

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

2. Mohamed Kalid Sitti Fathuma, (deceased)

2A. Abdul Jabbar Fathima Rushdiya,

3. Ibrahim Rahila.

4. Ibrahim Majid, (deceased)

4A. A. Mohamed Kalid Sitti Fathuma,

No. 128/4, Colombo Road,

Mahamodara, Galle.

2<sup>nd</sup> to 4<sup>th</sup> Defendants-Appellants-Appellants

**SC/APPEAL/45/2017**

**CA/APPEAL/1178/98(F)**

**DC GALLE 8972/P**

Vs.

Mohamed Fahim Wadood,

No. 2678, Colombo Road,

Mahamodara, Galle.

Substituted Plaintiff-Respondent-  
Respondent

Mubashir Sali, (deceased)

No. 143/2, Colombo Road,

Mahamodara, Galle.

Mohamed Zayan Sali,

No. 143/2, Colombo Road,

Mahamodara, Galle.

Substituted 1<sup>st</sup> Defendant-Respondent-  
Respondent

Before: Hon. Chief Justice P. Padman Surasena  
Hon. Justice Mahinda Samayawardhena  
Hon. Justice Arjuna Obeyesekere

Counsel: M.C.M. Muneer with Imalsha Sathsarani for the Substituted 2<sup>nd</sup> Defendant-Appellant-Appellant.  
Dr. Sunil Cooray for the Substituted Plaintiff-Respondent-Respondent and the Substituted 1<sup>st</sup> Defendant-Respondent-Respondent.

Argued on: 17.10.2025

Written submissions:

By the Substituted 2<sup>nd</sup> Defendant-Appellant-Appellant on 14.11.2025.

By the Plaintiff-Respondent-Respondent and 1<sup>st</sup> Defendant-Respondent-Respondent on 19.10.2017.

Decided on: 13.01.2026

**Samayawardhena, J.**

The plaintiff instituted this action in the District Court of Galle against four defendants seeking partition of the land described in the schedule to the plaint between himself and the 1<sup>st</sup> defendant in equal shares. The 2<sup>nd</sup> to 4<sup>th</sup> defendants were named as parties on the footing that they reside in a house standing on the land, which is depicted as buildings Nos. 1 and 2 in the preliminary plan marked X. In the plaint, the plaintiff averred that the said defendants were entitled only to the superstructure, without soil rights, and that they could be compensated for the value of the house. The plaintiff set out his pedigree in the plaint. The 1<sup>st</sup> defendant did not contest the plaintiff's case.

The 2<sup>nd</sup> to 4<sup>th</sup> defendants filed a joint statement of claim setting out a different pedigree and claimed entitlement to an undivided ½ share of the land on that basis. Having done so, they further averred, in the final paragraph of their statement of claim, that they had also acquired prescriptive title to ½ share of the land.

It is quite apparent from the said statement of claim that the primary claim of the 2<sup>nd</sup> to 4<sup>th</sup> defendants to ½ share was founded on devolution of title based on an alternative pedigree, and not on prescriptive possession. In any event, it is well settled that a claim of prescription cannot lie in respect of an undivided share, but only in respect of a definite and identifiable portion of land.

Significantly, even at the trial, the 2<sup>nd</sup> to 4<sup>th</sup> defendants failed to raise a proper or intelligible issue on prescription. The issue framed as issue No. 12 reads as follows: “12. පාරුකුවකරුවන්ගේ කාලාවයෝදී හිමිකම්?” This issue, as framed, is vague and devoid of any clear legal meaning. It does not assert that the 2<sup>nd</sup> to 4<sup>th</sup> defendants have acquired prescriptive title to the land or to any defined portion thereof.

The District Court accepted the pedigree pleaded by the plaintiff and rejected the pedigree put forward by the 2<sup>nd</sup> to 4<sup>th</sup> defendants. At the trial, the 1<sup>st</sup> defendant gave evidence and produced old title deeds in support of the plaintiff's pedigree. It is clear that the pedigree advanced by the 2<sup>nd</sup> to 4<sup>th</sup> defendants is wholly untenable. They asserted that one Sulaiman Lebbe was entitled to a ½ share of the land and that they derived title through him, but conspicuously failed to explain how the said Sulaiman Lebbe acquired any such entitlement.

