AN INTRODUCTION TO HOUSING AND LAND LAWS IN SRI LANKA

CENTRE ON HOUSING RIGHTS AND EVICTIONS
COHRE

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An Introduction to Housing and Land Laws in Sri Lanka

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List of COHRE – Sri Lanka Publications

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MESSAGE FROM COHRE SRI LANKA PROJECT MANAGER

Few things in life can become as highly politicised and emotionally charged as one's access to land and adequate housing. Sri Lanka currently faces a severe crisis in which access to land and housing permeates the various challenges of developing the country and providing a stable and peaceful environment for all of its citizens.

Sri Lanka's ongoing 20 year-old civil conflict has produced one of the largest populations of Internally Displaced Persons (IDPs) in the world. With the escalating violence following the breakdown of a ceasefire agreement, the number of conflict IDPs is increasing on a daily basis. It is estimated that in 2007 there are over 750,000 IDPs in Sri Lanka*, of which 300,000 have been displaced in the recent upsurge in violence between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). Secondary occupation, the establishment of High Security Zones, and the complete destruction of houses and property await those lucky enough to be able to return to their homes.

Three years after the Asian Tsunami many displaced persons still have not received adequate housing and over 11,500 still live in temporary camps. Many still await restitution claims from the government or international organisations. However, many others have fallen through the policy gaps and have been forgotten or in some cases purposely discriminated against.

Other vulnerable and marginalised groups do not have access to judicial remedies for violations of their economic, social and cultural (ESC) rights. These include slum and plantation communities who lack security of tenure and

who are vulnerable to the forces of the economy and government sponsored 'development' projects resulting in forced evictions. Women are particularly vulnerable to housing violations and have suffered from gender based discrimination related to titling schemes, restitution, and other elements of emergency/disaster relief.

While Sri Lanka's domestic legal system has yet to fully recognize the full range of international human rights standards and obligations, especially ESC rights, it nevertheless provides the legal framework in which these issues must be discussed and resolved. An understanding of the legal obligations of the state, and the application of domestic law is essential to helping to eliminate land and housing violations across the wide spectrum of challenges facing Sri Lanka today.

Introduction to Housing and Land Laws in Sri Lanka is aimed at helping lawyers, policy makers, civil society and international organisations understand the complex domestic legal framework so that they may better ensure the protection of housing and land rights in their respective activities. It provides an introduction to housing and land laws that can be adapted to a variety of situations across Sri Lanka. It also offers practitioners a guide to the various legal mechanisms that can be engaged to help ensure the protection of housing and land rights.

COHRE is hopeful that this report offers new insight and tools for human rights defenders, development and conflict management specialist in Sri Lanka so that we may all contribute to building a better, safer and more secure future.

Todd Wassel

COHRE, Sri Lanka Project Manager

26 November 2007

* Figures for IDPs have been gathered from a variety of sources including UNHCR, OCHA, government agencies, and independent fact finding missions. Accurate figures are difficult to determine, however, it is generally agreed that the actual number of IDPs is greater than 750,000 persons.

Acronyms

COHRE	Centre on Housing Rights and Evictions
ESCR	Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LDO	Land Development Ordinance
NHDA	National Housing Development Authority
TAFREN	Task Force for Rebuilding the Nation
UDA	Urban Development Authority

INTRODUCTION

The Centre on Housing Rights and Evictions (COHRE) is an international non-governmental organisation founded in 1994 and having offices in nine countries. COHRE is one of the largest and most influential human rights organisations dedicated to securing the right to adequate housing. COHRE's work focuses on protecting housing rights and preventing forced evictions.

In July 2005 COHRE opened its office in Sri Lanka to assist and seek redress for victims of economic, social and cultural rights violations in Sri Lanka, in particular for those displaced by conflict and by the tsunami. Its aims are also: to influence and develop jurisprudence, legislation and policies in the field of housing rights; to empower local communities with regard to their housing, land and property rights; to conduct relevant research projects; and to train the judiciary, NGOs, practising lawyers, policy makers, legislators and local communities in Sri Lanka — particularly in the field of housing rights and generally on economic, social and cultural rights.

In pursuing its aim to develop housing rights jurisprudence in Sri Lanka and in building the capacity of practising lawyers in the field of housing rights, COHRE Sri Lanka initiated a research project on housing and land laws in Sri Lanka. This publication is based on the findings of this project and is intended to provide an introduction to Sri Lanka's housing and land laws. Its detailed analysis is confined to the main laws relating to land and housing.

Part I sets out the framework within which the right to adequate housing is recognised under international law. It examines the recognition of the right to adequate housing in international human rights instruments and articulates the scope of the right to adequate housing.

Part II provides an introduction to housing laws in Sri Lanka. It analyses the statistics relating to housing ownership in Sri Lanka and discusses housing policies adopted by the Government. It looks in detail at laws dealing with housing, focusing on relevant case law. It also examines Sri Lanka's obligations under international law and to what extent these obligations have been met.

An introduction to land laws in Sri Lanka is contained in Part III, which sets out land policy in Sri Lanka and features a section on land ownership indicators. It also analyses the laws relating to land acquisition, State lands, land reform, partition and other important laws affecting land rights.

