

**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) (amended) Act
No. 54 of 2006.

SC / APPEAL / 08 / 2018

SC / HCCA / LA / 258 / 2016

WP / HCCA / GPH / 312 / 2010 (F)

DC Gampaha: 40786 / L

Bastian Koralalage Allin Luigi Quintus

Rodrigo,

Sarasavi Mawatha,

“Camp View”,

Ragama.

PLAINTIFF

-Vs-

1. Kuruppu Arachchige Ranjini

Hemalatha,

16, Samagi Mawatha,

Ragama.

- 2. Kuruppu Arachchige Sarath,**
16, Samagi Mawatha,
Ragama.

- 3. Ratnayaka Mudiandelage Ariyawathi,**
16, Samagi Mawatha,
Ragama.

- 4. K. Nihal Alias Patty,**
16, Samagi Mawatha,
Via Siriwardena Road,
Ragama.

DEFENDANTS

AND THEN BETWEEN

- 1. Kuruppu Arachchige Ranjini
Hemalatha,**
16, Samagi Mawatha,
Ragama.

- 2. Kuruppu Arachchige Sarath,**
16, Samagi Mawatha,
Ragama.

- 3. Ratnayaka Mudiandelage Ariyawathi,**
16, Samagi Mawatha,

Ragama.

4. **K. Nihal Alias Patty,**
16, Samagi Mawatha,
Via Siriwardena Road,
Ragama.

DEFENDANTS – APPELLANTS

-Vs-

**Bastian Koralalage Allin Luigi Quintus
Rodrigo,**
Sarasavi Mawatha,
“Camp View”,
Ragama.

PLAINTIFF – RESPONDENT

AND NOW BETWEEN

K. Nihal Alias Patty,
16, Samagi Mawatha,
Via Siriwardena Road,
Ragama.

(Appearing by his Power of Attorney holder)

Heekenda Mudiyanseelage Indumathi,

R2b, Samagi Mawatha,

Ragama.

4TH DEFENDANT – APPELLANT –
APPELLANT

-Vs-

Bastian Koralalage Allin Luigi Quintus

Rodrigo,

Sarasavi Mawatha,

“Camp View”,

Ragama.

(Deceased)

PLAINTIFF – RESPONDENT –
RESPONDENT

Pahan Samadhi,

Sarasavi Mawatha,

“Camp View”,

Ragama.

SUBSTITUTED PLAINTIFF –
RESPONDENT – RESPONDENT

1. Kuruppu Arachchige Ranjini

Hemalatha,

16, Samagi Mawatha,

Ragama.

2. Kuruppu Arachchige Sarath,

16, Samagi Mawatha,

Ragama.

(Deceased)

2a. Ratnayaka Mudiyanhelage

Ariyawathi,

16, Samagi Mawatha,

Ragama.

2b. Kuruppu Arachchige Dilki

Madushani,

16, Samagi Mawatha,

Ragama.

3. Ratnayaka Mudiandelage Ariyawathi,
16, Samagi Mawatha,
Ragama.

**DEFENDANTS – APPELLANTS –
RESPONDENTS**

Before: A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J. &
Mahinda Samayawardhena, J.

Counsel: S.N. Vijithsingh for Defendant – Appellant – Appellant.

Rajitha Hathurusinghe for substituted Plaintiff – Respondent – Respondent.

Argued on: 24.09.2024

Decided on: 23.03.2026

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

1. In this case the question of law that arises for determination is whether the Plaintiff – Respondent – Respondent (“the Plaintiff”) instituted this possessory action against the Defendant-Appellant-Appellants (“the Defendants”) within the time stipulated in Section 4 of the Prescription Ordinance.
2. This Court granted leave to appeal to the Defendants and the plea of extinctive prescription within the contemplation of Section 4 of the Prescription Ordinance was the only question of law that was argued in this appeal.