The evidence established that the plaintiff and the 1<sup>st</sup> defendant became entitled to the land by deed marked P3. It was also the evidence of the 1<sup>st</sup> defendant at the trial that the 2<sup>nd</sup> to 4<sup>th</sup> defendants entered upon the land

as licensees of his predecessors in title. The learned District Judge accepted this evidence and, among other grounds, rightly rejected the claim of prescription advanced by the 2<sup>nd</sup> to 4<sup>th</sup> defendants.

On appeal, the Court of Appeal affirmed the judgment of the District Court.

A previous Bench of this Court granted leave to appeal to the 2<sup>nd</sup> to 4<sup>th</sup> defendants on the following questions of law, as formulated in paragraph 18 of the petition tendered to this Court seeking leave to appeal.

- (a) *Did their Lordships of the Court of Appeal err in affirming the judgement of the learned trial Judge in the absence of substantial evidence to prove that the 2<sup>nd</sup> to 4<sup>th</sup> defendant-appellants were licensees?*
- (b) *Did their Lordships of the Court of Appeal err in failing to appreciate that the long possession of the 2<sup>nd</sup> to 4<sup>th</sup> defendants coupled with payment of assessment tax for the entirety of the corpus was sufficient to establish prescriptive title?*
- (c) *Did their Lordships of the Court of Appeal fail to appreciate that the plaintiff's and the 1<sup>st</sup> defendant's action was a collusive action designed to eject the 2<sup>nd</sup> to 4<sup>th</sup> defendants from the corpus?*
- (d) *Did their Lordships of the Court of Appeal fail to appreciate the lapses on the part of the learned trial Judge that the plaintiff and the 1<sup>st</sup> defendant had filed the said action after a period of 12 years had elapsed since the execution of the purported transfer deed (P3) which period alone was sufficient to establish prescriptive title?*

Before this Court, the 2<sup>nd</sup> to 4<sup>th</sup> defendants confined their claim solely to prescriptive possession. They did not assert any right to the land by deed or by inheritance. In light of what I have already stated, it is sufficient to conclude that their prescriptive claim cannot succeed. Prescriptive

possession against the true owner cannot be established in so casual or perfunctory manner.

I shall now address the questions of law one by one. The first question of law proceeds on the premise that the plaintiff was required to prove that the 2<sup>nd</sup> to 4<sup>th</sup> defendants were licensees. I do not agree. Once the plaintiff and the 1<sup>st</sup> defendant established their paper title to the land, the burden shifted to the 2<sup>nd</sup> to 4<sup>th</sup> defendants to demonstrate the basis on which they were in possession of the land. If their claim is founded on prescription, it is for them to establish all the requirements of prescriptive possession. There is no burden on the plaintiff or the 1<sup>st</sup> defendant to disprove such a claim. Nor is there any presumption in law that a person found in possession of another's land holds such land by prescription.

The second question of law proceeds on the premise that long possession, coupled with the payment of rates in respect of the entire land, is sufficient to establish prescriptive title. This proposition is plainly contrary to the fundamental principles governing the law of prescription. Long possession and prescriptive possession are not synonymous. Long possession, even when coupled with the payment of municipal rates, does not *ipso facto* satisfy the statutory requirements of section 3 of the Prescription Ordinance.

The third question of law relates to the allegation of collusion. There is no material to suggest that the partition action was collusive in nature. The mere fact that co-owners institute a partition action with a view to terminating co-ownership cannot, by itself, be characterised as collusion. The predecessor in title transferred the land to the plaintiff and the 1<sup>st</sup> defendant by deed P3, expressly acknowledging the presence of the 2<sup>nd</sup> to 4<sup>th</sup> defendants on the land. Significantly, as reflected in the schedule to the deed, the transfer was effected "*exclusive of the superstructure of the wattle-*

*walled thatched house bearing assessment No. 128/4, Colombo Road thereon*". This recital is inconsistent with any allegation of collusion.

By the fourth question of law, the 2<sup>nd</sup> to 4<sup>th</sup> defendants contend that the institution of the partition action twelve years after the execution of deed P3 is, of itself, sufficient to establish prescriptive title in their favour. This contention is unsustainable in law. As already stated, mere lapse of time, without strict proof of all the essential elements of prescriptive possession, does not confer title by prescription.

For the foregoing reasons, I answer all the questions of law in the negative. I affirm the judgment of the Court of Appeal and dismiss the appeal, but without costs.

Judge of the Supreme Court

P. Padman Surasena, C.J.

I agree.

Chief Justice

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court