PART I

THE RIGHT TO ADEQUATE HOUSING

International law recognises the right to adequate housing in numerous treaties and conventions. The right to adequate housing has been articulated in Article 25(1) of the Universal Declaration of Human Rights and it has also been recognised in other major international human rights treaties.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Article 2 of the ICESCR, in setting out the nature of the obligation of States, provides that States Parties must implement the rights articulated using the maximum available resources with a view to progressively realising these rights:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

> resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

As the Committee on Economic, Social and Cultural Rights (the Committee on ESCR) has noted,[1] ensuring the right to adequate housing is significant in many respects. It is closely linked to many other rights — civil, political and socio-economic. Ensuring the right to housing enables the enjoyment of other rights, such as the right to an adequate standard of living, freedom to choose one's residence and rights to health and education. Similarly, the full enjoyment of other rights such as freedom of expression, freedom of association and the right to participate in public decision making is crucial for the realisation of the right to adequate housing. Other rights, such as the right to not be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence, constitute a very important dimension in defining the scope of the right to adequate housing.

The right to housing as guaranteed by international law is the right to 'adequate' housing. In defining the scope of the term 'adequate', the Committee on ESCR acknowledged that social, economic, cultural, climatic, ecological and other factors, in part, determine adequacy. It identified the following as essential components of adequacy:

- legal security of tenure
- availability of services, materials, facilities and infrastructure
- affordability
- habitability
- accessibility
- location
- cultural adequacy

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[1] Committee on ESCR, General Comment No. 4, *The Right to Adequate Housing* (Art. 11, para. 1 of the Covenant) (Sixth Session, 1991), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), p. 53.

The right to adequate housing also implies the right to not be forcefully evicted from one's home. In 1997, the Committee on ESCR issued General Comment No. 7 specifically addressing the issue of forced evictions.[2] This defines forced evictions as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection". While forced evictions patently breach the rights enshrined in the ICESCR, they may also violate civil and political rights, such as the right to life, the right to the security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

Article 11(1) of the ICESCR describes the State's obligations with regard to forced evictions and is complemented by Article 17 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees against 'arbitrary or unlawful interference' with one's home. Article 17 of the ICCPR states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

The Committee on ESCR in its General Comments No. 4 and 7 lays down the test to determine the legality of forced evictions. Firstly, forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law. Secondly, governments must ensure that all feasible alternatives to evictions are explored in consultation with affected persons. Thirdly, it spells out the procedural protections that should be guaranteed in carrying out the evictions.

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[2] Committee on ESCR, General Comment No. 7, *The Right to Adequate Housing* (Art. 11, para. 1 of the Covenant): forced evictions, UN Doc. E/C.12/1997/4 (1997).

Prior to carrying out any evictions, especially those involving large groups, States Parties should consult with affected persons and explore all feasible alternatives for avoiding or minimising the need to use force. Legal remedies and compensation must be available to affected persons.

The States Parties are bound to give effect to the ICESCR. One of the main modes by which this can be done is through enacting legislation. The Committee on ESCR has identified enacting such laws as "an essential basis upon which to build a system of effective protection". It clarified that legislation must also apply in relation to "all agents acting under the authority of the State or who are accountable to it".

PART II

HOUSING LAWS IN SRI LANKA

2.1 Housing ownership indicators

Surveys conducted in 1982 revealed that 84 per cent of the lands in Sri Lanka are State owned while only 16 per cent are privately owned. Of the State-owned lands, 18 per cent consist of large inland waters while 33 per cent consist of forests and forest reserves. 27 per cent of the lands are agricultural.[3] A survey carried out by the Central Bank of Sri Lanka in 2003/2004[4] indicates that 88.7 per cent own their homestead lands and 35.4 per cent own their agricultural lands.

Sri Lanka's housing stock includes single houses, attached houses, condominiums, flats, annexes, row houses, line rooms and shanties. According to the survey carried out by the Central Bank of Sri Lanka[5] in 2003/2004, 91 per cent of people live in single-unit houses. In comparison with a survey carried out in 1996/1997, this represents an increase in the number of single-unit houses. 1.3 per cent of people live in condominiums or flats while 2.8 per cent live in attached houses or annexes. 3.9 per cent of people live in line rooms. Slum and shanty dwellers have increased to 0.8 per cent. Table 1 details the

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3 Institute of Policy Studies of Sri Lanka, *State of the Economy* (Colombo: IPS, 2004).

4 *Report on Consumer Finances and Socio-Economic Survey 2003/2004, Part 1* (Colombo: Central Bank of Sri Lanka, 2005).

5 Ibid.

types of housing in the urban, rural and estate sectors, comparing data from the surveys carried out in 1996/1997 and 2003/2004.

