

Intermediate Year
Sri Lanka Law College

Law of Property - I



Empowers Independent Learning



Independent Law Student Movement

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1. PREVENTION OF FRAUDS ORDINANCE No.7 OF 1840

Section 2

Applies to land / immovable property concerning

1. sale / purchase / transfer / assignment
2. contract / agreement for future sale / purchase
3. mortgage
4. bargain / contract / agreement for effecting a sale / purchase / transfer / mortgage / assignment

Formalities to be observed under section 2 of the Prevention of Frauds Ordinance when executing transaction relating to immovable property

1. It must be in writing
2. Signed by the party making it (transferor) or by some person lawfully authorized by him
3. In the presence of a licensed notary public and 2 or more witnesses present at the same time
4. Duly attested by such notary public and witnesses.

There are several instances that section 2 formalities have to be followed, which were developed by decided cases-

1. An instrument affecting growing timber and cultivation of coffee or similar plantation crops has to be executed according to section 2 formalities.
2. An instrument affecting planter's share need to comply with section 2 provisions
3. An agreement to transfer immovable property in consideration of a marriage has to be in accordance to section 2 formalities. *Noorul v Noor Hameen* 51 NLR 143
4. Any amendment or alteration made to a document executed in accordance with section 2 provisions also has to be in accordance with the provisions of section 2. In *Suppaiah v Situnayake* 53 NLR 89, the validity period of a sales agreement was extended by an oral agreement and the court held that such extension made orally or without following the provisions of section 2 is invalid.
5. A tenancy from month to month by informal lease also required section 2 compliance. *Perera v Perera* 70 NLR 79

Instruments affecting immovable property that need not be prepared in terms of Section 02 of the Prevention of Frauds Ordinance

- A lease at will (section 02)
- A lease for a period not exceeding one month (section 02)
- When an immovable property or land is dedicated to the Maha Sangha it becomes a sangika property and need not follow Section 02 formalities. This was held in the cases
Dharmawamsa Thero v Ukku Banda 60 NLR 350
Dharmavidassi Thero v Dammadassi Thero 57 NLR 469
- **Section 17** of the statute specifies that when the state or the government is a party to an immovable property transaction, such transaction need not follow section 02 formalities.

Wijesuriya v. AG

• When there is an immovable property affecting a Trust, what applies is Section 5(1) of the Trust Ordinance and not Section 2 of the Prevention of Frauds Ordinance.

Nadaraja v Kanapathy 49 NLR 121

Valliamma Atchy v Abdul Majeed 45 NLR 169

• **Section 03(1)** specifically provides that provisions of section 2 need not be applied to any contract or agreement for the cultivation of paddy fields or chena lands for any period not exceeding twelve months, if the consideration for such contract or agreement shall be that the cultivator shall give to the owner of such fields or lands any share or shares of the crop or produce. In *Ukku Banda v Tikiri Banda 53 NLR 291* it was held that to apply Section 3(1), both formalities have to be proved.

• Agreement to sell Cinnamon. In the case of *Wall and Company v Schraader* it was observed that what is taken out from cinnamon is the cinnamon bark, which is not attached to the ground, therefore it cannot be considered as immovable property. The agreement created no interest in the land and accordingly requires no notarial instrument.

• Similarly, it has been held that an agreement by which an owner of land lets coconut trees standing on it for drawing toddy, and which only involves a license to enter upon the land for that specific purpose only, does not create an interest in land. *Fernando v Ahemaris 2 CLR 183*

• An agreement to sell the paddy cultivation harvest also need not follow section 02 formalities. *Dionis v Lewis 13 NLR 291*

2. AGRARIAN DEVELOPMENT ACT No.46 of 2000

Preamble to the act states the three main objectives of the Act;

- a. set out a National Policy in relation to rights of tenant cultivators
- b. to impose restrictions on persons using agricultural lands for non-agricultural purposes
- c. to ensure maximum utilization of agricultural lands for agricultural production.

Paddy lands cultivated by a tenant cultivator to be offered for sale to tenant cultivators (Section 02)

(i) Where owner of paddy land intends to sell it, he must first offer the land in sale to the **tenant cultivator**.

Such offer must be made;

- a) in writing
- b) sent by registered post
- c) stating the price at which he offers to sell

A copy of such offer must be sent to Agrarian Development Council of the area in which the land is situated, by registered post.

(ii) Where the tenant cultivator is willing to purchase the land at the price offered, he must indicate his willingness to buy to the owner & the Agrarian Development Council in writing, sent by registered post.

Thereafter the Council will fix a period within which the transfer must be completed.

(iii) Where a tenant cultivator is willing to buy the land but claims that the price offered is excessive, the Agrarian Development Council in consultation with the owner will determine a reasonable price (having regard to market price of paddy land of the area).

Agrarian Development Council will fix a period within which the transfer must be completed. Tenant cultivator must then buy the land at that price within the time period prescribed.

(iv) Where the Commissioner General after inquiry satisfies the tenant has failed or neglected to act in accordance with at the above procedure, he can take action to evict the tenant cultivator, in accordance to Section 08 procedure.

(v) Where the owner transfers the land to a 3rd party in violation of the above provisions, the Commissioner General shall after inquiry declare the transfer null & void and evict the 3rd party who is in occupation.

A copy of the declaration that the transfer is null & void must be sent to the registrar of land in the district in which the land is situated, for the purpose of cancelling the entry in the relevant folio.

Maximum extent that can be cultivated (Section 05)

(1) Maximum extent of paddy land that can be cultivated by a tenant cultivator is **5 acres** **including** the land cultivated

- by the spouse of the tenant cultivator
- by a child of the tenant cultivator under 18 years

(2) However, subject to the above limitations, the Minister can determine from time to time the extent of paddy land that can be cultivated by a tenant cultivator within a district by Order published in Gazette.

(3) Where a tenant cultivator is in possession of paddy land which is greater than the extent determined by an order -

- he can select the extent of paddy land that he is entitled to cultivate & vacate the remainder.

Where he fails to do so he shall be evicted from the extent of paddy land in excess of the land specified by the order, in accordance with the section 08 procedures.

(4) Where tenant cultivator vacates such excess land, landlord is entitled to cultivate in that land.

Procedure for eviction (Section 08)

- (i) Where Commissioner General orders a person to vacate agricultural land & the person fails to comply with the order, Commissioner General or his authorized agent may present a written report to the Magistrates' Court of the area where the land is mainly or wholly lies, with the following facts ;
 - a. setting out the nature of the order , person to whom it was issued and the extent of land to which the order relates
 - b. stating that the person who has been ordered to vacate has failed to vacate such extent of land
 - c. pray for an order to evict the person & name a person to whom the vacant possession should be handed over.
- (ii) Upon such report being presented to Court, the Magistrate shall make an Order directing the fiscal or the peace officer of the court to evict the person & deliver possession of such extent of land to the person mentioned in the report.
- (iii) The fiscal or peace officer has to comply with such Order and make a due report setting out the manner in which he executed the Order.
- (iv) Fiscal can use such force as is necessary to enter land / evict any person / deliver person.
- (v) A person who unlawfully dispossesses an occupier who has been placed in possession by the fiscal is guilty of an offence. Further, upon conviction magistrate shall direct the fiscal to place the dispossessed person in possession and to evict the accused.

INTERPRETATION

"CULTIVATOR" (with reference to an extent of paddy land) means

1. Any person other than a Farmers' Organization or Agrarian Development Council
2. Who by himself or by any member of his family or jointly with any other person
3. Carries out on such extent of paddy land the following:
 - a. 2 or more of the operations of ploughing, sowing and reaping; and
 - b. The operation of watching the crop in each season during which paddy is cultivated on such extent with reference to an extent of paddy land.

“AGRICULTURAL” includes:

- a) The growing of rice, all field crops, spices and condiments, industrial crops, vegetables, fruits, flowers, pasture or fodder
- b) Dairy farming, livestock rearing and breeding
- c) Plant and fruit nurseries
- d) Bee keeping and inland fisheries

“AGRICULTURAL LAND” means

Land used or capable of being used for agriculture within the meaning of the Act and includes;

- Private lands
- Lands alienated under the Land Development Ordinance
- Lands alienated under the State Lands Ordinance
- Lands alienated under any other statute

“EVICT” (in relation to a tenant cultivator of paddy land) means

to deprive a tenant cultivator of his right to use, occupy and cultivate the whole or any part of the extent of paddy land let to him by the use of direct or indirect methods.

“MEMBER OF THE FAMILY” (With reference to any person) means;

- a) the spouse or
- b) a son or daughter who is less than 18 years

“PADDY LAND” means

- a) Land which is cultivated with paddy OR
- b) is prepared for the cultivation of paddy OR
- c) having previously been cultivated with paddy which is suitable for cultivation &
 - Includes any land adjoining or appertaining to it which is used by the cultivator as a threshing floor or for constructing his dwelling house
 - BUT does not include chena land or any other land which is with the permission of the Commissioner General is used for any purpose other than cultivation.

“OWNER CULTIVATOR” (With reference to paddy land) means a person who is the;

- a. Owner or
- b. usufructuary mortgagee

of such & who is the cultivator of the entirety of such extent and

Where the paddy land has been alienated by the Land Development Ordinance - person who derives title such extent of land & who is a cultivator of that entire land.

3. LAND ACQUISITION ACT NO 09 OF 1950

The Land Acquisition Act makes provision for the acquisition of private lands by the State to be used for public purposes. The principal enactment No. 9 of 1950 has been amended on several occasions to accommodate the needs of the State and to some extent to safeguard the rights of the public.

Investigations for selecting land for public purpose (Section 02)

If the minister decides that a particular land in any area is needed for any public purpose, he may direct the acquiring officer (of the district) to exhibit a notice in a conspicuous place in the area. (s. 2(1))

- (i) The notice will be
 - in all three languages
 - stating that the land specified in the notice is required for a public purpose and
 - any of the acts authorized by the subsection can be carried out to investigate the suitability of land for public purpose (s. 2(2))
- (ii) The acquiring officer or any other person authorized by him in writing can enter into any land together with persons, implements, materials, vehicles and animals as may be necessary for such investigation.

The following acts can be committed in such investigations to

- a. survey and take levels of the land
- b. dig or bore into the sub-soil of the land
- c. set out boundaries of the land and the intended line of any work proposed to be done on land.
- d. mark levels, boundaries and lines by placing marks and cuttings
- e. cut down & clear standing crop, fence jungle on the land (where necessary to carry out work)
- f. do all other necessary acts to investigate the suitability of land.

BUT

If there is an occupied building or enclosed court or garden attached, the authorized officer cannot enter without giving the occupier seven days' notice of his intention to do so.

Compensating for damage done during investigations carried out on land (Section 03)

Section 03 deals compensating the owners of the land who had sustained a loss due to the steps taken for assessing the suitability under Section 02.

Where any officer empowered to enters any land causes damage to land by doing any act which he is authorized to do under section 2(3)

He must

- assess the compensation for the damage
- apportion the amount among the owners of the land.
- give written notice of the assessment & the amount each owner will receive.

(2) Where any owner/owners is/are not satisfied with the amount of compensation assessed or apportioned in the notice, he/they can make a written appeal to the acquiring officer of the district in which the land is situated within 14 days.

(3) Where the acquiring officer allows an appeal he must make a fresh assessment & apportion the compensation or confirm the apportionment already assessed. The decision of the acquiring officer shall be final.

- (4) Officer issuing notice shall –
- Tender to each person entitled to compensation, the amount of compensation allowed to him by such notice where no appeal is made against it within 14 days or where an appeal is made but the acquiring officer dismisses it.
 - Tender to each person entitled to compensation the new amount payable where an appeal is made and has been allowed by the acquiring officer.

Notice of an objection to intended acquisition (Section 04)

- (1) Where the minister is satisfied that a particular land is suitable for a public purpose, he may direct the acquiring officer
- to give a notice to the owner/s of land and
 - to exhibit the notice in a conspicuous place on the land.
- (2) The notice shall:
- be in Sinhala, Tamil and English
 - contain a description of the land which is intended to be acquired
 - state that the government intends to acquire that land for a public purpose & those objections may be made to the Permanent Secretary of such ministry.
 - specify a period within which an objection should be made (not less than 14 days from the date on which such notice is given).
- (3) Where objections to such acquisition are made within the time allowed by the notice, the Permanent Secretary shall consider such objection OR direct an officer to consider such objection on his behalf and make recommendations to him.

When such objections are considered every objector should be given an opportunity of being heard in support.

After the consideration of the objections, Permanent Secretary shall make recommendations to the Minister (Minister in charge of the Ministry specified in the notice) and the Minister shall after considering such the recommendations, make his own recommendations on the objection.

- (4) No decision shall be taken to acquire only a part of a building if the owner of the building desires that the whole of the building should be acquired, unless such part can be severed or demolished without serious detriment to the rest of the building.

“Building” for the purpose of this section includes land which, being necessary for the convenient use and occupation of the building would pass by devise of the building.

★ **Section 4A** was introduced to the principle Act by a subsequent amendment. Accordingly-

Where notice has been exhibited according to Section 2 or Section 4, no owner shall for a period of 12 months after the date of exhibition of such notice-

- sell or dispose of that land – any sale or transfer in contravention of this provision shall be null & void

OR

- b) do any act which directly or indirectly depreciates the value of the land – any person who contravenes the provision shall be guilty of an offence punishable with a fine not exceeding one thousand rupees.