3. The Defendants came to frame this question of law before this Court having regard to the factual matrix of the chronological events that surround this case. At the very outset, let me hasten to add that the plea of extinctive prescription in order to defeat the action of the Plaintiff had not been taken anywhere in the courts *a quo*. It is only in the Supreme Court that this question of law has been raised but the entitlement to a possessory remedy for the Plaintiff has been affirmed by both the District Court of Gampaha and the Civil Appellate High Court in Gampaha solely on the proved facts.
4. Before I deal with the question of law whether the Defendants could invoke the time bar to defeat the action in which the Plaintiff has succeeded in the Courts below, I must place some salient facts that will illustrate the background to the case.
5. It was in the year 1988 that the Plaintiff had been given permission to occupy the land depicted in the Schedule to the plaint. Since his own land had been acquired by the State, the subject matter of this action was given to the Plaintiff by the National Housing Development Authority (NHDA) and consequently he was placed in possession of the land.
6. As found by both the learned Judges of the Courts below, his possession had been disturbed by the Defendants in 1995 whereupon a 66 Application in the Magistrate's Court Gampaha resulted in no one being placed in possession so to speak by the learned Magistrate, as the Magistrate found no breach of the peace. Accordingly, the learned Magistrate of Gampaha directed that a civil action be filed.
7. Though the Magistrate's Court action was filed in 1995 itself within stipulated time from dispossession, the civil action that was instituted by the Attorneys-at-Law took on behalf of the Plaintiff the form of a possessory action. In fact, according to the Plaintiff the disturbance and dispossession had taken place on 30 July 1995. The

order of the Magistrate of Gampaha resulting in neither party being given possession with an accompanying direction to file civil action was made on 31 January 1996.

8. The instant civil action which took the form of a possessory remedy was filed on 15 May 1997, as the plaint clearly indicates. It is thus apparent that the plaint dated 15 May 1997 was filed almost 2 years after the disturbance and dispossession but within one year from the date of the order of the Magistrate dated 31 January 1996.
9. Mr. Vijith Singh, the learned counsel for the Defendants making his submissions on the only question of law before this Court namely whether the possessory action filed by the Plaintiff was barred by Section 4 of the Prescription Ordinance contended that since there was a lapse of 2 years before the possessory action was filed, the Plaintiff could not have maintained this action.
10. It has to be remembered that this plea advanced for the first time by Mr. Vijith Singh in his able submissions before this Court was never raised either before the learned District Judge of Gampaha or the learned Civil Appellate High Court Judges of Gampaha.
11. The relevant question of law before this Court runs as follows;

“Whether the Honorable High Court Judges of the Civil Appellate High Court of Gampaha erred in law by failing to consider whether the Respondent had instituted the action within the stipulated time period as necessary in a possessory action?”

12. Before I proceed to deal with the extinctive plea of time bar in Section 4 of the Prescription Ordinance which was raised for the first time in this forum, let me add another significant highlight in this case. There is evidence that the NHDA transferred the subject matter to the Plaintiff by way of a deed of transfer bearing

no.2074 and dated 3 May 2001 clothing him with title even to maintain a *rei vindicatio* action.

13. The confinement of title to the Plaintiff, as could be seen had taken place while possessory action was ongoing in the District Court. Such a title holder to the land is sought to be rendered out of Court by this extinctive plea which would have the effect of denying possession to the Plaintiff.

14. In passing, I must make the observation that even at the time he sought the assistance of the Magistrate's Court to regain possession in 1995, the Plaintiff had already been granted a permit for the land by the NHDA and that would have entitled him to file a *rei vindicatio* action as he was a lawful possessor – see the dictum of Gratiaen, J. in ***Palisena v. Perera***¹ but it was his misfortune that a 66 Application was mounted in the Magistrate's Court which did not prove to be an effective remedy as the learned Magistrate of Gampaha dismissed the application on the ground of want of breach of the peace by his order dated 31 January 1996.

15. Instead of choosing to file a *rei vindicatio* on his behalf after the dismissal of the 66 Application, a possessory action which is akin to some elements of a 66 Application was filed on behalf of the Plaintiff on 15 May 1997 in the District Court of Gampaha and it is the invocation of a possessory action preceded by a 66 application that had led to an objection of time bar to the maintainability of the possessory action.

16. As I said before, it was during the pendency of the possessory action in the District Court that the Plaintiff gained absolute title to the land. His possessory action had succeeded in both the District Court and the Civil Appellate High Court but the question arises whether the Defendants could successfully invoke the time bar in

¹ 56 N.L.R. 407

Section 4 to deny possession to the Plaintiff who has since become the owner of the land.