Table 1

Types of houses by sector – 1996/1997 and 2003/2004[6]

As a percentage of households

Sector	Urban		Rural		Estate		All sectors	
Type of housing unit	1996/1997 [a]	2003/2004 [b]	1996/1997 [a]	2003/2004 [b]	1996/1997 [a]	2003/2004 [b]	1996/1997 [a]	2003/2004 [b]
Single house	70.3	79.7	96.4	96.9	10.2	28.1	88.5	91.2
Condominium/flat	4.8	5.3	0.5	0.7	0.0	0.0	1.0	1.3
Attached house/ annex	23.0	9.3	2.9	1.5	83.2	7.9	9.7	2.8
Line room/row house[c]	0.0	3.4	0.0	0.3	0.0	63.4	0.0	3.9
Shanty	1.7	2.0	0.1	0.6	0.2	0.5	0.3	0.8
Other	0.1	0.3	0.2	0.1	6.4	0.2	0.5	0.1

[a] Excluding northern and eastern provinces

[b] Excluding Killinochchi, Mannar and Mullaitivu districts

[c] Recorded under the attached house/annex category in the 1996/1997 survey

Source: *Report on Consumer Finances and Socio-Economic Survey 2003/2004, Part 1* (Colombo: Central Bank of Sri Lanka, 2005)

Nearly 90 per cent of housing units are self owned. This is particularly so in the urban and rural sectors. In the estate sector only 21.5 per cent of housing units are self owned, but this represents an increase of nearly 10 per cent since 1996/1997. In the estate sector nearly 75 per cent of housing units are either State owned or owned by employers. A total of 2.5 per cent of people live in

[6] Ibid., p. 78.

leased or rented accommodation, with that proportion rising to 8.3 per cent in the urban sector. Table 2 details the types of ownership in the urban, rural and estate sectors.

Table 2

Types of ownership by sector – 1996/1997 and 2003/2004[7]

As a percentage of households

Sector	Urban		Rural		Estate		All Sectors	
Type of ownership	**1996/1997 (a)**	**2003/2004 (b)**	**1996/1997 (a)**	**2003/2004 (b)**	**1996/1997 (a)**	**2003/2004 (b)**	**1996/1997 (a)**	**2003/2004 (b)**
Self owned	84.5	82.9	95.5	94.3	10.2	21.5	89.5	89.2
Owned by government/ employer	1.9	3.2	0.4	1.0	74.7	74.1	4.6	5.0
Leased/rented	9.1	8.3	1.6	1.7	1.3	0.2	2.5	2.5
Free of rent	3.6	5.0	2.1	2.9	13.2	4.2	2.9	3.2
Other	0.9	0.5	0.5	0.1	0.1	0.0	0.5	0.1

(a) Excluding northern and eastern provinces

(b) Excluding Killinochchi, Mannar and Mullaitivu districts

Source: *Report on Consumer Finances and Socio-Economic Survey 2003/2004, Part 1* (Colombo: Central Bank of Sri Lanka, 2005)

The 2003/2004 survey indicates an average floor area of 16.8 square metres per person. Reflecting a decline in congestion in residential buildings, the number of rooms per person rose from 0.9 in 1996/1997 to 1.1 in 2003/2004. The Central Bank attributes this increase to progress achieved in improving residential housing stock in the country over the last two decades. The

7 Ibid.

average floor area per person was greater in the urban sector compared to the rural and estate sectors. The survey suggests that this is due to the fact that middle- and high-income earners have the capacity to bear the cost of building larger houses in urban areas. In the estate sector the average floor area and number of rooms per person is considerably lower compared to the other two sectors. Table 3 illustrates the congestion in residential buildings.

Table 3

Congestion in residential buildings by sector[8]

Sector	Urban	Rural	Estate	All sectors	Urban	Rural	Estate	All sectors
	1996/1997[(a)]				2003/2004[(b)]			
Measures								
Floor area per person (square metres)	15.9	15.2	4.8	14.7	18.8	17.1	7.6	16.8
Rooms per person	0.9	1.0	0.5	0.9	1.1	1.1	0.7	1.1

[(a)] Excluding northern and eastern provinces

[(b)] Excluding Killinochchi, Mannar and Mullaitivu districts

As indicated in Table 1, 0.8 per cent of people live in shanties. A majority of these settlements are on Government land, and they are found predominantly in Colombo city. Table 4 details the number of shanty units in Colombo city in 1993.

[8] Ibid.

Table 4

Shanty units in Colombo city in 1993

Municipal districts	Number of shanty units
Colombo North	5 508
Colombo Central	6 190
Borella	3 785
Colombo East	4 835
Colombo West	1 117
Total	28 685

Source: Colombo City Office, National Housing Development Authority

An indication of the quality of housing can be gleaned from the construction material used. The 2003/2004 Central Bank survey reveals that 55.4 per cent of housing units are built of bricks while 21.1 per cent are of cement blocks. 12.5 per cent of housing units have been constructed with wattle and daub or mud, while in 1.7 per cent of cases wooden planks or metal sheets have been used.

In summary, the 2003/2004 statistics indicate that there has been an overall improvement in housing conditions.

2.2 Housing policy

Sri Lanka does not have a well-formulated housing policy. Successive governments have dealt with the issue of housing by adopting *ad hoc* policies catering to particular situations as they have arisen, and not as part of a broader and well-formulated policy.

The first Ministry of Housing was created in 1952. Since then, several government departments and agencies have been established to formulate housing policy and to carry out housing projects under successive governments. These include the National Housing Department (1952), the National Housing Development Department (1977), the Greater Colombo Economic Commission (1977), the Urban Development Authority and the National Housing Development Authority (1979) and the Mahaweli Development Authority.