Declaration that land is required for a public purpose (Section 05)

- (1) Where minister decides (under s. 4(5)) that a land should be acquired, he shall make a written declaration that such land is needed for public purpose and will be acquired under this Act, and shall direct the acquiring officer –
- to cause such a declaration in Sinhala, Tamil and English languages to be published in the gazette and
 - exhibited in some conspicuous place on or near that land.

- ★ Such declaration shall be conclusive evidence that such land is required for a public purpose.

Survey and plan of land (Section 06)

When a declaration under s. 5 that a particular land is required for public purpose has been published, the acquiring officer may–

- if there is no plan of that land made by Survey Department or
- if there is no plan suitable for the purpose of the proceedings

cause a survey and a plan of that land to be made by a Surveyor of that department or a licensed surveyor acting under the directions of the Surveyor General.

Notice to persons interested in land (Section 07)

(1) The acquiring officer will;

- publish a notice in the gazette in all 3 languages and
- where in his opinion the value of the land exceeds Rs. 500/= notice must be published in newspapers one of each language and
- display the notice in all 3 languages in a conspicuous place on or near the land.

(2) The notice must;

- a) describe the land intended to be acquired
- b) state that the land will be acquired under the Land Acquisition Ordinance and that claims for compensation must be made to the acquiring officer mentioned in the notice and
- c) direct every person interested in the land to appear before the acquiring officer personally or through an agent on a date, time and place specified in the notice (date should be at least 21 days after the exhibition of the notice) and notify the acquiring officer in writing (at least 7 days prior to date in notice) the
 - nature of his interest in the land
 - particulars of his claim for compensation
 - amount of compensation
 - details of computation of compensation

Inquiry into claims for compensation (Section 09)

(1) After a notice of acquisition is published, acquiring officer must hold an inquiry at the place where all interested parties are directed by the notice to meet.

Acquiring officer must inquire into

- a) The market value of the land
- b) The claims for compensation that have been brought to his notice
- c) Interests of each person claiming compensation
- d) Other matters that need to be investigated before awarding compensation

(2) Acquiring officer conducting the inquiry is empowered to issue summons to any person to produce any documents or give evidence for the purpose of determining the above matters.

Reference for claims and disputes to court for determination (Section 10)

- (1) Once an inquiry held under section 9 is concluded, the acquiring officer holding the inquiry shall either-
 - make a decision on every claim made in or over the land which is to be acquired and on every such dispute which may arise and give notice of his decision to parties to the dispute, or
 - refer the claim or dispute for determination to the District Court or the Magistrate's Court having jurisdiction.
- (2) Any person who is dissatisfied with the findings of the acquiring officer may within 14 days of the service of the notice of the decision, make application to the Acquiring Officer for the reference of the claim or dispute.
 - Every such reference made by the aggrieved party should be referred to the District Court having jurisdiction on the matter for further determination.

Award of the acquiring officer (Section 17)

- (1) Once the inquiry is concluded under section 09 or a decision is made under section 10, the Acquiring Officer has to make an award under his hand determining:
 - a) the persons who are entitled to compensation
 - b) the nature of the interests that each person has on the land to be acquired
 - c) the total amount of the claims for compensation for the acquisition of the land
 - d) the amount of the compensation which in his opinion should (in accordance with the provisions of Part VI of this Act) be allowed for such acquisition; and
 - e) the apportionment of the compensation among those persons.

CALCULATION OF COMPENSATION

- (1) Part VI of the Act deals with calculation of compensation.
- (2) The amount of compensation to be paid under this Act for the acquisition of that land is based on the **market value** of that land. (Section 46)
- (3) The term " market value is defined in section 45 as the amount which the land might be expected to have realized if sold by a willing seller in the open market as a separate entity on the date of publication of the notice (Section 07) in the Gazette.
- (4) According to Section 46 ,additional compensation is awarded where -
 - a) Damage sustained by reason of severance of the land from his other land,
 - b) Damage sustained to adjoining land of claimant or immovable property on adjoining land as a result of acquisition.
- ★ **The maximum amount of compensation that can be claimed under the above two heads extends to only 20% of the market value of the land**
- c) Damage sustained by loss of business carried out on the acquired land
- ★ **The amount of compensation shall not exceed three times the average annual net profits from the business, for the three calendar years immediately preceding the date on which the notice was published in gazette.**
- d) Reasonable expenses have been incurred as a result of change of residence necessarily caused by acquisition

Matters to be ignored when assessing compensation (Section 48)

- a) Degree of urgency which has led to the acquisition of land
- b) Claimant's disinclination to part with the land
- c) Damage sustained by claimant which if caused by a private person would not give rise to a suit
- d) Damage which is likely to be caused by or in consequence of the use to which the land is put after its acquisition. (*Ex:- If the land is acquired for a chemical factory*)
- e) Any Increase which is likely to occur in market value of land as a reason of the use to which it is put after its
- f) Any Outlay or improvement made or commenced on the land after notice of acquisition was exhibited under section 04.
- g) The special suitability or adaptability of the land for which it is acquired for. (*Ex: Land near the Katunayaka airport*)
- h) The amount of any such increase in the market value of the land which has been restrained by any Court or is contrary to law or is detrimental to the public health.

Deduction (Section 47)

- (1) According to section 47 if only a part of the land is acquired and the market value of the balance portion increases due to the acquisition, an amount up to 20% of compensation can be deducted.

4. RENT ACT NO 07 OF 1972

Rent legislation in Sri Lanka dates back to the 1940s. Initially, the relationship between landlord and tenant was governed by Roman Dutch Law. However, Roman Dutch Law was found to be inadequate for addressing housing issues created by industrialization. In 1942, the Rent Restriction Ordinance was enacted and several amendments were subsequently brought in. The Rent Act No. 7 of 1972 ushered in a socialist approach which did not favour private ownership.

Exempted Premises (Section 2(4))

According to section 2(4) the rent act does not apply to the following premises;

(1) Exempted premises which are referred to in the schedule of the Act **(s.2(4)(a))**

- a) Any premises (residential or business) of which the landlord is a local authority
- b) Any premises (residential or business) of which the landlord is the Commissioner for National Housing
- c) Any business premises which has an annual assessment value as at 01/01/1968 which is higher than the values given in the table on its area.

According to the regulations the annual assessment value (AAV) that needs to be considered is the

- AAV in force on the first day of January 1968 or
- Where the assessment of the annual value of such premises is made for the first time after the first day of January 1968, the annual value as specified in such assessment.

AREA	ANNUAL VALUE (Rs.)
Municipality of Colombo	6000
Any other Municipality	4000
Urban Councils	2000
Town Councils	1000

- d) Any business premises which is not situated within Municipal Council or Town Council area shall be exempted –
 - If on the date of commencement of this Act such premises were let at a rent exceeding Rs. 1500 per annum or
 - Where such premises were not let on that date, of they were first let thereafter at a rent exceeding Rs.1500 per annum.

However, the Rent Board may on application of the tenant, declare that any premises referred in the preceding provision are not exempted premises, if the board is satisfied that the fair rental value of the premises is not more than Rs. 1500 per annum.

- (2) Any residential premises constructed after January 1, 1980 and let on or after that date. **(s.2(4)(b))**
- (3) Any residential premises occupied by the owner on January 1, 1980 and let on or after that date. **(s.2(4)(c))**
- (4) A residential premises in the occupation of –
 - A person who has been issued with a valid visa and whose total income exceeds one thousand rupees per month or
 - A non- resident company **(s.2(4)(d))**

Grounds of ejectment

Unlike in Common Law, a landlord cannot eject his tenants as he wishes, under the Rent Act. **Section 22** specifies the grounds on which a tenant can be ejected. **Section 22(1)** deals with premises that have a **monthly rent less than Rs. 100** and **Section 22(2)** deals with premises that have a **monthly rent more than Rs.100**.

- (1) **Sec 22 (1)** -A landlord can evict a tenant -
 - Where rent is in arrears for 3 months or more (**s.22(1)(a)**)
 - Where the rent is in arrears for one month after it has become due (**s.22(2)(a)**)
- (2) Where the premises are reasonably required (**s.22(1)(b)**) & (**s.22(2)(b)**)
 - For occupation as a resident for the landlord or any member of the family of the landlord or
 - For the purpose of the trade, business, vocation or employment of the landlord
- (3) Where such premises were let to the tenant for use as a residence by reason of his being in the service or employment of the landlord and the tenant has ceased to be in such service or employment. (**s.22(1)(c)**) & (**s.22(2)(c)**)
- (4) Where the tenant or any person residing with him or his sub tenant has, in the opinion of the court, been guilty of conduct which is
 - a nuisance to adjoining occupiers or
 - convicted for using the premises for any immoral or illegal purposes or
 - the condition of the premises has deteriorated as a result of negligence or default of such person. (**s.22(1)(d)**) & (**s.22(2)(d)**)

By the amendment made to the consolidated Rent Act in 2002 (Act No 26 of 2002), three new grounds for ejectment was introduced.

- (5) Where structural alterations has been made to the premises by the tenant without prior approval in writing of the landlord and relevant local authority. (**s.22(1)(e)**) & (**s.22(2)(e)**)
- (6) Where the character of the premises has been changed by the tenant partly or wholly (from residential to business or vice versa) without obtaining the prior approval in writing, of the landlord. (**s.22(1)(f)**) & (**s.22(2)(f)**)
- (7) Where the premises is required for redevelopment. As a pre requisite the landlord must fulfill the following requirements;
 - A sum equivalent to ten years annual vale of such premises or
 - Twenty per centum of the market value of such premises or
 - Rupees one hundred and fifty thousand

Whichever is higher has to be deposited by the landlord with the Commissioner for National Housing for payment to tenant as compensation. (**s.22 (1) (g)**) & (**s.22 (2) (g)**)

Apart from the grounds enshrined in section 22 of the Act, there are other grounds on which a landlord can eject a tenant from the premises, under the Rent Act.

- (8) **Section 10(5)** - where the tenant has sub-let such premises or any part of it without prior consent in writing of the landlord, the landlord is entitled to a decree of ejectment regardless of sec 22. He may obtain decree from competent court against the tenant and sub-tenant.

Section 28- Where the tenant has failed to occupy the premises without reasonable cause for a continuous period of not less than 6 months, he will be deemed as a non-occupying tenant. Hence loses the protection of the Rent Act.

Demolishing of premises for redevelopment (Section 18A)

(1) The Commissioner of Housing may -

- Upon application made by the owner of any building used for business or residential purposes and constructed for least 40 years prior to the date of application,
 - After affording the occupants of such building an opportunity of being heard
- make an order authorizing the owner to demolish such building if the Commissioner is satisfied that the re-development of the land is needed for efficient utilization of the land.

(2) Where the Commissioner makes an order authorizing the owner of the building to demolish such building, the Commissioner shall -

- Specify the number of residential or business units to be constructed on the land on which the demolished building stood and
 - Order the owner to provide alternate accommodation for the tenant in the same vicinity OR alternatively a sum equivalent to 2 years rent to the tenant to enable him to arrange alternate accommodation, until the construction is completed or
 - pay compensation as the commissioner thinks reasonable.
 - ✓ A sum equivalent to ten years annual value of such premises or
 - ✓ Twenty per centum of the market value of such premises or
 - ✓ Rupees one hundred and fifty thousand
- Whichever is higher will be paid as compensation

Subletting (Section 10)

(1) Exclusive occupation in whole or part of the premises in consideration of payment of rent, in a defined and distinct part of by a third party is known as subletting.

(2) According to section 10(2), subletting is allowed with the prior written consent of the landlord. When the premises are sublet the Rent Board has to decide the proportionate rent of such part of the premises.

(3) Section 10(5) states that where the tenant has sub-let such premises or any part of it without prior consent in writing of the landlord, the landlord is entitled to a decree of ejectment regardless of sec 22.

He may obtain decree from competent court against the tenant and sub-tenant.

In *Wimalasuriya v Ponnaiyah*, it was held that no quit notice is required in the case of an unauthorized sub tenant.

(4) Section 10(6) states where the tenant who had sublet such premises or any part of it receives an amount exceeding the authorized rent or any amount the board has fixed as the proportionate rent or any premium, commission, gratuity or like payments, such tenant shall be guilty of an offence and the landlord is entitled to a decree for the ejectment of such tenant from the premises.

(5) Where any premises are sublet by a tenant, the tenant shall in relation to the subtenant or each of the subtenants be deemed to be the landlord of the premises for all purposes of the Act.

RENT BOARD

Constitution of the Rent Board (Section 38)

- (1) The Minister can establish Rent Boards for the areas in which the act is in operation.
- (2) The Board shall consists of the 5 members; -
 - a) four members are appointed by the Minister (who are not members of Municipal Councils ,Town Councils or Urban Councils), out of which at least two members has to be tenants of residential premises
 - b) the Chief Valuer . However, in the any boars in the Municipality of Colombo, the Municipal Assessor shall be a member in lieu of the Chief Valuer.

The Minister shall nominate one of the members appointed by him to be the Chairman of the board.

- (3) At any meeting of the board three members shall constitute a quorum.

