

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

Weeravairodhi Mudiyanselage Agala
Kumbure Gedara Jayathissa,
No. 32/2, B.O.P. 316,
Baudharthagama,
Thalpotta, Polonnaruwa.

Plaintiff-Respondent-Appellant

SC/APPEAL/109/2020

HCCA/ANURADHAPURA/1201/2018(F)

DC POLONNARUWA 14952/L

Vs.

Weeravairodhi Mudiyanselage Agala
Kumbure Gedara Punchi Banda,
No. 32/2, B.O.P. 316,
Baudharthagama,
Thalpotta, Polonnaruwa.

Defendant-Appellant-Respondent

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando
Hon. Justice M. Sampath K.B. Wijeratne

Counsel: Sapumal Bandara with Nisali Peiris and Ganguli Dayaratne
for Plaintiff-Respondent-Appellant.

J.P. Gamage, Melisha Perera, Theekshana Ranaweera,
Chamara Fernando for the Defendant-Appellant-Respondent.

Argued on: 22.09.2025

Written submissions:

By the Plaintiff-Respondent-Appellant on 21.10.2025.

By the Defendant-Appellant-Respondent on 31.10.2025.

Decided on: 17.12.2025

Samayawardhena, J.

The plaintiff instituted action in the District Court of Polonnaruwa seeking a declaration of title to the land described in Schedule A to the plaint, ejectment of the defendant from the land described in Schedule B thereto, which forms part of Schedule A, and damages. The defendant filed answer praying for the dismissal of the plaintiff's action and made a cross-claim for compensation in respect of improvements, in the event the Court were to hold in favour of the plaintiff. Upon conclusion of the trial, the District Court entered judgment in favour of the plaintiff and dismissed the defendant's cross-claim.

On appeal by the defendant, the High Court of Civil Appeal of Anuradhapura set aside the judgment of the District Court and allowed the appeal on the ground that the plaintiff had failed to succeed to the land as required by section 68(2) of the Land Development Ordinance.

Being dissatisfied with the judgment of the High Court, the plaintiff preferred this appeal with leave obtained. This Court had granted leave to appeal on the following two questions of law:

- (a) Did the High Court fail to appreciate that the defendant did not raise an issue in the District Court in regard to the failure of the plaintiff to comply with section 68(2) of the Land Development Ordinance?

(b) Did the High Court fail to appreciate that the defendant did not lead evidence to the effect that the plaintiff did not enter into possession of the land?

The plaintiff is the younger brother of the defendant. In terms of section 19 of the Land Development Ordinance, their father was issued a Grant in respect of the land described in Schedule A to the plaint in 1982. The father nominated the plaintiff as the successor to the land. The father died on 20.11.1994 and the mother on 18.12.2011. The plaintiff instituted action in the District Court on 03.10.2012 on the basis that he is the lawful owner of the entire land as the duly nominated successor.

In terms of section 48 of the Land Development Ordinance, upon the death of a permit-holder or owner of a holding (grantee), the spouse is entitled to succeed to the land or holding, whether or not such spouse has been nominated as a successor.

48A(1). Upon the death of a permit-holder who at the time of his or her death was required to pay any annual instalments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such instalments, the spouse of that permit-holder, whether he or she has or has not been nominated as successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse.

(2) If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under subsection (1) to the land alienated on the permit, the terms and conditions of the permit are complied with by such spouse, such spouse shall be entitled to a grant of that land subject to the following conditions:-

- (a) such spouse shall have no power to dispose of the land alienated by the grant;
- (b) such spouse shall have no power to nominate a successor to that land;
- (c) upon the death of such spouse, or upon his or her marriage, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land:

Provided that the aforesaid conditions shall not apply to a grant of any land to be made to a spouse who has been nominated by the deceased permit-holder to succeed to the land alienated on the permit.

(3) Any disposition or nomination made by a spouse in contravention of the provisions of subsection (2) shall be invalid.

48B(1). Upon the death of the owner of a holding, the spouse of that owner shall be entitled to succeed to that holding subject to the following conditions:-

- (a) upon the marriage of such spouse, title to the holding shall devolve on the nominated successor of the deceased owner or, if there was no such nomination, on the person who was entitled to succeed under rule 1 of the Third Schedule;
- (b) such spouse shall have no power to dispose of that holding;
- (c) such spouse shall have no power to nominate a successor to that holding:

Provided that the aforesaid conditions shall not apply to a spouse who has been nominated by the deceased owner of the holding to succeed to that holding.

(2) Any disposition or nomination made by a spouse in contravention of the provisions of subsection (1) shall be invalid.

In terms of section 49 of the Land Development Ordinance, where the spouse fails to succeed to the land or holding, or where the spouse has succeeded and subsequently dies, the person nominated as successor by the permit-holder or grantee shall succeed to such land or holding.