The National Housing Development Authority (NHDA) has undertaken several housing projects, including the Hundred Thousand Houses Programme (1979-1983) in which those living in extreme poverty were provided with free housing, and the 1.5 Million Houses Programme (1989-1994) which provided housing assistance to low-income families. At present, the NHDA is carrying out several housing projects which address issues of underserved settlements, low- and middle-income groups and public servants, as well as housing loan programmes and cluster housing programmes in rural areas, a sustainable housing programme for the estate sector and the provision of social infrastructure for the estates sector.[9]

Under the auspices of the Ministry of Housing, the Sustainable Township Programme sought to provide houses for approximately 66 000 slum and shanty dwellers in Colombo and to release the vacated prime land for development purposes.

The Mahaweli Development Scheme is one of the largest resettlement schemes that Sri Lanka has undertaken. Under this scheme, approximately

[9] www.nhda.lk

58 000 families displaced as a result of the Kotmale and Victoria development projects were relocated in the Mahaweli area. Among those relocated were the inhabitants of ancient villages from the area, early encroachers of State land and the landless.[10]

In addition, several public sector housing schemes aimed at particular target communities have been implemented. For instance, the Ministry of Fisheries and Aquatic Resources has implemented several housing projects since the 1970s to assist fishing communities. Similarly, under the Plantation Human Development Programme several housing projects have been implemented to construct and upgrade housing conditions in the estate sector.[11]

Special housing programmes, coordinated by the Task Force for Rebuilding the Nation (TAFREN), have been launched to assist those affected by the tsunami.

2.3 Laws on housing

2.3.1 The Constitution

The Sri Lankan Constitution recognises only civil and political rights, not socio-economic rights. Therefore, there is no express provision to safeguard citizens' housing rights in its fundamental rights chapter.

Article 14(1)(h) of the Constitution deals with the freedom to choose one's residence, and provides that:

> Every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka.

[10] *Landlessness and Land Rights in Post-Tsunami Sri Lanka* (Colombo: Centre for Policy Alternatives, 2005), p. 12.

[11] Ibid.

The only constitutional protection of housing rights is in the Directive Principles of State Policy. Article 27(c) of the Constitution provides that the State must ensure:

> the realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.

The Directive Principles are declaratory only and are not justiciable in a court of law.

2.3.2 Rent Act No. 7 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 industrialisation. The rapid growth of industry resulted in a rising concentration of people in cities and consequent housing shortages. Vulnerable tenants were subject to exploitation by landlords who, holding the bargaining power, demanded exorbitant rents.

A statutory framework designed to favour the tenant was introduced to govern this area. In 1942, the Rent Restriction Ordinance[12] 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. This framework, which was heavily weighted in favour of the tenant, was then subjected to changes that strengthened the position of the landlord[13] — consistent with the open economic policies adopted by the Government. Through amendments to the Acts of 1980 and 2002, the following premises are

[12] Rent Restriction Ordinance No. 60 of 1942.

[13] Amending Law No. 10 of 1977, Amending Act No. 55 of 1980 and Act No. 26 of 2002. Amending Act No. 55 of 1980 exempted from the Rent Act houses built or rented for the first time after 1 January 1980. The Rent (Amendment) Act No. 26 of 2002 attempted to strike a balance between the rights of the landlord and tenant. It highlighted the need for development and the need to address the housing shortage.

now exempt from the purview of the Rent Act, strengthening the bargaining power of the landlord:[14]

a) excepted premises;

b) residential premises constructed after 1 January 1980 and let on or after that date;

c) residential premises occupied by the owner on 1 January 1980 and let on or after that date;

d) residential premises occupied or possession thereof taken by the landlord on or after 1 January 1980 and let on or after that date;

e) residential premises in the occupation of a person issued with a visa under the Immigration and Emigration Act and whose income exceeds Rs. 1 000 per month, or of a non-resident company which has been exempted by the Commissioner for National Housing; and

f) residential premises let after 12 December 1980 to a person or company referred to in the preceding paragraph.

The effect of the 1980 and 2002 amendments has been to exempt a large number of premises from the purview of the Rent Act. As will be shown later, tenants of the exempted premises are denied the protection of the Rent Act, especially in relation to ejectments.

At the same time, the amendments introduced several provisions that favour the tenant. They impose restrictions on increasing rent[15] and provide for instances where such increases are permitted.[16] They restrict landlords from demanding as rent amounts in excess of the authorised

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14 Amending Act No. 55 of 1980 exempts items (a), (b), (c), (e) and (f) while Amending Act No. 26 of 2002 exempts item (d).