Powers of the Rent Board

- (1) Where the landlord of any premises refuses to give a certificate of tenancy, the board shall upon application made to it by the tenant, give a certificate of tenancy relation to such premises in the prescribed form **(s.35(2))**
- (2) The board may, upon application made to it by the tenant or the landlord of any such premises, determine the amount of authorized rent of the premises **(s.34)**
- (3) The board shall have the power to determine a successor, upon the death of the tenant **(s.36)**
- (4) The rent board shall prepare, keep and maintain up-to-date Rent Register in respect of each premises situated within its areas of jurisdiction and for that purpose the board may require the landlord or tenant of premises to furnish such information and particulars as it may deem necessary. **(s.37)**
- (5) Where the board is satisfied that the landlord has without reasonable cause discontinued or withheld any amenities previously provided or has failed to carry out repairs, the board may make an order directing the landlord to provide such amenities or to carry out such repairs. **(s.13(1))**
- (6) Authorize the landlord to carry out such improvements, repairs or structural alterations to the premises, where the tenant refuses to give consent **(s.5(1)(b))**

BOARD OF REVIEW (Section 40)

- (1) Any person aggrieved by any order made by any Rent Board may appeal against the order to the Board of Review.

- (2) Board of Review consists of not more than seven members appointed by the Minister. Such members shall be person who hold or have held judicial office or are attorneys-at-law.

Continuance of tenancy upon death of tenant (Section 36)

- (1) Section 36 of the original Act, which has been amended by Act No 26 of 2002 specifies as follows ;

Upon the death of the tenant of any premises-

- a) Any person who in the case of a residential premises is the
 - ✓ surviving spouse or child or
 - ✓ parent or
 - ✓ unmarried brother or sister of the deceased tenant if he was unmarried at the time of death, and was a member of the household of the deceased tenant during the whole of the period of six months immediately preceding his death, and
- b) In the case of business premises , is the surviving spouse or child of the deceased tenant, where such spouse or child carries on in such premises the business carried on by the deceased tenant

shall be deemed for the purpose of this Act, to be the tenant of the premises.

- (2) However, none of the persons listed above shall be deemed to be the tenant of the premises of the deceased tenant, if such person –
- a) Was the owner of any such premises on the date of the death of the deceased tenant or
 - b) Is not the surviving spouse, child, parent, brother or sister of the original tenant.

DETERMINATION OF RENT

Standard Rent (Section 04)

- (1) Standard Rent is the aggregate of the annual assessment value (valuation as at 01/01/1969) and the amount of rates paid annually to the local authority.
- (2) If the annual assessment value is less than the relevant amount, the annual rent equals the annual assessment value
- (3) If the annual assessment value is more than the relevant amount, the annual rent equals the relevant amount.
- (4) The term “**relevant amount**” is defined in **section 48**.

	Relevant amount in relation to residential premises	Relevant amount in relation to business premises
Municipality of Colombo	2000	8000
Any other Municipality	1500	4000
Urban Council	1000	2000
Town Council	500	1000

Permitted Increases (Section 05)

- (1) Section 05 states that where the landlord has incurred expenditure on the improvement, repair or structural alterations of the premises-
- with the prior consent of the tenant or
 - in any case where the tenant has withheld his consent, with the prior approval of the Board

the standard rent of such premises may be increased for a period of five years by 25% each year of the amount of the expenditure so incurred.

Authorized Rent (Section 06)

- (1) For the purpose of this Act, the authorized rent of any premises shall be the aggregate of the standard rent of the premises determined under section 04 and any increase of rent permitted by section 05.

STANDARD RENT (S. 04)	+	PERMITTED INCREASES (S.05)	=	AUTHORIZED RENT
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- (2) Section 03 of the Act states that it shall not be lawful for the landlord to demand rent in excess of the authorized rent and for the tenant to pay or offer any amount of rent in excess of the authorized rent of such premises.

5. LAND REFORM LAW NO 1 OF 1972

The Land Reform Law was enacted in 1972 in keeping with the socialist policies of the Government at the time. The main intention of this law was to break the monopoly in the ownership of land and to distribute land among the citizens in a more equitable manner.

Purposes of this Law (Section 02)

The purpose of this Law is to establish a Land Reform Commission with the following objects:

- a) to ensure that no person shall own agricultural land in excess of the ceiling; and
- b) to take over agricultural land owned by any person in excess of the ceiling and to utilize such land in a manner which will result in an increase in its productivity and in the employment generated from such land.

Ceiling on agricultural land (Section 03)

- (1) The maximum extent of agricultural land which may be owned by any person, (in this law referred to as the “**ceiling**”) shall;
 - a) If such land consists exclusively of paddy land – **25 acres**
 - b) If such land does not consist exclusively of paddy land – **50 acres** (so that total extent of paddy land within this land, if any, shall not exceed the ceiling on paddy land)
- (2) Any agricultural land owned by any person in excess of the ceiling on the date of commencement of this law shall as from that date;
 - a) be deemed to vest in the commission
 - b) be deemed to be held by such person under a statutory lease from the commission. **(s.3(2))**
- (3) In the computation of the acreage of agricultural land for the purpose of applying the ceiling, the following areas situated within the land shall not be taken into account;
 - a) $\frac{1}{2}$ acre surrounding the residence of the owner of land
 - b) any garden surrounding staff quarters or labour lines on such land, not exceeding $\frac{1}{8}$ acre for every family resident in such quarters or lines
 - c) area not exceeding $\frac{1}{2}$ acre set apart for a family burial ground **(s.3(3))**
- (4) **Section 3(4)** enacts that -
 - a) where any land is subject to a mortgage, lease, usufruct life interest, the mortgagor, lessor or the person in whom the title to the land subject to the usufruct or life interest is, or
 - b) where any land is held on a permit or a grant issued under the Land Development Ordinance, the permit holder or the alienee on such grant;
 - c) where such any land is owned by a trustee under a private trust for the benefit of any other person, the private trust;
 shall be deemed to be the owner of such land, for the purpose of this Act.

Where a person become owners of agricultural land in excess of the ceiling (Section 05)

- 1) Where any person becomes the owner of agricultural land in excess of the ceiling, the land owned in excess of the ceiling shall as from that date
 - ✓ Be deemed to vest in the Commission and
 - ✓ Be deemed to be held by that person under a statutory lease from the commission

- 2) Where any person become the owner of land in excess of the ceiling by reason of marriage or inheritance or both, such person may transfer within a period of two years such excess extent of land to any person by sale or otherwise.

INTRTPRETATION (Section 66)

“Agricultural land” means

- land used or capable of being used for agriculture
- including private lands, lands alienated under the Land Development Ordinance or the State Lands Ordinance or any other enactment and
- includes also things attached to the earth or permanently fastened to anything attached to the earth BUT shall exclude -
 - a) any cultivated agricultural land owned or possessed by a public company
 - b) any such land which was viharagam or devalagam land
 - c) any such land which was owned or possessed by a religious institution
 - d) any such land which constitutes -
 - ✓ a charitable trust as defined in the Trusts Ordinance or
 - ✓ a Muslim charitable trust or wakf as defined in the Muslim Mosques and Charitable Trusts or Wakfs Act
 - e) any such land held in trust under the Buddhist Temporalities Ordinance

“Agriculture” includes -

- the growing of rice, all field crops, spices and condiments, industrial crops, vegetables, fruits, flowers, pasture and fodder;
- dairy farming, livestock-rearing and breeding;
- plant and fruit nurseries

“Person” means-

- a) A family-
 - i. consisting of the surviving spouses or spouse and any surviving child or children under the age of eighteen years; or
 - ii. if there are no surviving spouses, any surviving child or children under the age of eighteen years; or
- b) any individual who is eighteen years of age or over; or
- bb) a private trust; or
- d) any other person within the meaning of the Interpretation Ordinance not being any such family or individual

Purposes for which estate lands vested in the Commission may be used (Section 42H)

- ✓ Alienation by way of sale, exchange, rent or lease to a person for agricultural development or animal husbandry or for a cooperative or collective farm.
- ✓ Alienation by way of sale or lease with the approval of the Minister for non-agricultural purposes.
- ✓ Alienation by way of sale in individual allotments for the construction of residential houses
- ✓ Alienation to any corporation established under the State Agricultural Corporations Act or Sri Lanka State Plantations Corporations Act.
- ✓ For a farm or Plantation managed by the commission or by its agent.
- ✓ For village expansion or any other public purpose.

LAND REFORMS COMMISSION

- 1) PART IV of the statute contains provisions regarding the establishment, constitution, powers and functions of the Land Reform Commission.
- 2) As per Section 43, the Land Reform Commission was established as a body corporate with the right to sue and to be sued in such name and has perpetual succession.
- 3) Composition of the commission is enshrined in Section 45. The Commission consists of the following members ;
 1. A chairman appointed by the Minister
 2. 5 other members appointed by the Minister
 - 2 members with wide experience in administration of land or in surveying or in law
 - Public officer nominated by the Finance Minister
 - Public officer nominated by the Minister of Plantation Industry
 - Public officer nominated by the Minister of Planning.
 3. 3 ex-officio members who shall be
 - ✓ The Land Commissioner
 - ✓ The Commissioner of Agrarian Services
 - ✓ The Director of Agriculture

6. PARTITION LAW NO 21 of 1977

Initially, it was the Roman Dutch Partition Law that was applicable in Sri Lanka. The origin of the legislative enactment governing partition in Sri Lanka dates back to 1863. Under British rule, Partition Ordinance No. 10 of 1863 was enacted. It was repealed by Partition Act No. 16 of 1951. The Law relating to partition is presently governed by provisions of Partition Law No. 21 of 1977

1. Partition Action is an action to obtain relief against the purported inconvenience of common property.
2. This applies for co-owned property, generally created through intestate succession or alienation of undivided property.
3. There are 3 ways of terminate co-owned property
 - ✓ By selling entire property to single person by consent of all co-owners
 - ✓ Amicable partition – all co-owners agreed to divide land by a plan
 - ✓ By way of partition decree entered by a competent court
4. Partition of land in the country entirely governed by the Partition Law No 21 of 1977
5. **Section 83 -"partition action"** means
 - an action instituted under the Partition law for the partition or sale of
 - any land or lands belonging in common to two or more owners
 - and includes any action, proceeding or other matter continued under section 82.
6. Partition law is both substantive and procedural. The provisions of the Civil Procedure Code will not apply to partition actions, unless specifically provided. In *Samarakoon v Punchi Banda* and *Dingirihamy v Appuahmy*, it was expressed that partition actions are a unique type of civil action for which the Civil Procedure Code does not apply.
7. The statute is drafted in such a way to notify everyone who is interested about the property that a case is pending. Because Partition decrees are in rem, which means that not only the parties to the action, but the entire world is bound by such decree.

Institution of Partition Action (Section 02)

- where any land belongs in common to two or more owners,
- any one or more of them
- may institute an action for the partition or sale of the land in accordance with the provisions of the PL.

Thus any co-owner/s entitled to institute an action for the partition or sale of the land.

Appropriate Court (Section 03)

- (1) Every partition action shall be instituted by
 - presenting a written plaint
 - to the District Court, within the local limits of whose jurisdiction the land which is the subject-matter of the action is situated in whole or in part.
- (2) Where there is an uncertainty as to the jurisdiction (where two or more Courts are situated in the area where the land is situated), any one of those courts may, if satisfied

that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any partition action relating to the land.

- (3) Such action so entertained and disposed of shall for all purposes be deemed to be duly instituted in a court of competent jurisdiction.

Requisites of a plaint (Section 04)

- (1) In addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented in a partition action shall contain the following particulars:-

- ✓ the name (if any) and the extent and value of the land to which the action relates
- ✓ a description of that land by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint
- ✓ the names and addresses of all persons who are entitled or claim to be entitled to any right, share, or interest to or in that land or
 - to any improvements made or effected on or to that land and
 - the nature and extent of any as such particulars are known to the plaintiff or can be ascertained by him and
- ✓ a statement setting out, with reference to a pedigree the devolution of the title of the plaintiff and where possible, the devolution of the title of every other person disclosed in the plaint
- ✓ A memorandum nominating a person to be the legal representative of the plaintiff for the purpose of the action, in the event of his death before the final judgment should be appended to the plaint.

Necessary Parties (Section 05)

The plaintiff in a partition action shall include in his plaint as parties to the action-

- ✓ all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled:-
 - a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise, or
 - b) to any improvements made or effected on or to the land

Registration of Lis pendens (Section 06)

- 1) The first step of a partition action is the registration of the action as a lis pendens.
- 2) Plaintiff shall file or cause to file an application with the plaint for registration of the action as a lis pendens -
 - addressed to the Registrar of Land of that district land situated or,
 - Whether land situated in two or more districts, separate application for registration of action as a lis pendens addressed to the Registrar of Lands of each district.
- 3) Such an application shall,
 - ✓ Be in triplicate, marked as 'original', 'duplicate', 'triplicate'
 - ✓ Be in the form prescribed by Registration of Documents Ordinance
 - ✓ Contain blank space to insert action number assigned by court
 - ✓ Not charge any fee, notwithstanding anything contrary in Registration of Documents Ordinance

- 4) One copy shall be retained by the Land Registry, 2nd will be sent to the court with certificate of Registrar of Lands and 3rd copy will be sent to the Registered Attorney of Plaintiff.
- 5) In the case of *Dharmarathna Thero v Siyadoris 1945 2 NLR*, it was held that the failure to duly register the lis pendens invalidate the entire procedure of action

Failure to comply with provisions of sections 4, 5 and 6 (Section 07)

Where the plaintiff fails to comply with sections 4, 5 or 6 Court may -

- ✓ return the plaint so that plaintiff can comply with the requirements within the time set by court or
- ✓ reject the plaint

Sale, Lease, Mortgage is void – (Section 66)

- 1) After partition action is duly registered as a lis pendens under RDO,
 - No voluntary alienation, lease, hypothecation of any undivided share, interest of land shall be made or effected until final determination by dismissal or final decree of partition or certificate of sale.
- 2) Any such voluntary alienation, lease, hypothecation shall be void.
 - Provided that if dismissed the Partition Action they deemed to be valid.
- 3) Any assignment after institution of partition action, of a lease or hypothecation effected prior to the registration of partition action as a lis pendens shall not be affected by sub section (1) and (2).
- 4) In the case of *Viran Appu v. Ariyaratna 70 NLR 552*, it was held -
 - Any such sale, alienation is not void, but subject to the portion of land that the transferor will be entitled.
 - Pending partition transfers are not illegal.

