies this approach. The Plaintiff's council had raised the rent of Winder's flat; Winder refused to pay the increase, paying only such an amount as he considered to be reasonable; the council sued for arrears of rent and possession of the flat; Winder argued in defence that the council had acted ultra vires by charging excessive rents. The local authority sought to strike out his defence in the county court by saying that it was only in judicial review proceedings that the invalidity of the raise could be challenged. The council took Winder to the House of Lords on this preliminary question alone. The House held that the defence could be raised without recourse to judicial review proceedings, while admitting that the issues raised are those of the public law. The validity of acts and decisions subject to review under the supervisory jurisdiction may also be challenged as a defence in criminal proceedings – see **MacGillivray v Johnson**⁹ and ope*

⁸ (1985) A.C 461

⁹ No 2 1994 SLT 1012

exceptionis in civil proceedings (see, especially, Vaughan Engineering Ltd v Hinkins & Frewin Ltd¹⁰).

No doubt, the issue of invalidity of the act of Ramani Gunawardane giving this permit to the Plaintiff without any scintilla of evidence to authorize that action is raised as a defence in this case and I take the view that the defence must succeed. Ope Exceptionis the plea of invalidity raised by the Defendant that the document on which the action is based is void must succeed”.

25. I had occasion to deal with collateral attack in ***Y.G. Gnanathilaka v. D. Dissanayake and Ariyathilaka v. D. Dissanayake*** – two identical fundamental rights applications in the case where the question of the validity of a circular was put forward and its invalidity was called in question by the Respondents. I had these observations to make on collateral attack in paragraphs 36, 37, 38 and 39 of the judgement which are worthy of note;

36. “When one party holds out the validity of a circular, it is not impermissible for the opposing party to show its invalidity. This is commonly known as collateral attack by the Respondents and oftentimes it so happens that when a party does not mount a direct attack against an adverse order, he is afforded an opportunity to attack it collaterally in the event the order or rule is put forward as valid against him.

37. The attempt on the part of the Respondents could be characterized as a justificatory measure of the 2004 Circular which the Petitioner is at liberty now to impugn by way of a collateral attack in these proceedings.

¹⁰ 2003 SLT 428

38. Paul Craig in his Administrative Law¹¹ states:

The general principle is that any defect that would be treated as jurisdictional in direct proceedings is equally available in a collateral challenge.

39. Wade & Forsyth discusses collateral challenges under the rubric Collateral Proceedings:¹²

The validity of the act or order may be challenged directly, as in proceedings for certiorari to quash it or for a declaration that it is unlawful. But it may also be challenged collaterally, as for example by way of defence to a criminal charge, or by way of defence to a demand for some payment.”¹³

26. Undoubtedly, Wilson – the original Defendant challenged the validity of the grant by raising an issue. But the question arises whether he did successfully establish that Defence. Did he lead evidence to prove that his father Kudahenaya did not leave his sister as the successor? In other words, is there evidence on record to show that the Plaintiff was not a successor of Kudahenaya the father?

27. When one peruses the evidence given by the only officer called by the Plaintiff from the Divisional Secretariat, Nuwara Eliya, that officer testified as to the procedure how nomination could be made in the case of a grant holder. However, no question has ever been asked of this witness in cross-examination that the Plaintiff was not nominated by her father as a successor. There is no rebuttal of the status of the Plaintiff as the probable successor of the father. In fact, the witness from the Secretariat went to the extent of stating in re-examination that the Plaintiff’s father had nominated a successor and therefore the title can be conferred on that successor.

¹¹ 7th Edition at p 745

¹² in Chapter 9 entitled Problems of Invalidity at page 235; See Rubinstein, Jurisdiction, and Illegality, ch.3

¹³ SC / FR / 240 / 2020 with 215 / 2020 and 97 / 2016 Decided on 29.11.2024

The witness testified that if the grantee Kudahenaya had nominated a successor, it was customary for the title to be transferred to such a successor. Thus, the grant in favour of the Plaintiff had not been seriously challenged and it proves that there was a nominated successor. This position was not assailed and shaken by the substituted Defendants.

28. This evidence of a nominated successor reduces the probability of the assertion made by the Defendant that there was an infringement of Section 72, and in fact, where such nomination as is contemplated in the Ordinance was followed, the title had to be transferred to the Plaintiff. In the absence of positive evidence offered by the Defendant, the fact that the Defendant was the *male heir* would not avail him. The Defendant had not discharged his burden of proving that there was no nomination. He has failed to prove an infringement of Section 72. If a collateral attack is mounted by a Defendant, it is his onus to establish that defence.

29. I take the view that in such a situation, the presumption found in Section 114 (d) of the Evidence Ordinance has to be drawn, namely the official act of alienation of the grant has been regularly performed. This presumption has not been rebutted by the Defendant and therefore the Defendant's plea of the invalidity of the grant fails.

30. The validity of the grant has thus been established and the conclusions reached by both the learned District Judge of Nuwara Eliya and the Civil Appellate High Court Judges of Kandy are beyond reproach.

31. Accordingly, the following questions of law raised on behalf of the 1st Substituted Defendant – Appellant – Appellant has to be answered in the negative.

a. Whether Their Lordships of the Civil Appeal High Court of the Central Province have erred in law when they affirmed the judgment of the Learned District Judge in as much as Their Lordships have failed to

consider and evaluate the documents and evidence tendered at the trial in their correct perspective;

- b. Whether Their Lordships of the Civil Appeal High Court of the Central Province have erred in law in as much as Their Lordships have failed to consider whether the Respondent has proved her title to the land in dispute as pleaded by her in her plaint before confirming the judgment of the Learned District Judge;*
- c. Whether Their Lordships of the Civil Appeal High Court of the Central Province have erred in law in as much as Their Lordships have failed to consider whether the Respondent is entitled to the land described in the schedule to the plaint in terms of the provisions of the Land Development Ordinance as per the circumstances pleaded in the plaint;*

32. In the circumstances, I proceed to affirm the judgments of both Courts *a quo* and dismiss the appeal of the Defendant – Appellants – Appellants with cost.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court

Dr. Sobhitha Rajakaruna, J.

I agree.

Judge of the Supreme Court