15 Section 3.

16 Section 5.

rent,[17] and there are similar restrictions on demanding excessive advances, premiums or other additional payments.[18]

The Act attempts to strike a balance in relation to the ejectment of tenants. There are certain grounds on which a landlord can institute action to eject a tenant; these are as follows:[19]

a) Arrears of rent

Where the standard rent of a premises does not exceed Rs. 100, the landlord can institute action to eject the tenant if rent has been in arrears for three months or more.[20]

A tenant of a residential premises for which the standard rent exceeds Rs. 100 or a business premises for which the standard rent exceeds Rs. 100 and the annual value of which does not exceed the relevant amount can be ejected if the rent is in arrears for one month or more.[21]

In the case of *Samaraweera* v. *Ranasinghe*[22], Basnayake C.J. held that:

> The tenant cannot avoid the consequences of his rent being in arrear for more than a month after it has become due by tendering the arrears in a lump sum. The moment the rent falls into arrear for more than a month he forfeits the protection afforded by the Act and the landlord becomes free to proceed against him in ejectment and there is nothing the tenant can do thereafter to prevent it.

However, this position changed with the amendments made to the Rent Act in 1980. Prior to instituting action to eject a tenant on the grounds of

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17 Section 6 provides that the authorised rent of any premises is the standard rent of the premises determined under Section 4 or, where any increase of rent is permitted by Section 5, the aggregate of the standard rent and every such permitted increase. Section 4 contains a detailed method of calculating the standard rent.

18 Section 9.

19 Section 22(1) and (2).

20 Section 22(1)(a).

21 Section 22(2)(a).

22 59 NLR 395, p. 397.

arrears of rent, the landlord must now give the tenant three months' notice of termination of the tenancy. If the tenant pays all arrears of rent prior to the institution of action or tendering proceedings, the landlord cannot institute or proceed with the action. Similarly, if the tenant pays all arrears of rent prior to the summons returnable date (provided it is the first occasion of such payment of arrears) the action cannot be proceeded with.

The courts have applied a strict approach to ensure that tenants are given the stipulated notice of termination of the tenancy. In *Ratnam* v. *Dheen*[23], the Court held that the plaintiff's action could not be maintained in view of the fact that three months' notice of termination of the tenancy was not given to the defendant. Similarly, in *Cassim* v. *Thiagarajah*[24], it was held that an action to eject a tenant is barred unless the landlord has given the tenant three months' notice of termination of the tenancy.[25] Where the tenant is in arrears of rent on the second occasion, it is sufficient to give only two months notice and where the tenant is in arrears of rent for the third time, one months notice suffices.

Rent may be paid either to the landlord or to an authorised person of the landlord. The term 'authorised person' has been defined to mean the mayor or the chairman of the local authority within whose administrative limits the premises are situated, or a person authorised by them or the Rent Board of the area, where the Minister of Housing so decides.[26] This provision allows tenants to pay rent either from the beginning of the tenancy or after the institution of action for ejectment. However, most tenants are not aware of this provision, so the advantage accrues to landlords who, in collaboration with corrupt officials attached to court registries, may negate this protection provided to tenants.

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23 70 NLR 21.

24 71 NLR 279.

25 These cases were decided under the Rent Restriction Act which was replaced by the Rent Act containing similar provisions with regard to giving notice of termination of the tenancy.

26 Section 21.

The Act protects a tenant who has defaulted on payment due to illness or unemployment. If the action for ejectment is instituted on the grounds of arrears of rent and where the Court is satisfied that the rent has been in arrears on account of the tenant's illness, unemployment or other sufficient cause, the Court can specify that the arrears of rent can be paid either in a lump sum or in instalments on dates specified by the Court.[27]

b) The premises is reasonably required by the landlord or a family member for residential or business purposes

Where the landlord or a member of his family requires the premises for business or residential purposes, the landlord can institute action to eject the tenant.[28]

Premises rented for less than Rs. 100

Prior to instituting action to eject a tenant, the landlord of a premises rented for less than Rs. 100 must deposit with the Commissioner of National Housing a sum equivalent to ten years' rent or Rs. 150 000, whichever is higher. This places a heavy burden on the landlord, who, despite having a need of a house in which to live, must make a minimum deposit of Rs. 150 000 in order to eject the tenant.

Once the proceedings for ejectment have been instituted in Court on the grounds that the premises is required for the landlord's residential or business purposes, the Commissioner for National Housing must immediately arrange for alternate accommodation to be provided to the tenant. The Commissioner must notify the Court of the availability of alternate accommodation and the sale price of such alternate accommodation. The Commissioner must also notify the amount the tenant would have to pay in order to become the absolute owner of such alternate accommodation, after off-setting the sum

[27] Section 22(5).

[28] Section 22(1)(b).

deposited by the landlord under Section 22(1)(b). The tenant may pay this amount interest free and in 720 equal instalments.[29]

A significant gap in the law is that it fails to ensure the alternate accommodation provided by the Commissioner is habitable. Section 22(8) defines alternate accommodation only to mean any house, apartment, flat or dwelling unit which has a floor area of not less than 400 square feet and which is situated within a 20-kilometre radius of the rented premises. It does not address the adequacy of the alternate accommodation. Section 22(1E) expressly states that the Court shall not inquire into the adequacy or suitability of the alternate accommodation offered by the Commissioner. This provision was brought in by the amending Act of 1977 to the "advantage of a one house owner economically disadvantaged landlord".[30] This is a clear violation of the right to adequate housing. It contravenes the Directive Principles of State Policy and is in breach of Sri Lanka's obligations under international law.