Procedure on acceptance of the plaint (Section 08)

When court accepts the plaint, court shall forthwith immediately,

- ✓ Insert the assigned case number to each copy of application for registration as lis pendens and to the plaint
- ✓ Transmit the application in triplicate to relevant Land Registry or Registries to register as lis pendens, within two weeks from the date accept the plaint
- ✓ Fixed a date, being a date not later than 7 weeks from the date of acceptance of plaint, for the return of registered lis pendens, by Registrar of Land (the court can in its opinion, as the circumstances require, extend such date)
- ✓ Fixed a date not later than 7 weeks, from the date of acceptance of plaint, on or before which the plaintiff shall deposit in court such estimated cost of preliminary survey of land as determined by the court.

Failure to deposit estimated cost of preliminary survey (Section 09)

Where the plaintiff fails to deposit the estimated cost of preliminary survey before the date fixed, Court may dismiss the action.

Returnable of Lis pendens by the Registrar of Land (Section 11)

Registrar of Land upon registration of lis pendens, shall return the triplicate of duly endorsed application on or before fixed date to the court, and shall cause a copy to be sent by registered post to the Registered Attorney of Plaintiff, if not to the plaintiff.

Declaration by attorney-at-law and papers to be filed with such declaration (Section 12)

- 1) After lis pendens is duly registered under RDO and returned Section 11, Plaintiff shall file declaration under hand of an Attorney-at-Law
 - Certifying that all such entries (folios) of the subject land have been personally inspected by such Attorney-at-Law after registration of action as lis pendens and
 - Containing statement of the name of every person found in those entries to be a person whom the plaintiff is required to include in plaint under section 5 as a party and if address of such person is registered, that address also.
- 2) Plaintiff shall file or caused to be filed, together with the declaration following-
 - ✓ If the declaration discloses any person not mentioned in the plaint as a party, but who should made as a party under section 5, an amended plaint including them as party. It shall be deemed to be the plaint for all purposes.
 - ✓ Many summons as equivalent to the number of defendants according to the form in the Second Schedule, and containing the name and address of the defendant on who, that summon is to be served
 - ✓ If language of any defendant is not the language of court, a translation of the summons in that language
 - ✓ Many copies of the plaint as is equivalent to the number of defendants, with translation thereof in the language of the defendant whose language is not the language of the court or
 - ✓ With leave of court, if appears to the court that compliance with this involve excessive expense, a concise statement of relevant paragraph of the plaint, with translation of as above.
 - ✓ One copy of the plaint, certified by the registered attorney as a true copy, to be attached to the commission issued to the surveyor who is to make the preliminary survey of subject land
 - ✓ Many copies of notice in the form prescribed in the Second Schedule with translation in the language of any defendant whose language is not the language of court,
 - ✓ Transmission of one copy of such notice and translation to the Gramaseva Niladari of the division in which the subject land is situated.
 - ✓ A percept to the fiscal (notice to 'tom tom beating')
- 3) If plaintiff fails to comply with this provision without sufficient cause, court may dismiss the action

Issue of Summons (Section 13)

Where court is satisfied that partition action has been registered as lis pendens under RDO and preliminary survey cost has been deposited in court by Plaintiff, court will order to issue summons to defendants with a copy of plaint

Section 14 – the provisions of Civil Procedure Code shall apply to service of summons

Public Notice of Institutions of Partition Action – (Section 15)

- 1) Court shall order a copy of notice and each translation be send to the Gramaseva Niladari of each division which land is situated, by registered post.
- 2) Gramaseva Niladari shall cause such copies of notice and translation to be exhibited in a conspicuous place of his office for period not less than 30 days and sent a report to court about that fact.
- 3) The fiscal shall cause, a copy of notice transmitted to him under section 13(1)-
 - to be exhibited in a conspicuous position on the land or each of the lands to which notice relates and
 - content of such notice to be orally proclaimed by tom-tom beating on such land and public place in the neighborhood of such land or village.
- 4) The cost can be recoverable 'pro-rata' by plaintiff.
- 5) Public notice requires because partition decrees are in rem.

Commission to Preliminary Survey – (Section 16)

- 1) Court will issue a commission to one of panel surveyors with the copy of the plaint, which is certified by the plaintiff's lawyer, directing him to survey the land to which the action relates and to make due return to his commission

Section 17

- 1) On receipt of his commission, the surveyor has to fix a date for the commencement of the survey and issue notice to all parties named in the plaint by registered post informing them the date on which the Commissioner proposes to commence the survey. Such notice is required to be given at least 14 days prior to the proposed survey.
- 2) After such notices are being sent, he has to be conducted the survey on the date and time fixed.

Return to Surveyors Commission – (Section 18)

- 1) After duly execute the commission, surveyor shall transmit to court,
 - A report in duplicate, verified by affidavit stating,
 - ✓ Dates on which notice of survey was issued to parties
 - ✓ Nature of land building, wells, trees, improvement, fence
 - ✓ Names, addresses of parties presents, persons who pointed out land to survey
 - ✓ Existing means of access for land, nearest public road
 - ✓ A plan in duplicate, verified by affidavit showing-
 - a. Boundaries of division of land subsisting at the time (as shown by parties) of his survey, indicating by appropriate letters, numerals
 - b. Boundary belonging to state
 - c. Location of building, walls, wells indicated by letters, numerals
 - d. Trace or course of road, path, stream
 - e. Any other physical feature
 - ✓ Certified copy of his field notes
 - ✓ Acknowledge of receipt of notice, remaining copies and translation of notices
- 2) If any party is not satisfied with the preliminary plan and report, he can ask for an alternate commission. Such alternate commission shall be sent to the same surveyor who did the initial survey, if not further satisfied, 3rd and final commission will be issued to the Surveyor General.

- 3) There can be only one Preliminary Plan, whether 1st, 2nd accepted by parties or the 3rd prepared by Surveyor General.

Statement of Claim – (Section 19)

- 1) Once summons being served, Preliminary Plan is done, defendant has to file statement of claim setting out the nature and extent of his right, share or interest in the land.
- 2) In addition parties who have not originally named as defendants, who claim their rights before the commissioner will be added as defendants and will entitle to file the statement of claim.
- 3) After the statement of claims is filed, trial commences.

List of Documents (Section 23)

- 1) List of documents on which the parties relies to prove their rights, share or interest in the land, together with an abstract of the content of such documents has to be filed within 30 days prior to the trial date.
- 2) An issue arose whether it is 30 days prior to first trial date or any trial. In the case of **Pushpa v Leelarathna (2004) 2 SLR 162** it was held that list of documents has to be filed within 30 days prior to any trial date.
- 3) **“Documents”** shall mean deeds, survey plans or other writings upon which any claim of title is based.

Interlocutory Decree – (Section 26)

- 1) At the conclusion of trial, judgment is pronounced in open court. As soon as the judgment is pronounced, court shall enter an Interlocutory Decree in accordance with finding in the judgment and it shall be signed by the judge.
- 2) Interlocutory Decree may include one or more of following orders; they are in consistence with one another-
 - ✓ Order for partition of the land
 - ✓ Order for a sale of the land in whole or in lots
 - ✓ Order for a sale of a share or portion of the land and partition of the remainder
 - ✓ Order that any portion of the land representing the share of any particular party, only shall be demarcated and separated from the remainder of the land
 - ✓ Order that specific portion of the land shall continue to belong in common to specified parties or to a group of parties
 - ✓ Order that any specified portion of the land sought to be partitioned or surveyed be excluded from the scope of the action
 - ✓ Order that any share remain un-allotted
- 3) In *Hewawitharana v Themis De Silva*, Thambiah J. held -
 - Section 26(2) does not exhaust the power of court
 - Since ‘may include’ court can order to dismiss the action also
- 4) After Interlocutory Decree is being entered a commission will be issued to the surveyor who prepared the Preliminary Plan to divide the land into lots or cells.

- 5) The commissioner shall taking into consideration the Interlocutory Decree with any special directions in judgment; demarcate such divided portion of land by permanent physical markings on the land.
- 6) After preparation of Final Plan it will be resent to court for consideration.
- 7) If any party not satisfied with the scheme of portion can challenge it by way of petition and affidavit and the District Judge shall hold an inquiry into that effect.

Final decree of partition – (Section 36)

On the date fixed under section 35 for consideration of scheme of partition or on any other later date the Court may after summary inquiry confirm the scheme with or without modification or reject Final Plan and order a fresh Final Plan, and enter final decree of partition accordingly.

Appeal – (Section 36A)

Any person dissatisfied with an order of court may appeal against such order to Civil Appellate High Court with leave to appeal

- After final decree is entered referring to Final Plan, it will be duly registered in the relevant folios of the Land Registry.
- Finally court will order to cancel the lis pendens which will be the last step of a Partition Action.

Finality of Decree – (Section 48)

Save as provided in sub section 5,

- Interlocutory Decree entered under section 26 and Final Decree entered under section 36,
- subject to decision in Appeal, *be good and sufficient evidence of title* any person has to right, share, interest awarded therein to him,
- and be ***final and conclusive*** for all purposes against all persons, whomsoever, whatever right, title or interest they have or claim to have to or in the land decree relates.
- And, *notwithstanding any omission or defect* of procedure or in any proof of title adduced before court or the fact that all persons concerned are not parties to the action,
- And, the right, share or interest awarded by any such decree shall be *free from all encumbrances* whatsoever other than those specified in decree.
- '*Omission, Defect*' include serve summons, substitute of heirs, appoint guardian ad idem etc.
- '*Encumbrances*' includes any mortgage, lease, usufruct, servitude, trust etc.

Section 48(5)

- Final Decree shall not have final and conclusive effect-
 - as against persons who not having been party to action, claim right, title, interest,
 - but only if, he proves that decree has been entered by a court without competent jurisdiction.
- Any party dissatisfied with decree cannot challenge in the same court. In the case of *Somawathie v. Madawala* – Supreme Court held that a party deprived by such decree can challenge it by way of revision application in the Court of Appeal
- *Nilakutti v Alvar*

- **Instances where a Partition Action can be Dismissed**
 - 1) Section 7 – Failure to comply with sections 4, 5, and 6. Courts shall return the plaint to comply within the time period specified or reject the plaint.
 - ✓ Section 4 – Failure to comply with requisites of plaint
 - ✓ Section 5 – Failure to cite necessary parties as best of plaintiff's knowledge
 - ✓ Section 6 – Failure to duly register the lis pendens

Dharmaratha Thero v Siyadoris – Failure to duly register the lis pendens invalidate the entire process
 - 2) Section 9 – Failure to deposit estimated cost for the preliminary survey
 - ✓ Fixed date not later than 7 weeks from the date of acceptance of plaint
 - 3) Section 12– Failure to comply without sufficient cause to fill required papers together with declaration by Attorney-at-Law
 - Disclose all names founded in folio entries
 - Many summons, copies of plaint as to number of defendants
 - Certified copy by Registered Attorney to be sent to surveyor
 - Copy of notice, translation, and percept to the fiscal

7. DEBT RECOVERY (SPECIAL PROVISIONS)

ACT NO 22 OF 1990

The long title of the act declares that the object of the act is to provide for the regulation or the procedure relating to debt recovery by lending institutions (procedural law)

INTERPRETATION (SECTION 30)

“LENDING INSTITUTIONS”

Lending Institutions means -

- ✓ A licensed Commercial Bank within the meaning of the Banking Act No. 30 of 1988
- ✓ A State Mortgage and Investment Bank established by the State Mortgage and Investment Bank Act No.13 of 1975
- ✓ A National Development Bank established by the National Development Bank Act No.2 of 1979
- ✓ A National Savings Bank established by the National Development Bank Act No.30 of 1971
- ✓ A Development Finance Corporation of Ceylon established by the Development Finance Corporation of Ceylon Act
- ✓ A Company registered under the Finance Companies Act No.78 of 1988 to carry on finance business.

“DEBT”

Debt means -

- A sum of money which is ascertained or
- Capable of being ascertained at the time of the institution of the action
- And which is in default, whether the same to be secured or not or
- owned by any person or persons, jointly or severally or
- as a principal borrower or guarantor or in any other capacity,
- And alleged by a lending institution to have arisen from a transaction in the course of
- Banking, lending, financial or other allied business activities of that institution, but does not include
- A sum of money owed under a promise or agreement which is not in writing.