17. Having set out this factual template, let me seek to assay the merits of the time bar plea that Mr. Vijith Singh has put forward on behalf of the Defendants.
18. The learned counsel for the Defendants has contended that since Section 4 of the Prescription Ordinance would bar the institution of the possessory action from the date of dispossession if not filed within one year, the Plaintiff should have set forth grounds of exemption in terms of Section 44 of the Civil Procedure Code (CPC)
19. Let me juxtapose Section 4 of the Prescription Ordinance vis-a-vis Section 44 of the CPC.

Section 4 Prescription Ordinance;

*“It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at **any time within one year** of such dispossession and on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title;*

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases”.

Section 44 Civil Procedure Code;

*“If the cause of action arose **beyond the period ordinarily allowed** by any law for instituting the action, the plaint must show the ground upon which exemption from such law is claimed”.*

20. It is a truism that the plaint must show the ground upon which exemption from the expiration of the period prescribed by the law of prescription is claimed. The language of the rule in Section 44 is mandatory and therefore whenever a Plaintiff seeks exemption from the operation of the law of limitation, he must show the grounds on which he seeks such exemption – see *Don Palis Appuhamy v. Perera*².

21. In *Boteju v. Rajanathan*³, it was held that compliance with Section 44 is mandatory. It could be seen that all that Section 44 of the CPC requires is that the plaint shall show the ground of exemption – see *Raghu Nath v. Syed Samad*⁴; *Punjab National Bank v. Kusum Saxena*⁵; *Roshan Lal Kathila v. Raja Rana Yogendra Chandra*⁶ on the Indian equivalent of Section 44. This shows that exemption need not be claimed specifically.

22. Indeed Section 4 of the Prescription Ordinance imposes the requirement of a possessory action to be filed within 1 year from the date of dispossession – see a discussion of Section 4 and its Roman - Dutch Law requirements in the case of *Sarathchandra Bandara v. Malkanthi Fernando and 2 Others*⁷.

23. On the other hand, what Section 44 of the CPC contemplates is that the Plaintiff shall show the ground upon which exemption from Section 4 is claimed. Thus, the plaint is

² (1882) 5 S.C.C 32 (FB)

³ (1986) 1 Colombo Appellate Report 385

⁴ 1908) 12 Cal WN 617

⁵ AIR 1998 Del 188 [LNIND 1997 DEL 997]

⁶ AIR 1996 HP 14

⁷ SC / APPEAL / 83 / 2013 Decided on 29.02.2024

required to set out the grounds/s for claiming such exemption i.e, the causes or reasons or attributes and/or the basis on which according to the Plaintiff, the period of limitation is not to be strictly constructed or strictly applied as stated in the plaint.

24. A perusal of the plaint undoubtedly shows that an application was made to the Magistrate's Court after the disturbance or dispossession on 30 July 1995 and this case lay in the Magistrate's Court till the Magistrate gave his order on 31 January 1996. It is to be recalled neither party was given possession by the learned Magistrate. It is in this background that paragraph 8 of the plaint has to be viewed. According to this paragraph, there was another event of disturbance that took place on 22 February 1997 which the Plaintiff avers led him to leave the subject matter of the action. The aforesaid paragraph reads as follows;

(08) ඉහත කී පරිදි එම නඩු නිමිත්ත මෙම පැමිණිලිකරුට උදා වූයේ විත්තිකරුවන් නීති විරෝධීව සාමූහිකව සහ වෙන් වෙන්ව පැමිණිලිකරුගේ නිරවුල් භුක්තියට 1997.2.22 දින නීතිවිරෝධීව පැමිණිල්ලේ උපලේඛනයේ විස්තර කරන ඉඩමට ඇතුළුව ඔහුගේ නිරවුල් භුක්තියට බාධා කරන බැවින්ය. එම කරුණ සම්බන්ධව පැමිණිලිකරු රාගම පොලීසියට 1997.3.13 දින පැමිණිලි කල අතර, එම පැමිණිල්ලේ සහතික පිටපතක් මෙම පැමිණිල්ලේ කොටසක් ලෙස 'පැ3' ලෙස ලකුණු කර ඉදිරිපත් කර සිටී.