In *Mowjood* v. *Pussadeniya*[31], the Court interpreted the restriction placed on it by Section 22(1E) and held that the Commissioner of National Housing is not free to offer any housing, regardless of adequacy. The Court laid down the following guidelines as provisional criteria for whether the premises offered can be accepted as alternate:

i. In giving alternate accommodation, the personal idiosyncrasies of the tenant with regard to preference may be ignored. Allocating housing based on an individual's needs render the process subjective and impractical. For instance, it would be unreasonable to give preference to the tenant's health or business needs or preferences to factors such as climate (except perhaps in most extreme cases) over the landlord's right to his house;

ii. The argument that the schooling of the dependants of the tenant would be disturbed is without merit. There are Government schools

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29 Section 22(1)A.

30 *Mowjood* v. *Pussadeniya* [1987] 1 Sri LR 63.

31 [1987] 1 Sri LR 63, p. 83-84.

all over the country and the child could attend another school within close proximity to his new house;

iii. One must consider the disparity between the rent so far paid and the rent payable. One must consider whether the difference is equitable in all the circumstances and the primary criteria there would be whether the payment which the tenant is being asked to make bears a reasonable relation to the present market value of the premises. With regard to this the age of the tenant is a material factor because the test should be whether the tenant could reasonably expect to benefit from the financial outlay which he is called upon to make because of the rent purchase foundation;

iv. It may be unreasonable to require a tenant to accept as alternate accommodation a house situated in an area where communal tensions could gravely prejudice the tenant — his physical safety and peace of mind. However, this is a question of fact in each case. The test must be whether the anticipation of the fear is reasonable;

v. Physical facilities in the new home must be approximately comparable taking account of the size of the tenant's family;

vi. The time given by the Commissioner for the tenant to move to the new house must be reasonable and adequate;

vii. The tenant is under a duty to make a sincere effort to secure suitable accommodation for himself. The tenant cannot have a closed mind on the matter so vitally affecting him. Thus, where there is evidence that the tenant has not even been willing to ascertain for himself the nature of premises offered, it is a tentative indication of a lack of *bona fides* on his part as such an attitude would nullify the statutory concession made to the landlord;

viii. The Commissioner must not act arbitrarily or capriciously or with bias in a discriminatory manner or in bad faith when making an offer for alternate accommodation;

ix. When the Commissioner offers an alternate house, the tenant must not be seen to prevaricate or delay giving vacant possession to the landlord. The landlord has a right to vacant possession of his house within a reasonable time of an alternate house being offered to the tenant.

Where the Court has issued a decree for ejectment of the tenant and the Commissioner for National Housing has notified the Court that he/she is able to provide alternate accommodation to the tenant, the Court will issue a writ in execution of the decree. However, where the Commissioner has failed to notify the Court of the availability of alternate accommodation, the Court can issue a writ after one year has elapsed from the date of decree, if the Court is satisfied that the landlord has deposited the required sum of money with the Commissioner.[32]

The law only obliges the landlord to deposit the required money with the Commissioner. The obligation to find alternate accommodation for the tenant is imposed on the Commissioner. On one hand this arrangement is fair, as a landlord who has rented his house for less than Rs. 100 cannot be expected to find alternate accommodation for the tenant when he himself needs the house for his residential or business purposes. On the other hand, absolving the landlord from any duty to find accommodation for the tenant and placing the entire burden on the Commissioner adversely affects the tenant.

The law does not explicitly require the tenant to find alternative accommodation. However, in *Jayaweera Bandara* v. *Weerasinghe*[33], it was held that where a tenant by his own act has disabled himself from accepting the offer made by the Commissioner, a writ can lawfully be issued because it is a case where the Commissioner has notified the Court that he is able to provide alternate accommodation to the tenant. The Court held that the tenant cannot be allowed to take advantage of circumstances which are self induced or brought about by himself.

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[32] Section 22(1)C.

[33] [1983] 2 Sri LR 205.

Where the Commissioner fails to find alternate accommodation within one year of the date on which the decree for ejectment has been entered, the tenant would be ejected.

Premises rented for more than Rs. 100

In the case of premises rented for more than Rs. 100, action can be instituted to eject the tenant where the premises is reasonably required by the landlord or his family members for residential or business purposes.[34]

Where the landlord owns only one residential premises (whether the premises was let before or after the commencement of the amending Act No. 55 of 1980), the premises must be reasonably required for occupation as a residence for the landlord or his family members, and the landlord must deposit a sum equivalent to five years' rent with the Commissioner for National Housing.

Despite the fact that it is only five years' rent that need to be deposited with the Commissioner, this could still work out to a large amount of money and place the landlord in a difficult position. However, this has been done to protect tenants and reduce the number of frivolous applications made to the Court by landlords.

The Act places a heavier burden on a landlord who owns one house and requires it for residential purposes by requiring him to deposit money prior to instituting action. In contrast, where the landlord is the owner of several premises and he requires one for residential purposes, he need not deposit money prior to instituting action.

In cases falling under this category, there is no requirement that the Commissioner for National Housing should find alternate accommodation for the tenant being ejected.

[34] Section 22(2)(bb).

Reasonable requirement

The key issue in cases filed on these grounds is whether the premises is reasonably required for residential or business purposes of the landlord or a member of his family. As to the scope of the term 'reasonable requirement', some guidance is given by the courts.