ACTION BY LENDING INSTITUTIONS FOR RECOVERY OF A DEBT (Section 02)

- 1) Section 2(1) states that a lending institution may institute an action to recover any debt in accordance with the procedure laid down in this act in the District Court, within whose local limits of jurisdiction -
 - ✓ the defendant resides or
 - ✓ the cause of action arises or
 - ✓ the contract sought to be enforced was made
- 2) No action shall be instituted by an institution in terms of this Act for the recovery of any debts, where the alleged sum in default is less than Rs.150,000/-
- 3) An action under this act shall be instituted by presenting a plaint in the form specified in the Civil Procedure Code. (section 03)

COPIES OF INSTRUMENT, AGREEMENT OR DOCUMENT SUED ON TO BE FILED (Section 04)

- 1) The court may order the following documents to be filed in court with the plaint instituting an action –
 - ✓ An affidavit to the effect that the sum claimed is lawfully due to the Institution from the defendant. The affidavit shall be made by any director or a principal officer of such Institution or an attorney-at-law duly authorized to bring and conduct the action on behalf of the Institution and affidavit shall be made by such person having personal knowledge of the facts of the cause of action
 - ✓ A draft decree nisi
 - ✓ The requisite stamps for the decree of nisi and for service thereof
 - ✓ Such number of copies of the plaint, affidavit, instrument, agreement or document sued upon or relied on by the institution as is equal to the number of defendants in the action
- 2) When these documents are filed in the District Court, the court will issue a decree nisi to be served on the defendant.
- 3) A decree nisi is a document where the court orders the defendant to show cause and give reasons why the decree nisi should not be made absolute.

SERVICE OF DECREE NISI (Section 05)

The decree nisi shall be ordinarily served on the defendant -

- a) By Registered post at the address given by the defendant to the institution
- b) Through the employer
- c) Through the Fiscal of the court (process officer)

If the court is satisfied that the decree nisi was properly served, the provisions of Section 06 will apply.

DEFENDANT NOT TO APPEAR OR SHOW CAUSE EXCEPT WITH LEAVE (Section 06)

- 1) Section 6(1) states that a defendant shall not appear and show cause against the decree unless he obtain leave to appear and show cause.
- 2) Section 6(2)

The defendant should file an application for leave to appear and show cause, supported by an affidavit which specifically deal with the plaintiff's claim and state clearly the defenses taken up to it and the facts relied upon for such defense.
- 3) The court after giving the defendant an opportunity of being heard, shall grant leave to appear and show cause either –
 - ✓ upon the defendant paying into court the sum mentioned in the decree nisi or
 - ✓ upon the defendant furnishing some security which appears to court to be reasonably sufficient to satisfy the sum mentioned in the decree nisi or
 - ✓ upon the court being satisfied on the contents of the affidavit filed that they have disclosed a defense which is prima facie sustainable
- 4) Section 6(3) states that where
 - ✓ the defendant fails to appear and show cause or
 - ✓ where his application to show cause was rejected

the court shall make the decree nisi absolute and endorse it.
- 1) Once it is made absolute, the court considers it as a Writ of Execution duly executed to the Fiscal, in terms of the Civil procedure Code (Section 13)
- 2) Any obstacle or resistance for the Fiscal in the execution of the writ shall be considered as Contempt of Court (Section 14)

- 3) As per Section 16, if the defendant is not satisfied with the order of court, he will have to file a leave to appeal application in the Civil Appellate High Court.
- 4) It is important to note that even when the leave is granted, the proceedings of the District Court will not be stayed, as in an ordinary leave to appeal action. For the proceedings of the lower court to be stayed a specific order needs to be obtained from the Civil Appellate High Court.
- 5) If the court finds that the plaintiff has filed the action without a sufficient cause, the court may award damages against the institution as per Section 11.
- 6) If there is no agreed interest rate between the parties, the Market Interest Rate at the time of instituting the action will apply.

CRIMINAL LIABILITY

- 1) Section 25 of the act creates Criminal Liability.
- 2) Accordingly, section 25 makes it an offence for a person
 - to draw cheques knowing that there is no sufficient funds in his account to honour such cheque or
 - to draw cheques and then countermand their payment so that the cheques will not be honoured.

Such person can be charged in the Magistrate Court.

- 3) Upon conviction he is liable to
 - ✓ an imprisonment for a period up to 1 year or
 - ✓ for a fine of either
 - Rs. 10,000/- (Ten Thousand Rupees) or
 - 10% of the cheque

whichever is higher.

- 4) When the interpretation section and the preamble of the statute are considered, the act only applies to lending institutions.
- 5) However, in the Supreme Court judgment in *The OIC, CID v. A.C. Soris (2005)*, majority of the judges decided that provisions of section 25 will not be confined to lending institutions. It can be used by individuals also.
- 6) Therefore, presently any person who is subjected to a returned cheque can file criminal action by way of a private plaint or through police, in the Magistrate Court in terms of section 25 of the Debt Recovery (Special Provisions) Act.

THE OIC, CID AND ANOTHER v A.C. SORIS

(Supreme Court)

Jayasinghe J, S Thilakawardane J and Udalagama J

- 1) The question which arose for determination in this case was whether an institution which is not a "lending institution" within the meaning of the Debt Recovery (Special Provisions) Act, cannot invoke the provisions of Section 25(1) of that act when a cheque is drawn by a party in violation of the provisions of that section.
- 2) The Petitioner-Respondent issued cheques to the value of Rs. 4.6 Million without sufficient funds to Udalalatha Multipurpose Co-operative Society. The said cheque

was issued by the accused as payment for the purchase of seed potatoes and the said cheque had been dishonoured.

- 3) The Respondent-Petitioner filed charges in terms of Section 25 of the Debt Recovery (Special Provisions) Act in the Magistrate's Court of Bandarawela. A preliminary objection was raised on behalf of the accused that the facts presented, does not warrant presenting a charge in terms of Section 25 of the Debt Recovery Act. The learned Magistrate overruled the objection and fixed the matter for trial.
- 4) Aggrieved by the said order the accused invoked the revisionary jurisdiction of the Provincial High Court to have the order set aside. The learned High Court Judge whilst refusing to issue notice, held that in terms of section 25(1)(a) of the Debt Recovery Act, it is an offence to draw a cheque without funds or without sufficient funds and that the "nature" of the person on whose favour it was drawn is immaterial for a prosecution under this section.
- 5) Aggrieved by the said order the accused invoked the revisionary jurisdiction of the Court of Appeal. The Court of Appeal held that Udalalatha MPCs does not fall within the interpretation of the meaning of "lending institution" and therefore has no relevance to prosecutions instituted in terms of the provisions of this act.
- 6) Aggrieved by this order, the Respondent - Petitioners filed special leave to appeal and leave was granted on two questions of law.
- 7) On behalf of the Respondent-Respondent-Petitioners it was submitted that Part 05 of the act constitutes criminal responsibility in respect of "any person" who knowingly draws up a cheque which is dishonoured by a bank for want of funds. Learned Deputy Solicitor General went on to submit that there was no link between part (1) to (4) and part (5) and that part (5) stands alone, and that the sole purpose of part (5) is to visit criminal liability on a person who knowingly draws a cheque which is dishonoured by a bank for want of funds.
- 8) With reference to Interpretation of Statutes by Bindra it was submitted that the construction of the statute cannot be limited by its title. The true nature of the law is to be determined not by the name given to it or by its form, but by its substance, where the language of the enactment is clear, its construction cannot be affected in any way by the consideration of the title of the act. Thus section 25 of the Act is clearly not ambiguous.
- 9) On behalf of the Accused-Petitioner-Respondent it was submitted that section 25 applies only in situations where transactions are between lending institutions and a "person" and section 25 has no application in respect of transactions entered into between two private persons or a "person" which is not a lending institution. It was further submitted that the act was brought in to speedily recover money by lending institutions and "any person" should be understood and interpreted with the spirit of the act and not independently.
- 10) Majority of the Bench held that section 25(1)(a) is self-contained and exists devoid of any ambiguity and given effect to, without resorting to any other provision. The learned Judges were also of the view that "institution of an action" in Part 1 of the Debt

Recovery Act as no relevance whatsoever to a prosecution instituted under Section 25(1) of the Act.

- 11) Thilakawardene J, in her dissenting judgment held that this section must be cautiously interpreted under the whole spirit of the act to mean that the procedure was optional to the lending institutions, and whether the procedure was civil or criminal. It was one that was restricted to transactions involving lending institutions. The intention of the legislature was clearly to assist the lending institutions to have a more effective recovery procedure and to deal with such defaulters who committed offences under the Act and was specifically enacted to assist lending institutions dealing with defaulters.

8. PRESCRIPTION ORDINANCE NO 22 OF 1971

The Prescription Ordinance No. 22 of 1871 is one of the oldest pieces of legislation setting out the time periods for instituting actions in courts of law.

The term of prescription for lands and other immovable property is ten years. According to Section 3 of the Ordinance, proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property by a title adverse to or independent of that of the claimant or plaintiff for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs.

The Section also provides that a plaintiff can bring an action or a party who intervenes in an action can obtain a decree in his favour upon proving uninterrupted adverse possession for a period of ten years, as aforesaid. In practice, however, prescriptive title to property is commonly used by defendants.

- 1) It is settled law today that the principles of Roman Dutch Law principles relating to prescription on immovable property have been altogether superseded by this statute. In **Therunnase v Manike (1895) 1 NLR 200**, it was held that RDL principles of acquiring property by prescription was swept away by the Prescription Ordinance.
- 2) In **Perera v Ranathunge 66 NLR 337**, Basnayake CJ held – “It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession and that the common law is no longer in force.”
- 3) It is important to note that a person can acquire ownership to property by prescription, only by a decree of a competent Court.
- 4) Prescription cannot be claimed by a person as a right but it can only be brought as a defense to defend himself. In the case of **Therunnase v Mainka 1 NLR 200**, Bonser CJ. Held – “prescription is not a sword to attack anyone but is only a shield which can only be used as a defense “
- 5) According to section 03 , in order to claim prescriptive title the defendant has to prove the following;
 - ✓ undisturbed and uninterrupted possession by the defendant
 - ✓ Title adverse to or independent of that of the owner
 - ✓ Continuous possession for a period of 10 years prior to the bringing of the action

INTERRUPTED AND UNDISTURBED POSSESSION

Prescriptive possession is statutorily required in Sri Lanka to be both “uninterrupted” and “Undisturbed”

UNINTERUPPED POSSESSION

- 1) If there is any break in the possession, prescriptive title cannot be claimed successfully. The term uninterrupted possession was discussed in many cases by our superior courts.
 - **Fernando v Wijesooriya (1947) 48 NLR 320** - it was held

“Whether a possession is ‘uninterrupted’ depends much upon the circumstances. If the continuity of possession is broken before the expiration of the period of time limited by the statute, the seisin of the true owner is restored; in such a case, to gain a title under the statute, a new adverse possession for the time limited must be had.”

• ***Siman Appu v Christian Appu (1947) 1NLR 288***

“Possession is interrupted if the continuity of possession is broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation.”

2) Several other cases illustrate the concept of an “interruption” of possession;

- ***Unnanse v de Hoedt (1920) 22 NLR 406*** – accepted the principle that, in the case of rights which are in their nature periodical, it is possible to prescribe by intermittent user.
- ***Jane Nona v Gunawardena (1948) 49 NLR 522***– held that symbolical possession by a purchaser at a court sale is not interruption of such possession and that an actual physical interruption must be proved.
- ***Appuhamy v Goonathilake (1915) 18 NLR 469***– registration of a deed cannot be regarded as an interruption of possession.
- ***Simon Appu v Christian Appu (supra)*** – an isolated act of violence or disturbance is not sufficient to interrupt the continuous possession.
- ***Lucihamy v Hanidu (1923) 26 NLR 41*** – held that bringing of a partition action does not automatically interrupt the running of prescription.
- ***Lucia Perera v Martin Perera (1951) 53 NLR 347***– A mere by the party prescribing that he should be given paper title by the legal owner, does not necessarily interrupt possession.

UNDISTURBED POSSESSION

- 1) The concept of “undisturbed” possession was commented on in ***Siman Appu v Christian Appu (supra)*** –It was stated that possession is "disturbed" either by an action -
 - intended to remove the possessor from the land, or
 - by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and
 - which convert his continuous user into a disconnected and divided user.
- 2) The idea of “undisturbed” and “uninterrupted” possession were contrasted by Lawrie A.C.J in the following terms; “Disturbance is something less than interruption. It is a disturbance if for a period of time someone succeeds in getting partial possession not to the entire exclusion of the former possessor but, jointly with him.”
- 3) In this case evidence suggested that the defendant had not enjoyed peaceful possession of the property to which he asserts prescriptive title. Eight years before the action, there had been a riot on the land when a house was burnt down and the defendant was tried for shooting some people but he had restrained dispossession successfully. The Supreme Court held that nevertheless, defendant had “undisturbed” possession.

ADVERSE OR INDEPENDENT POSSESSION

- 1) Possession relied upon in support of a prescriptive title is required to be “by a title adverse to or independent of that of the claimant or plaintiff in the action”
- 2) “Adverse title” is interpreted as “possession ut dominus” -as owner or with the intention to possess as owner.
- 3) An occupation which began in a subordinate capacity (tenant, licensee) can be converted into adverse possession by an overt act or a series of acts indicative of a challenge to the owner’s title.
- 4) The parenthetical clause included in section 03 provides for three illustrations as to adverse title. They are possession unaccompanied by –
 - ✓ The payment of rent or produce
 - ✓ The performance of any service or duty
 - ✓ Any act by the possessor from which an acknowledgement of a right existing in any other person may be naturally and fairly be inferred.