49. Upon the death of a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or of an owner of a holding, without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to the land alienated to that permit-holder on the permit or holding or upon the death of such spouse, a person nominated as successor by such permit-holder or owner shall succeed to that land or holding.

In terms of section 72 of the Land Development Ordinance, where both the spouse and the nominated successor fail to succeed, succession to the land or holding shall take place in the manner prescribed in Rule 1 of the Third Schedule to the Ordinance.

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

Section 68 of the Land Development Ordinance defines the meaning of the term “failure to succeed”. In terms of section 68(1), a spouse fails to succeed where such spouse refuses to succeed to the land or holding, or fails to enter into possession of the land or holding within a period of six months reckoned from the date of death of the permit-holder or grantee. In terms of section 68(2), a nominated successor fails to succeed where such nominated successor refuses to succeed to the land or holding, or fails to enter into possession of the land or holding within a period of six months reckoned from the date of death of the permit-holder or grantee where the permit-holder or grantee dies without leaving a spouse, or, where the permit-holder or grantee dies leaving a spouse, from the date of the failure of such spouse to succeed or from the date of death of such spouse.

68(1). The spouse of a deceased permit-holder, who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or the spouse of an owner, fails to succeed to the land held by such permit-holder on the permit or to the holding of such owner, as the case may be—

- (a) if such spouse refuses to succeed to that land or holding, or*
- (b) if such spouse does not enter into possession of that land or holding within a period of six months reckoned from the date of the death of such permit-holder or owner.*

(2) A nominated successor fails to succeed to the land held on a permit by a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner if he refuses to succeed to that land or holding, or, if the nominated successor does not enter into possession of that land or holding within a period of six months reckoned—

- (i) where such permit-holder or owner dies without leaving behind his or her spouse, from the date of the death of such permit-holder or owner; or
- (ii) where such permit-holder or owner dies leaving behind his or her spouse, from the date of the failure of such spouse to succeed, such date being reckoned according to the provisions of paragraph (b) of subsection (1), or of the death of such spouse, as the case may be.

It is necessary to state at this stage that possession is mainly of two kinds, namely actual possession and constructive possession. Section 68 shall be construed as encompassing both forms of possession. To hold otherwise would defeat the statutory scheme and place a surviving spouse, particularly one of advanced age, at an unfair disadvantage, as such a spouse may be incapable of entering into physical possession of the land upon the death of the permit-holder or owner.

In the plaint, the plaintiff himself pleaded that the defendant had forcibly entered into possession of the portion of land described in Schedule B while the father was still alive. In cross-examination, the plaintiff unequivocally admitted that the defendant had been in possession of that portion since 1980. The defendant in his evidence stated that he had been residing there with his family from 1978. The action was instituted in the District Court on 03.10.2012. These facts, which emerged both from the pleadings and from admissions made in evidence, were never in controversy at any stage of the trial. Accordingly, the submission of learned counsel for the plaintiff that the judgment of the High Court cannot be sustained on the ground that no issue was raised at the trial on succession in terms of section 68(2) is without merit.

In *Nevil Fernando v. Sanath Fernando* [2024/25] BLR 78, I had occasion to explain the law on the impermissibility of shifting positions from pleadings

to trial and thereafter on appeal, subject to strictly limited exceptions, in the following terms:

A party to an action is subject to specific constraints in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. He cannot keep changing his position to suit the occasion. There must be an end to litigation. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by Court, a party cannot present a different case at the trial from what was raised by way of issues. Thirdly, once the judgment is pronounced by Court, the losing party cannot present a different case before the appellate Court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has developed in our Courts to entertain questions of fact for the first time on appeal subject to strict conditions, which have been discussed in The Tasmania (1890) 15 App. Cases 223 and Appuhamy v. Nona (1912) 15 NLR 311. The cumulative effect of these two leading decisions is that a question of fact can be raised for the first time in appeal if:

- (a) “it might have been put forward in the Court below under some one or other of the issues framed”; and
- (b) “if it is satisfied beyond doubt” that
 - (i) “it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial”; and
 - (ii) “no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box”.

On the unique facts and circumstances of this case, I am satisfied that all facts bearing upon the contention relating to failure to succeed in terms of section 68(2) of the Land Development Ordinance were before the High Court and, as stated earlier, those facts were never in dispute. The case therefore falls within the recognised exception permitted by law. In these circumstances, the High Court was well within its jurisdiction in entertaining and deciding that issue.

Accordingly, I answer the questions of law upon which leave to appeal was granted in the negative and dismiss the appeal. I make no order as to costs.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court

M. Sampath K.B. Wijeratne, J.

I agree.

Judge of the Supreme Court