In *Weerasena* v. *Mathupala*[35], the Court held that in deciding the issue of reasonable requirement, the Court must take into account the position of the landlord as well as that of the tenant together with any other factor which is relevant to the decision of the case. The efforts made by the tenant to find alternate accommodation must be taken into account. Where the tenant has not made serious attempts to find alternate accommodation, this would count as a factor against him. In weighing the comparative needs of the landlord and tenant, the Court stated that it would adhere to the following principles:

i. where the hardship to the landlord is equally balanced with that of the tenant, the landlord's claim must prevail;

ii. where the hardship to the landlord outweighs the hardship to the tenant, the landlord's claim must prevail;

iii. where the hardship to the tenant outweighs the hardship to the landlord, the landlord's action must be dismissed;

iv. the landlord is not expected to demonstrate necessity. The words 'reasonably required' cannot mean something more than a desire, but something much less than absolute necessity will suffice.

In *The Bishop of Chilaw* v. *W. Wijenathan*[36], the Court held that Section 22(2)(b) does not only refer to 'residence' and 'business' — it also takes into account trade, profession, vocation and employment. A landlord can use a residential premises for non-residential purposes after recovering the premises from the tenant if he refrains from letting the premises. It was held

[35] [1992] 1 Sri LR 329.

[36] B.L.R. [1991] Vol. IV Part 1, p. 13.

that the landlord's requirement does not have to be an immediate need. Instead, a genuine need which will come into existence in the near future was held to be sufficient.

c) Termination of employment

A tenant of a premises occupied by him because of his employment by the landlord can be evicted when the tenant ceases to be employed by the landlord.[37]

d) Use of premises for immoral or illegal purposes

Where the tenant is guilty of conduct which is a nuisance to adjoining occupiers or has been convicted of using the premises for immoral or illegal purposes, or the condition of the premises has deteriorated due to the negligence or default of the tenant, the landlord can institute action to eject the tenant.[38]

In *Abraham Singho* v. *Ariyadasa*[39], the Court held that the illegal sale of arrack in the premises, in contravention of the provisions of the Excise Ordinance, is a use of the premises for an illegal purpose. Court further held that such a sale on a single occasion is sufficient to constitute such use.

In *Lakshman De Silva* v. *Vivekanandan*[40], the Court held that abuse, intimidation, parking of cars and vans constantly blocking access to the plaintiff's premises, assaulting the plaintiff's brother-in-law, constant harassment by throwing crackers at the plaintiff's dogs and generally using threatening and insulting language directed at the plaintiff were rightly held by the lower Court to constitute conduct which is a nuisance justifying ejectment.

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37 Sections 22(1)(c) and 22(2)(c).

38 Sections 22(1)(d) and 22(2)(d).

39 71 NLR 138.

40 [1994] 3 Sri LR 335.

e) Unauthorised structural alterations[41]

Where structural alterations to the premises have been done by the tenant without prior authorisation by the landlord and the local authority.

f) Change of the character of the premises[42]

Where the character of the premises has been changed by the tenant from a residential premises to a business premises or vice versa without the permission of the landlord, action can be filed to eject the tenant.

g) Development of the premises[43]

The tenant can be ejected where the premises is required for the purpose of development. In this case, the landlord must deposit with the Commissioner for National Housing a sum equivalent to ten years' annual value of such premises calculated on the date of institution of the action, or 20 per cent of the market value of the premises determined by the Chief Valuer on the date of filing action, or Rs. 150 000, whichever is higher, for payment as compensation to the tenant. The Act, however, fails to define the term 'development'.

h) Abandonment[44]

Where the tenant of a residential premises has ceased to occupy the premises without reasonable cause for a continuous period of six months, the landlord can file action to eject the tenant.

Judicial pronouncements lay down the principle that a tenant is considered to have abandoned the premises if two conditions are satisfied: there should not only be physical departure from the premises but there must also exist an intention not to return. Such an intention can be gathered from the conduct of the parties and surrounding circumstances.

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41 Sections 22(1)(e) and 22(2)(e).

42 Sections 22(1)(f) and 22(2)(f).

43 Sections 22(1)(g) and 22(2)(g).

44 Section 28.

In the case of *G.E. Premaratne* v. *E. Suppiah*[45], Thambiah J. held that:

> In order that there might be abandonment not only should the tenant leave the premises but his intention to abandon should also be clear. A person cannot abandon a right without intending to do so. A temporary departure therefore, with the intention of returning to the premises, does not constitute abandonment.

In the case of *A.J.M. Fernando* v. *M.C. Ponrajah*[46], where a tenant was compelled to leave the rented premises on account of riots, Sansoni C.J. held that, "The mere fact that a tenant leaves the premises does not terminate a contract of tenancy …. A person cannot abandon a right without intending to do so". It was held that considering the surrounding circumstances of this case, it is clear that the plaintiff never gave up his rights as a tenant.

i) Subletting[47]

The tenant cannot sublet the rented premises without the prior written consent of the landlord. Section 10 of the Act provides that:

> For the purposes of this Act, any part of any premises shall be deemed to have been let or sublet to any person if such person is in occupation of such premises or any part thereof in consideration of the payment of rent and the provisions of this Act shall not apply to such letting or subletting unless the landlord has consented in writing to the letting or subletting of such premises.