However, these illustrations do not provide an exhaustive list.

- **Lebbe Marrikar v Sinu (1907) 10 NLR 339** – held that a person who enters into possession of land under an agreement with the owner to sell the land to him, cannot acquire title by prescription after the lapse of 10 years. Such a person’s title was not adverse to the title of the true owner.
- **Navaratne v Jayathunge (1948) 44 NLR 517** – held that a person entering into a land in subordinate character (licensee)cannot claim prescriptive title unless he had committed an overt act, showing his intention to possess adversely and be in possession for ten years thereafter.
- An exception to the normal rule has been identified by our courts in the case of **Alwis v Perera (1919) 21 NLR 321**, where it was held that possession of a land for a very considerable length of time, taken together with the circumstances of the case may be justify a court in presuming that possession started with a subordinate character, has changed to adverse possession at some point of time.

THE PERIOD OF PRESCRIPTIVE TITLE

- 1) The claimant must prove possession for ten years before bringing the action.
 - **Carolus Appu v Anagihamy(1949) 51 NLR 355** – the period of possession of an intestate person can be tacked on to the possession of his heirs for the purpose of computing the period of ten years required to acquire prescriptive title under section 3 of the Prescription Ordinance.

NATURE OF POSSESSION REQUIRED FOR PRESCRIPTION

- 1) For prescription to be successfully proved, the party claiming prescription must prove that he had physical possession of the land.
 - **Matilda Peiris v Clara Fernando 62 NLR 534** – plaintiff claiming prescriptive title failed for want of physical proof of possession. It was explicitly asserted that “the crucial question to be decided is the question of physical possession.”
- 2) Derivative possession – It is settled principle that a party claiming a prescriptive title can support his claim on the footing of another’s possession of the land in question. Thus, for the purpose of prescription, one is able to possess through a servant, an agent or a lessee.
 - **Fenando v Menika 3 Balasingham’s Rep. 115**

Lascelles CJ said: "it is true that, for the purpose of acquiring title by prescription, possession by a tenant is sometimes equivalent to possession by the landlord; an encroachment for example made by the tenant would enure to the landlord's benefit."

- **Silva v Kumarihamy 25 NLR 449**

"To establish a title by prescription, there must be actual possession by a person as of right by himself or by persons deriving title from him, such as a licensee, lessee, servant or other agent."

- 3) The general principle is that a title acquired by prescription must be limited to the actual area of land in possession and no claim can be made for the entire land. However, this principle must be applied with due regard to the property and to the use and cultivation of which it is susceptible.

- **Raki v Lebbe (1912) 16 NLR 138**

In this case plaintiff claimed prescriptive title on the whole land though S who had grazed cattle on the land. It was held "the greater part of the land was uncultivated or could not be cultivated without great expense, and the occupation of S and of the plaintiff was, in my opinion, such occupation as was to be expected, having regard to the nature and the condition of the land."

- A similar approach was adopted by the Supreme Court in **Cooray v The Ceylon Para Rubber Co Ltd (1922) 23 NLR 321**
- **Perera v Fernando (1920) 21 NLR 466**
Twenty- five years before the date of the dispute, A took a strip of land belonging to the adjoining block, fenced it with his land, dug holes and planted with some coconut trees. This portion soon reverted to jungle and A cultivated only his own land up to the true boundary. Prescriptive title could not be claimed to the encroached strip as A had no intention to keep this strip of land and to possess it as his own.
- The question in these cases is primarily one of fact- namely, whether; having regard to the circumstances of the particular case, possession of a part of the land can be construed reasonably as tantamount to possession of the entire land. This question was answered in the affirmative in Raki v Lebbe and in the negative in Perera v Fernando.

PRESCRIPTION AMONG CO-OWNERS

- 1) Co-owners are persons who jointly own a land. Each co-owner has the same rights on the property despite the partition that they own.
 - 2) Prescription among co-owners is slightly different from general prescription of immovable property.
 - 3) In addition to the requirements in Section 03, prescription must start with an **overt act**.
 - 4) An overt act is a prominent act such as a fight, to show that the co-owner claiming prescriptive title has started possessing the whole or part of the co-owned land as against all other co-owners, without accepting their co-ownership rights.
 - 5) An overt act must be established in court with cogent evidence.
 - 6) The following cases judicially recognized the concept of prescription among co-owners;
- **Corea v Isinaris Appuhamy 15 NLR 65**

One of the several co-owners had possessed the land for 30 years. He had planted, leased, mortgaged and sold portions of the land and generally dealt with them as owner. The issue was where a prescriptive title can be effectively asserted as against all other co-owners on the footing of such possession.

It was held that co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

- ***Thilakarathne v Bastian (1918) 21 NLR 12***

Betram C.J interpreting the opinion of the Privy Council in *Corea v Appuhamy* (supra) stated as follows;

"The word "adverse" in reference to cases of co-ownership must be interpreted in the light of three principles of law:

- I. Every co-owner having a right to possess and enjoy the whole of the property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.
- II. Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.
- III. A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity.

Where a person's possession was originally not adverse and he claims that it has become adverse, the onus is on him to prove it. He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession. "

- ★ A person who has entered into the possession of land in one capacity is presumed to continue to possess in the same capacity unless the nature of possession is changed by an overt act. There cannot be a change in the nature of possession by a secret act.

- ***Orloff v Gerbe 10 NLR 183***

It was held that where a person enters into occupation of property belonging to another with the latter's consent and permission; he cannot acquire title by prescription to such property unless he gets rid of the character in which he commenced to occupy the property by undertaking some overt act showing an intention to possess adversely to the owner.

- ***Naguda Marikar v Mohamadu 7 NLR 91***

PRESCRIPTION AGAINST THE STATE

- 1) The Prescription Ordinance does not regulate matters connected with prescription against the state.
- 2) Section 15 of the Prescription Ordinance states that prescription does not run against the state; **"nothing herein contain shall in anyway affect the rights of the State....."**
- 3) In *Attorney-General v Wanduragala (1901) 5 NLR 98*, it was held that the presumption in favour of the State is rebuttable only by proof of a grant by the State or by payment of taxes.

9. APARTMENT OWNERSHIP LAW NO 11 of 1973

- 1) With the urbanization and increasing number of people in and around Colombo, need arose to maximize the land utilization in urban areas.
- 2) since the RDL principle that the owner of the land owns everything which stands on it, cannot be applied for a multi- story housing unit, our legislature introduced a new piece of legislation known as the Apartment Ownership Law No 11 of 1973.
- 3) At the early stages multi story housing units were built and managed by the State.
- 4) In mid-1990 a large number of people moved from Northern to Colombo due to the ethnic conflicts. In order to facilitate accommodations, private individuals started to build apartments within the Colombo city limits. Since the regulatory framework was not sufficient to cope up with this increasing number of multi-story housing units, the original law was amended by Apartment Ownership (Amendment) Act No 39 of 2003, which is the present statute in operation.

Types of Condominium Property (Section 02)

Section 02 of the law makes reference to three types of condominium property -

- a) **Condominium Property** - any building erected on alienated land held as one land parcel and capable of being subdivided into parcels.
- b) **Provisional Condominium Property** - any building erected on alienated land held as one land parcel and capable of being subdivided into parcels.
- c) **Semi Condominium Property** - any building on alienated land held as one land parcel, on which there are more than one completed condominium parcels fit for human habitation.

Registration of a Condominium plan, Provisional condominium plan or Semi-Condominium plan (Section 03)

- 1) The owner of any condominium plan, semi-condominium plan or provisional condominium plan needs to register it by sending an application to the Registrar of Titles appointed by the Registration of Titles Act.
- 2) When there is a completed building that can be subdivided and which is certified by the General Manager of the Condominium Management Authority (CMO), an application can be made for the registration of the condominium plan either within
 - a)
 - ✓ 18 months from the date of the first sale or agreement to sell or;
 - ✓ 3 months from the date of completion of such building
 whichever arises earlier.
 - b) If there is no sale being done before the completion, the time period provided for registration is within 6 months from the date of completion.
- 3) According to Section 3(2) any person who doesn't comply will be charged before a Magistrate and upon conviction a maximum fine of Rs. 50,000 can be imposed.

Mode of application for registration (section 03A)

- 1) Such application shall be made in triplicate in the prescribed form. The original and the duplicate shall be sent to the Registrar and the triplicate be sent to the General Manager of the Condominium Management Authority.

Such application shall be accompanied by the following particulars -

- ✓ prescribed fee
 - ✓ building plan approved by the planning authority
 - ✓ the written consent of every person (if any) who has an interest in the land (mortgagee, lessee)
 - ✓ certificate of title to the land parcel
 - ✓ certificate of conformity issued by the local authority
 - ✓ if there is a mortgage on the land, details of the mortgage
 - ✓ Certificate from the Condominium Management Authority certifying that the necessary amenities are provided.
 - ✓ Declaration by the applicant attested by the notary public containing details provided in Section 3A(2)(J)
 - ✓ Condominium plan in triplicate containing such details as are specified in section 5
 - ✓ Certificate by a qualified Architect or a qualified Civil Engineer that the building was constructed according to the plans.
- 2) Once the application has been forwarded, CMA will take steps to register the property and issue the Condominium Certificate which enables the each unit to be considered as a unit and a distinct parcel which can be purchased, sold, transferred, leased out mortgaged , gifted or to be dealt in any other way as done in any immovable property

Condominium Management Corporation (CMC)

- 1) Every completed condominium property shall have a CMC for its day-to-day management activities. Every unit owner will be a member of the CMC.
- 2) Section 20 (A to Q) deals with the functioning of the CMC
 - ✓ Section 20(B) – CMC is a body corporate which can sue and be sued in its corporate name
 - ✓ Section 20(C) – Duties of the CMC
 - ✓ Section 20 (D) – Obtaining insurance policy for the condominium property
 - ✓ Section 20 (F)- CMC can take over the management if the corporation is not performing their duties correctly
 - ✓ Section 20 (G) –CMC is entitled to have their own bylaws and in the absence of such bylaws, bylaws specified in the act would apply.
 - ✓ Section 20 (K) – liabilities of CMC

Management Corporation

- 1) Management Corporation as per schedule one can appoint a council for the day to day management. The council will comprise of lesser number of unit owners who will deal with the day to day activities of collecting maintenance fee, payment of salaries, maintain and repairing the property and the common elements etc.
- 2) It is essential that the management Corporation have its AGM within one calendar year, with the participation of an officer of the CMA. In such meetings –
 - ✓ The council will be appointed
 - ✓ Annual accounts will be approved
 - ✓ Auditors will be appointed
 - ✓ The resolutions will be taken for discussion.

Condominium Management Authority (CMA)

- 1) It is an authority established by the Apartment Ownership Law for the purpose of monitoring, regulating and functioning of condominium property within the country.
- 2) Roles of the Condominium Management Authority includes-
 - ✓ Issuing certificate that the common amenities have been provided and that the building is fit for occupation certified by the General Manager.
 - ✓ To resolve disputes between the management corporation and the owner or owners and occupiers of the property (Quazi Judicial Function)
 - ✓ To encourage defaulters to pay the maintenance fees.
 - ✓ To assist the unit owners to form the Management Corporation in order to manage and administrate of common elements.
 - ✓ To ensure that all buildings comprising of condominium particles are insured against risks.
 - ✓ Removal of unauthorized constructions.

INTERPRETATION (Section 26)

- **“condominium parcel”** means –
a defined space which is shown as an independent parcel on a condominium plan or semi condominium plan or provisional condominium plan and which is designed for independent use consisting of 1 or more rooms whether occupying the entirety or part of 1 or more storeys in a building of more than 1 storey and which is shown as a separate condominium parcel.
- **“Encumbrance”** Includes -
 - i. A mortgage of the land or of any limited interest therein, whether arising by act of parties or by operation of law
 - ii. A lease of the land or any interest therein
 - iii. A servitude or restrictive covenant binding upon the land
 - iv. An agreement to convey or re-convey the land or mortgage or lease the land
- **“Land parcel”** Includes-
land parcels of any tenure, any building or parts thereof, so much of the air above the surface as may be reasonably used or enjoyed by any owner and all substances under the surface (excluding minerals within the meaning of the Mines and Minerals Law No 4 of 1973) whether or not held apart from the surface and any estate or interest therein.

“Building” includes-

any building partially completed or where applicable any building to be erected within a storey shown or specified in any Condominium plan or semi condominium plan or in the Provisional condominium plan for approval to the authority for the time being responsible for granting such approval.

“Owner of the condominium parcel” Means-

the registered owner for the time being of a condominium parcel having a freehold estate in the condominium parcel or where a leasehold estate in the condominium parcel has been created a leasehold estate in the condominium parcel having an unexpired term of not less than 20 years computed as from the date of registration of such creation of leasehold estate.

- **“Registrar”**

The registrar of titles appointed under the Registration of Titles Act No 21 of 1998 and having jurisdiction over the registered district in which the condominium property, semi condominium property or provisional condominium property is situated.

- **“Common element”**

Property which is comprised in any plan approved by the authority for the time being responsible for the approval.

- **“Sub-divided building”**

Any one or more buildings comprised in a condominium plan, semi condominium plan or provisional condominium plan approved by the local authority.