25. If this was the event that led him to vacate the land and seek refuge elsewhere his cause of action to redress this wrong by way of a possessory action arose on 22 February 1997. His plaint to the District Court was filed on 15 May 1997 within a period of 3 months.

26. Thus, it would appear that the cause of action was not barred by any time bar as the Plaintiff's case was instituted within 3 months from the date of dispossession. Thus, there is no taint of extinctive prescription that would affect the case of the Plaintiff

and this explains as to why the Defendants did not raise the plea of time bar in their answer.

27. From the submissions made by Mr. Vijith Singh, the Defendants appear to compute the time bar from the first event of disturbance that took place on 30 July 1995.

28. Thus, it is illogical to contend that the action of the Plaintiff was barred by prescription. I would further add that if the averments in the plaint on the face of it that brought the case brought the case of the Plaintiff beyond the time limit fixed by Section 4, the Defendants could have moved the District Court for a dismissal of the action. In *Actalina Fonseka and Others v. Dharshani Fonseka and Others*⁸, Kulatunge, J. concluded that if the plaint does not contain sufficient particulars or even in a case where it is alleged that the plaint does not disclose a cause of action, the correct procedure under Section 46 (2) of the CPC is to move, before pleading to the merits, to have the plaint taken off the roll - see comparable dicta in *Muthukumarana v. Wimalaratne*⁹ which declared that there is nothing in the CPC which prohibits a party to an action filing a motion at any stage and claiming an appropriate relief. J.A.N. De Silva, C.J., citing *Actalina Fonseka* (supra) opined the same view that an objection can be raised by way of a motion under Section 46 (2) of the CPC.¹⁰

29. None of these objections was ever taken by the Defendants by way of a motion to the entertainment of the plaint when the Defendant had the opportunity to raise it even later as held in the case of *Divisional Forest Officer v. Sirisena*¹¹. In other words, the Defendants failed to take advantage of the principle *nunc pro tunc* (*what one could have done then, it could be done now*).

⁸ (1989) 2 Sri.L.R. 95

⁹ (1991) 1 Sri.L.R. 139

¹⁰ (2011) B.L.R 242

¹¹ (1990) 1 Sri.L.R. 44

30. Having failed to exercise their rights under Section 46 (2) of the CPC, the Defendants never raised the time bar in their answer which they filed in response to the plaint. I have already shown that the time bar in Section 4 does not affect the case of the Plaintiff. However, if the plaint had disclosed a cause of action which arose beyond the time limit permitted by limitation, it was as much an obligation on the part of the Defendants to allege and prove time bar, which the Defendants grievously failed to do.

31. It is well settled that the extinctive prescription, if any, operates subject to a doctrine of waiver (*Juanis Appuhamy v. Juan Silva*)¹² and the fact that the answer of the Defendants was devoid of any time bar objection must be taken to mean there was no time bar at all. Even if the Defendants had cross examined the Plaintiff on the lines of time bar though there were no preliminary issues on time bar, the Defendants could not have raised any issue on time bar having regard to the evidence led in the case. In any event, this Court bears in mind the dicta of Bassnayake, J. (as His Lordship then was) in *Brampy Appuhamy v. Gunasekera*¹³ ;

“The effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right; the Court will not take the statute into account unless it is specifically pleaded by way of defence”.

32. Thus, this Court cannot go into the question of time bar and in any event as I have demonstrated, the case does not suffer from any infirmity on time bar. In the circumstances, I hold that the cause of action of the Plaintiff entitled him to a decree for possession and I proceed to affirm the judgements of the District Court of Gampaha dated 8 December 2010 and the judgement of the Civil Appellate High Court of Gampaha dated 2 May 2016.

¹² (1908) 11 N.L.R. 157

¹³ (1948) 50 N.L.R. 253 at 222

33. Accordingly, the question of law raised on behalf of the Defendants is answered in the negative and the appeal is dismissed with costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

Judge of the Supreme Court

I agree

Mahinda Samayawardhena, J.

Judge of the Supreme Court

I agree