10. MORTGAGE ACT NO 06 of 1949

Mortgage is a security furnished by a person for the repayment of a loan.

- 1) It is important to note that by a mortgage neither the ownership nor the possession of the property changes.
- 2) The same property can be subject to more than one mortgage, where the first mortgage is known as the primary mortgage and second and further mortgages are known as secondary mortgages. In the secondary mortgage the first mortgage must be mentioned and in the process of recovery, the primary mortgage will get the priority.
- 3) There is a concept called Usufructary mortgage, where the harvest or the income of a land is allowed to be taken by the lender or mortgagee, in lieu of interest for the money borrowed.
- 4) When the borrower defaults to pay the loan as agreed, a cause of action will arise to recover the defaulted sum by putting the mortgage into execution. By default to repay, there is no automatic transfer of ownership or rights to the lender.
- 5) Where the repayment of a loan is being defaulted, the mortgagee has to file an action in the District Court and the procedure to such action is set out in the **Mortgage Act No. 06 of 1949 (as amended)**. The action which will be filed to execute the mortgage is known as **Hypothecary action**.
- 6) Section 02 of the act defines a "hypothecary action" to mean -
 - ✓ an action to obtain an order declaring the mortgage property to be bound and executable for the payment of the money due upon the mortgage and
 - ✓ to enforce such payment by a judicial sale of the mortgage property.
- 7) Accordingly, the mortgagee will file action in the District Court where,
 - ✓ The mortgage of property is located at or
 - ✓ Where the mortgage bond has been entered into or
 - ✓ Where the defendant resides
- One of the main elements of a Hypothecary Action is that all interested parties should be notified.

8) Persons entitled to notice (Section 05)

According to Section 05 of the act, there are several parties or persons who are entitled for notice of the action. They are,

- a) a person who has any interest in the land
 - ✓ where the mortgage would affect such interest or
 - ✓ where there is a document registered in the relevant folio, which creates an interest on the land.
- b) a person who has registered his name and address in terms of Section 06 for the purpose of receiving notice with regard to a hypothecary action.
- 9) According to Section 06, any person who thinks that he should be notified of a hypothecary action, should register his name and address in the folio where the property is registered. [The format is provided in the 1st schedule.]
- 10) As per Section 08, the Attorney-at-Law of the Plaintiff has to give a declaration specifying the following-

- ✓ Certifying that the lis pendens of such action has been duly registered under the Registration of Documents Ordinance and that such registration has been affected in the correct folio/folios.
 - ✓ Certifying that the register maintained under the Registration of Documents Ordinance or a certified extract therefrom and all relevant entries in such register have been personally inspected by such Attorney-at-Law.
 - ✓ Containing a statement of the names and registered addresses of every person, if any, found upon such inspection to be a person entitled to notice of such action.
- 11) Once the lis pendens is being registered, the District Judge will order to issue summons to the defendants.
 - 12) According to Section 09, simultaneously, an order will be given to issue notice of hypothecary action to every person who is stated in the declaration filed under Section 08, as persons entitled to notice of action but who has not been joined as a defendant to the action.
 - 13) According to Section 10, the plaintiff can choose the manner of issuing notice. The two modes are-
 - a) As per Section 10(1)(a) notices may be served at the registered address of the parties through registered post by the Registrar of the Court
 - a copy of such notice shall within a period of two weeks from the date of posting of the notice
 - ✓ be affixed in a conspicuous place upon the mortgaged land
 - ✓ be published in a newspaper specified by the court
 - b) As per sec. 10(1) (b) the notice may be served in any manner provided by the Civil Procedure Code for the service of summons.
 - 14) According to section 12, when such notices are being sent to the parties, any such person can make an application to be added as a party to the action within one month of the date
 - ✓ of posting of the notice to him under section 10(1)(a) or
 - ✓ of publication of a copy in a newspaper,
 whichever comes later
 - ✓ or where the notice is served in like manner as summons, within one month of the date of such service.
 - 15) According to Section 13 any person entitled to notice of hypothecary action to which such notice has not been issued under Sections 09 and 10 is entitled to make an application to court any time before the sale of the mortgaged land, to be added as a party to the action.

Registration of lis pendens

- 1) In a hypothecary action registration of lis pendens is mandatory and without lis pendens being registered no further action can take place. After lis pendens is registered the action will continue in the manner as that of an ordinary civil action.

Sale under hypothecary action

- 1) Property liable to sale in execution of decree
- According to Section 46
- ✓ no decree in any hypothecary action upon any mortgage of land and no decree in any action for the recovery of an money due upon any such mortgage

- ✓ shall order any property whatsoever, other than the mortgage of land, to be sold for the recovery of any money due upon the mortgage and
- ✓ no property whatsoever, other than the mortgaged land, shall be sold or be liable to be sold in execution of any decree.

In other words only the land subject to the mortgage can be sold in the judicial sale. Any other land owned by the defendant cannot be taken into consideration for the recovery of the loan.

- 2) According to Section 48 the judicial sale has to be taken place within two months from the date of the decree. The direction of the sale will be made by Court in terms of Section 50 of the act.
- 3) Accordingly the land will be sold by Fiscal of the Court to the highest bidder in a public auction. (Section 52)
- 4) The plaintiff in a hypothecary action is not entitled to bid for or purchase any mortgaged land sold in execution of the decree unless leave to bid and purchase is granted by the court. (Section 51)
- 5) Once the sale is being done; the fiscal conveyance will be prepared following the format given in form 4 of the schedule to the act.
- 6) Once the deed is been executed, it is the duty of the fiscal to deliver the peaceful possession of the property to the purchaser.
- 7) Where the property is being sold for a price higher than the amount stated in the decree, the balance proceeds can be claimed by the defendants, after establishing their claims and rights.

11. RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) ACT NO 40 OF 1990

- 1) This statute was amended considerably by Act No 24 of 1995 and Act No 1 of 2011.
- 2) The original act did not have any financial limitations, but by the amending act in 2011, a financial limitation of Rs. 5 million was introduced. At present, loans with an outstanding capital less than Rs. 5 million cannot be recovered by banks.
- 3) The object of this act is to provide for the recovery of loans granted by banks for the economic development of Sri Lanka.
- 4) This Act only applies to banks, which is defined in section 22 ,

"Bank" means -

- ✓ a licensed commercial bank within the meaning of the Banking Act, No. 30 of 1988, other than any bank established under the provisions of the Regional Rural Development Bank Act, No. 15 of 1985:
 - ✓ the Development Finance Corporation of Ceylon established by the Development Finance Corporation of Ceylon Act (Chapter 165) ; and
 - ✓ the National Savings Bank established by the National Savings Bank Act, No. 30 of 1971.
- 5) The concept introduced by this statute is known as "**Parate execution**"
 - 6) To apply the provisions of this statute, three requirements must be fulfilled -
 - ✓ There has to be a loan, which is secured by a mortgage, granted by a bank
 - ✓ A bank within the meaning of this Act
 - ✓ The sum defaulted on the loan has to be more than five million rupees.

Registration of the address of the borrower (Section 02)

- 1) Every person to whom a loan is provided shall register with the bank an address to which all notices to him should be addressed.
- 2) Any notice which is required to be served on any person shall be deemed to have been duly served -
 - ✓ if it is sent by post in a registered letter directed to that person at the address registered by him, if delivered in the ordinary course of post.
 - ✓ Where a person fails to do so, the bank shall publish in the gazette in 3 daily newspapers in all 3 languages, a notice addressed to him.

Action by Board when default is made (Section 03)

- 1) Whenever default is made in the payment of any sum due on any loan, whether on account of principal or of interest or of both, default shall be deemed to have been made in respect of the whole of the unpaid portion of the loan and the interest due thereon up to date and
- 2) The Board may in its discretion, take action as specified either in Section 5 or in section 4 of the Act

Authorization of Sale of Mortgaged Property (Section 04)

- 1) (subject to the provisions in section 07) the Board may by resolution authorize a person specified in the resolution to sell by public auction any property mortgaged to the bank as

security for any loan, in respect of which default has been made in order to recover the whole of the unpaid portion of such loan and costs recoverable under section 13.

Notice of Resolution (Section 08)

- 1) Notice of every resolution under section 04, authorizing the sale of any property shall be-
 - ✓ Published in the Gazette and
 - ✓ In at least three daily newspapers in Sinhala, Tamil and English and
 - ✓ Copies of such notice shall be dispatched to the borrower. if he is alive
 - ✓ And to every person who has, in respect of the property, registered his address

Notice of Sale (Section 09)

- 1) Notice of the date, time and place of every sale authorized by the resolution must be published in Gazette, not less than 14 days before the date fixed and copies of such notice shall be-
 - ✓ Dispatched to the borrower, if he is alive and to every person to who notice of any resolution is required to be dispatched
 - ✓ Posted on or near the property to be sold

Payment before sale (Section 10)

- 1) If the borrower tender to the Board the whole of the defaulted sum together with interest and other cost, if any, any time before the date fixed for sale, the property shall not be sold.

Upset Price (Section 11)

- 1) The board may fix an upset price below which the property shall not be sold to any person, other than the Bank to which the property is mortgaged.
- 2) In *Samanthapala Jayawardena v. Sampath Bank (2005) 1 SLR 340*, it was decided that the bank can purchase the property in the auction at a nominal price, which can be far more below the market price of the property.

Default in respect of one of several loans on same property (Section 12)

- 1) In a case where two or more loans have been granted by a bank on the security of the same property, and default has been made on the payment of any sum due upon one or more of such loans, even though no default has been made in respect of the other loans, the board can authorize the property to be sold to recover the total amount due to the bank in respect of both or all loans

Recovery of expenses and costs incurred by the bank (section 13)

- 1) In addition to the defaulted sum, any other costs, charges and expenses incurred by the bank can also be recovered. Such expenses are advertising fees, auctioneer's fee etc.

Payment of excess (Section 14)

- 1) When the property is sold the bank has to refund the balance proceeds after deducting the capital, interest and expenses under section 13, to the borrower or any person legally entitled.

Certificate of Sale (Section 15)

- 2) Once the property is sold, the Board shall issue a Certificate of Sale. Such certificate of sale gives all the right, title and interest of the property to the purchaser.
- 3) According to section 15(2) the certificate of sale signed by the Board shall be conclusive proof with respect to the sale of any property that all the provisions of the act relating to the sale of that property have been complied with.
- 4) In *Hajji Omar v Wickramasinghe (2002) 1 SLR 105*, Mark Fernando J discussed in detail the finality of the certificate of sale.
- 5) As per section 15(4), every certificate of sale shall be liable to stamp duty and charges as if it was a conveyance of property, all of which shall be payable by the purchaser.

Order for Delivery of Possession (Section 16)

- 1) Once the Certificate of Sale is issued to the purchaser, the bank must take steps to deliver the possession of the property to the purchaser.
- 2) The purchaser can file an application in
 - ✓ The District Court of Colombo or
 - ✓ The District Court where the property is situated
 to obtain an order for delivery of possession of that property.
- 3) Every application shall be made and shall be disposed of, by way of a summary procedure in accordance with the provisions of Chapter 22 of Civil Procedure Code.

Cancellation of Sale (Section 17)

- 1) Where the property sold has been purchased on behalf of the Bank, the Board may at any time before it resells that property, cancel the sale, by an endorsement to that effect on a certified copy of the certificate of sale, if the borrower pays the full sum with interest and cost.

According to section 18, when the property sold has been purchased on behalf of the bank, the board may at any time resell the property and transfer all the rights, title and interest to the purchaser by endorsement on a certified copy of the certificate of sale.

Section 19 imposes a limitation that the bank should not keep the property for a longer period than necessary.

Offence (Section 20)

If any person without reasonable cause, resists, obstructs, or prevents person authorized by the Bank, by a resolution, to sell the property mortgaged to the bank, shall be guilty of an offence punishable by-

- ✓ Imprisonment not exceeding 6 years or
- ✓ A fine not exceeding five thousand rupees (Rs.5000/-)
- ✓ Or both

upon conviction by a Magistrate.

Procedure when Borrower is dead (Section 07)

- 1) Where a borrower is dead and probate of his will or letters of administration to his estate have not been issued to any person, the Bank may make an application in
 - ✓ the District Court of Colombo or
 - ✓ the District Court of the district in which the property, mortgaged to the Bank by the borrower, is situated
- 2) If the court is satisfied that the grant of probate or the issue of letters of administration is likely to be unduly delayed, the court shall appoint a person to represent the estate of the borrower for the purposes of this section

Parate Execution

- 1) Parate execution is one of the most common methods of loan recovery employed by banks in Sri Lanka, where immovable property has been hypothecated to banks as security.
- 2) This remedy is available for a mortgage under the Roman law, where the mortgagee is vested with the power to sell the mortgaged property without recourse to court.
- 3) The provisions of the Recovery of Loans by Banks (Special Provisions) Act provides that a bank can recover the loan granted to a borrower by selling the property mortgaged, at an auction, without the intervention of the court.
- 4) The power granted to Banks, by the statute, to auction property to recover the loans due by way of parate execution was constantly upheld by our courts.
- 5) This procedure is relatively quick and it also gives the borrower an opportunity to come before the bank during the interim period and settle the amount due.

- **3rd Party Mortgage vs Parate Execution**

- 1) When the borrower mortgages someone else's property, it is known as a third party mortgage where borrower and mortgagor are two different persons.
- 2) In a hypothecary action there is no prejudice to the mortgagor because he will be a party to the action or at least be notified.
- 3) But under this statute, neither notice of resolution nor notice of sale needs to be given to the mortgagor. It only requires such notice to be given to the borrower. Therefore in a parate execution the mortgagor will be at a disadvantage.
- 4) Considering this position the Supreme Court in the case *Ramachandran v Hatton National Bank (2005) BLR 86*, decided that parate execution cannot be exercised on a 3rd party mortgage.
- 5) However, in the judgment of *Hatton National Bank v Jayawardena (2007) BLR 50*, Supreme Court decided that the decision in Ramachandran's case with regard to third party mortgages, will not apply when the borrower and mortgagor are a company and its director.
- 6) Directors of a company who is benefited from facilities obtained by the company from a bank against mortgage of their property cannot hide behind the veil of incorporation and claim that the mortgage is a third party mortgage as contemplated in Ramachandran case.

Interpretation (Section 22)

"Board" (In relation to a Bank) means-

the Board of Directors of the bank or anybody of persons by whatever name or designation called for the time being charged with the management or administration of such bank.

12. REGISTRATION OF DOCUMENTS ORDINANCE

No 23 of 1972

- 1) The present law relating to registration is contained in Ordinance No 23 of 1972 which deals exclusively with registration of documents and makes no provision for the registration of title.
 - 2) This statute is described as “an Ordinance to amend and consolidate the law relating to registration of documents.”
 - 3) Chapter III of the Ordinance deals with the registration of documents pertaining to lands.
 - 4) Section 06 specifies that in Chapter III, unless the context otherwise requires, “instrument” means an instrument affecting land. “Land” is defined as including “things attached to earth or permanently fastened to anything attached to the earth or “e.g.: - buildings and large trees.
 - 5) The fundamental provision contained in the Registration of Documents Ordinance is that declaring that unregistered instruments are void against subsequent registered instruments. (Section 7(1))
 - 6) Section 12 specifies how the registration of instruments should be done at land registries.
 - In the land registry each identified land is given a page in the register which is known as the “folio”.
 - The registry can be in several volumes for administrative purposes.
 - According to the present practice a land is identified using 4 parameters.
 - a) Location/ situation (specifying the district and the village, pattu , korale)
 - b) Name of the land
 - c) The four boundaries (North, East, West, South)
 - d) Extent
- In addition to all these things a survey plan can identify a land most specifically. However, a survey plan is not a must for the identification of a land.

REGISTRABLE INSTRUMENTS

- 1) The following categories of instruments have been held in decided cases to be registrable:
 - a) Every deed or instrument regarding a sale, gift, mortgage, purchase or any other assignment of land.
 - b) The probate of a last will.
 - c) A grant of letters of administration.
 - d) A notice of seizure issued by a fiscal on a mandate of sequestration.
 - e) A document attested by the Notary acknowledging the receipt of the sum of money due by way of principal, interest and costs of action on a mortgage bond
 - f) A certificate of no claim.

LEGAL EFFECT OF REGISTRATION

- 1) Section 7(4) states: “Registration of an instrument under chapter III shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have, except the priority conferred on it by Section 7.”

- 2) The legal effect of registration has been explained in a series of cases which can be looked upon as settling the law on the subject.

- ***Lairis Appu v. Tennakoon Kumarihamy (1958) 61 NLR 97***

"The object of the registration in simple form is to safeguard the purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by the vendor (transferor). The effect of registration is to give the transferee whatever the title the vendor had prior to the execution of the earlier unregistered deed."

- ***Massilamany v. Santiago (1911) 14 NLR 292***

"The only effect of registration was to give priority to the subsequent registered deed. The earlier deed is not affected in any way, save that it has to take second place."

- ***James v. Carolis (1914) 17 NLR 76***

"If an intended purchaser finds on the register no adverse deed affecting the property, he is placed in the same position as regards his title to the land, as no such deed in fact existed. On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed in the register. He has given an image to the world that his deed does not exist."

THE REQUISITIES OF PRIORITY

1) **The two contesting documents should come from the same source.**

- 1) It is settled principle that the doctrine of priority by registration becomes relevant only when deed proceed from the same source. In other circumstances, the outcome depends not on the issue of registration but on investigation of the title existing in the different transferors at the time of the respective alienations.
- 2) As a condition of applicability of the principle as to priority by registration, two persons should claim "interest traceable to the **same origin**".
- 3) The Courts have held that the following instances creates documents from the same source ;

A. Deceased and Heirs/executors

A deceased person before his death executes a deed which is not registered. Thereafter, his heirs execute a deed for the same property after his death, which is registered. The two documents are from the same source.

- ***Fonseka v. Cornelis (1917) 20 NLR 97***

A duly registered deed executed by heirs will get priority over an unregistered probate.

- ***Horne v. Marikar (1952) 27 NLR 185***

The same principle as in the above case was applied for Letters of Administration.

- Probate and Letters of Administration are registrable documents. If they are not registered they will lose priority.

- ***James v. Carolis (1914) 17 NLR 76***

A conveyed his land to B. After A's death C, who was A's intestate heir, conveyed the same land to D. The deed in favour of D was registered before the deed in favour of B. Held that the deed in favour of B was void as against the subsequent deed in favour of D by reason of prior registration, since the two conveyances proceeded from the same source.

B. The Judgment Debtor and the Fiscal

A Judgment Debtor is a person who has been declared by a court as a person who has to pay a sum of money to another person.

Fiscal is a court officer who will auction the properties of a Judgment Debtor, if the Judgment Debtor does not pay the sum of money ordered to be paid by the court.

It is settled that a conveyance from the judgment debtor and a conveyance from the Fiscal are treated, in the context of the law of registration, as proceeding from the same source. *Assarappa v. Weeratunga (1911) 47 NLR 417*

C. the Insolvent and the Assignee in insolvency

Insolvency can only be declared by a court of law. Once the insolvency is declared, an Assignee will be appointed to administer his properties.

Conveyances made by the insolvent and the assignee in insolvency are deemed to be from the same source *Haniffa v. Silva (1912) 15 NLR 362*

2) The two competing document should create adverse interest

1) Instruments may be said to be adverse when the rights dealt with by them are inconsistent or antagonistic, but not when the rights dealt with by one do not interfere with, or infringe, the rights dealt with by the other.

2) Examples of documents creating adverse interest -

a) Primary mortgage and Secondary Mortgage

Subsequent registered mortgage prevails over the first in the event of a dispute

b) A lease and a private or fiscal's transfer

- *Muthuramen v. Massilamany (1913) 16 NLR 289*

The contest was between an unregistered lease and a subsequent mortgage, duly registered, and followed by a mortgage decree and purchase in execution. It was accepted without question that the interests of the claimants were adverse.

c) Planting Agreement and a Sale

- *Appuhamy v. Gooetilleke (1915) 18 NLR 469* it was held that a planting agreement which stipulates that the planter should become entitled to a certain share of the soil on fulfilling the terms of an agreement and a subsequent sale of the property, created an adverse interest.

d) A Gift and a Sale

- *Appuhamy v. Holloway 44 NLR 276*
- *Kobbekaduwa v. General Rubber Company (1931) 32 NLR 353*– deed of transfer prevailed over deed of gift by reason of prior registration

e) A Fiscal's Sale and a Private Sale

- *Tikiri Banda v. Loku Banda (1911) 15 NLR 63*
- *Juan Appu v. Weerasena (1917) 20 NLR 30*

3) The requirement of valuable consideration

The law of Sri Lanka confines the advantage of priority by registration to deeds supported by the passing of valuable consideration.

- *Fernando v. Fonseka (1899) 1 CLR 82*

"The term *Valuable consideration means money, marriage or anything similar to that.*" It was held that a registered gift cannot claim priority over an unregistered sale.

- *Mohomed Hamidu v. Rahimuttu Natchia (1892) 2 CLR 32*

The contest was between two deeds of gift. The latter deed of gift was registered, while the earlier deed of gift was not. Registration was held to be irrelevant in these circumstances.

- *Nambuwasan v. Deonis Appu (1962) 65 NLR 353*

It was stated that where a transaction embodies in a deed purports on the face of it to be a sale, the deed itself constitutes prima facie evidence of the passing of valuable consideration.

FACTORS VITIATING PRIORITY BY REGISTRATION

a) FRAUD AND COLLUSION

- 1) The registration of Documents Ordinance having laid down the general principle that unregistered instruments are void against subsequent registered instruments, declare: "*But Fraud or Collusion in obtaining such subsequent instrument or in securing the prior registration thereof; shall defeat the priority of the person claiming thereunder.*" (Section 7(2))

FRAUD

- 1) There is no definition for the term Fraud. An established principle in this regard is that the mere existence of knowledge of a prior unregistered conveyance is not sufficient to deprive him of the right to gain priority by registration.

- *Assarappa v. Weeratunga 14 NLR 417*
- *Hal v. Palmadulla Weli Plantation Co. Ltd. 31 NLR 55*

- *Lairis Appu v. Tennakoon Kumarihamy (1962) 64 NLR 97*

"Mere notice of a prior unregistered instrument is not enough. There must be actual Fraud in the sense of Dishonesty."

- 2) The difficulty of defining "fraud", in the abstract, has been emphasized in the case law.

- *Appu Singho v. Leelawathie (1958) 60 NLR 409.*

"It is not necessary or wise to give abstract illustrations of what constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances."

- 3) All that can be usefully done, therefore, is to illustrate, by reference to decided cases, situations in which a finding of fraud had been reached in this context.

- *Kirihamy v. Kiribanda (1911) 14 NLR 284*

B prompted A to purchase a property from his sister in 1897 and the deed was not registered. B in 1889 purchased the same property from original owner (his sister) and registered it and thereafter claimed priority on registration. Court held that under the circumstances, the conduct of B in taking a conveyance of the property from his sister in 1889 amounted to fraud both in obtaining the deed and in securing prior registration.

- *Caruppen Chetty v. Wijesinghe (1910) 14 NLR 152*

Under a decree obtained by the plaintiff against the respondent and others as executors of the last will of one W, the plaintiff seized the land in dispute as property of W and purchased it himself. The defendant, who had a registered transfer in his favour, was present at the Fiscal's sale but deliberately refrained from notifying his title to the purchaser. It was held that the fact of registration did not afford protection to the defendant, since he had been guilty of fraud.

COLLUSION

- 1) Collusion means “joining together of two parties in a common trick.” This was decided in the case -

- ***Ferdinando v. Ferdinando (1912) 23 NLR 143***

Father (first defendant) gifted his property to his son, by a deed which was never registered, subject to a life interest in his favour. Son died in 1918 leaving a widow and child. The widow (plaintiff) sent a letter of demand to the first defendant for the title deed. Three days after, by a deed which was registered the first defendant transferred the land to his son-in-law (second defendant) who was aware of the earlier deed. The second defendant transferred the property to the third defendant. It was held that, in the circumstances of the case, there was collusion between the first and the second defendants and that, consequently, the second defendant cannot acquire a superior title by registration.

- ***Arumugam v. Arumugam (1951) 53 NLR 490***

A brought certain property from B and entered into possession of it as its lawful owner. C was aware of the transaction. Nevertheless, C, in the hope of taking advantage of the fact that A had registered his deed in the wrong folio, purported subsequently to purchase from B, with knowledge of B's intended fraud, certain rights in the property. C registered the later deed in the correct folio. It was held that C was guilty of collusion and could not, therefore, claim the benefit of prior registration.

B. REGISTRATION IN THE WRONG FOLIO

- 1) **Section 14(1)** states :

"Every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered."

- 1) The effect of this provision is that an instrument which is registered in the wrong folio is denied the benefit of priority.
- 2) In *Silva v Appu (1914) 4 Bal. N. of C 28*, it was held that “**correct folio**” is the folio which the Registrar opened for registering deeds relating to the particular land and in which the first such deed is registered. This criterion was applied in *Marikku v. Fernando (1914) 17 NLR 481*.
- 3) Once an instrument dealing with land has been registered, all the other instruments dealing with that land must, in order to satisfy the requirement of law relating to registration, be entered in the same or connected folio.
- 4) The folio is generally started by registering the first deed relating to that land and when the folio is full it will be carried forward to a new folio with a cross reference.
- 5) In *Ranmenika v. Appuhamy (1941) 42 NLR 299*, emphasized that a deed affecting the divided portions of a larger land must be registered in a separate folio and that the new folios must be connected by means of cross reference with the folio in which the larger land had been registered.
- 6) According to the present legal principles, even if the registration in a wrong folio was due to a negligent act or a mistake, priority cannot be claimed. *Logus v. Lawrence (1961) 63 NLR 377*

REGISTRATION OF A LIS PENDENS

- 1) It is possible to register a pending action in respect of immovable property or a land as lis pendens and is made compulsory for the plaintiff under the **partition law and the mortgage law**. This would protect a person who is unaware that the property is pending action, prevent the initiation of other disputes over the land and it minimizes disputes between parties.
- 2) **Section 11** of the RDO states –
 - For the purpose of registering a lis pendens a document in the prescribed form shall be presented for registration, and such document shall be registered in the same manner as other instruments affecting land, but shall be retained by the Registrar.
 - A lis pendens may be registered at any time after the plaint has been accepted by the court in accordance with the provisions of the Civil Procedure Code.
 - Where a lis pendens has been duly registered, such registration shall continue in force until such time as it is cancelled under section 33 of the RDO