A landlord of a premises sublet without his written consent being obtained can file action to eject the tenant.

In the case of *Deen* v. *Dissanayake*[48], the Court held that the essence of subletting is that the sub-tenant must be in exclusive occupation of a part

[45] 64 NLR 276, p. 277.
[46] 68 NLR 575, p. 576.
[47] Section 10.
[48] [2001] 2 Sri LR 132, p. 135.

of the premises originally let, such part being a defined and separate portion over which the tenant had relinquished his right of control, for the time being, in consideration of the payment of rent.

In *Sirisena* v. *Mutukumarana and Others*[49], the Court was of the view that:

> It could be contended that a mere delay to seek the enforcement of a statutory right should not deprive a landlord from seeking its invocation. However, this is not a mere delay on the part of the plaintiff-respondent in that she has allowed the 2nd defendant-appellant to pay rent from 1979-1989 purporting to issue receipts in the name of the 1st defendant-respondent. Therefore, she has accepted the fact that 2nd defendant-appellant was the sub-tenant under the 1st defendant-respondent. The fact that lease bond would expire in 1989 is no bar to the plaintiff-respondent to terminate the tenancy agreement, in 1981 when she found that the premises had been sublet without her written consent. Therefore, condonation or waiver should operate as a bar to the exercise of the landlord's statutory right to secure the ejectment of the tenant on the ground of subletting.

In the case of *Samad* v. *Samsudeen and Another*[50], Somawansa J. held that:

> It is conceded that the burden of proving the grounds for ejectment including unlawful subletting is with the plaintiff-respondent. However once the plaintiff-respondent proves that the premises had been in the exclusive occupation of a third party other than a tenant as in the instant case in the absence of any explanation by the tenant or the third party showing that there is no subletting, Court has to draw the presumption that it is a case of subletting by the tenant to such third party. In the instant case no evidence was led to give any explanation to the effect that the 2nd defendant-appellant is not paying any rent to the 1st defendant-appellant for occupation by him of the premises in suit. It should be noted that the 1st defendant-

[49] [2002] 2 Sri LR 253, pp. 259, 260.

[50] [2003] 2 Sri LR 234, p. 241.

> appellant for reasons best known to him did not consider it necessary to give any reasonable explanation.

j) Destruction of property

The destruction of property or the subject matter is grounds for the termination of the contract between the landlord and the tenant.

In the case of *Giffry* v. *De Silva*[51], Sansoni C.J. held that:

> It is clear that after the fire there was nothing that the plaintiff could occupy as a building, and that is why he vacated the premises. The learned Judge correctly found that the building could not be used either for purposes of habitation or business. Thus the subject matter of the lease, which was the building, had been completely destroyed, because there was nothing left except two walls. The law is clear that where a building which is the subject of a lease is burnt down without the fault of the landlord or of the tenant, as was the case here, the contract is at an end, for the subject matter of the contract is also at an end.

Thus, in the absence of a fault attributable to the landlord and a contractual stipulation to the contrary, the contract between the landlord and tenant is terminated if the subject matter is totally or substantially destroyed.

k) Continuation of tenancy after the death of the tenant

Under the Common Law, a tenancy terminates upon the death of either party. However, the Rent Act makes provision, in limited instances, for the continuation of the tenancy after the death of the tenant.

In the case of residential premises, the surviving spouse, child, parent, unmarried brother or sister of the deceased tenant or where the deceased tenant was unmarried at the time of death and his/her brother or sister was a

[51] 69 NLR 281, p. 282.

member of the household of the deceased tenant during the whole period of six months immediately preceding the tenant's death, such brother or sister, are deemed to be tenants of the premises. Where the surviving spouse or child of the deceased tenant carries on in such premises the business carried on by the deceased tenant, such surviving spouse or child is deemed to be tenants of the business premises[52].

The aforementioned persons are not deemed to be the tenant of the premises of the deceased tenant as aforesaid if such person was the owner of any premises on the date of the death of the deceased tenant and is not the surviving spouse, child, parent, brother or sister of the original tenant. Upon the application of the landlord to the Rent Board, the Board will hold an inquiry and determine the person who shall be deemed to be the tenant of the premises.

In *Devarajah and another* v. *Ariyatunga*[53], S.N.Silva J. Held that:

> Athough the contract of tenancy is based on common law it is regulated in specific respects by the statutory provisions as contained in Rent Act No. 7 of 1972. One specific instance of such statutory regulation is contained in section 36 which provides for the continuance of tenancy upon the death of a tenant of premises governed by the Rent Act. The requirements that should be satisfied for such succession are stated in relation to residential premises and business premises in paragraphs (a), (b) and (c) of sub section (2). This sub section ends with the provision that the person satisfying such requirements "shall, subject to any order of the board as hereinafter provided, be deemed for the purposes of this Act to be the tenant of the premises". Thus the continuance of the tenancy is based upon a statutory fiction and not a fresh contract of tenancy.

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[52] Section 36 (2).

[53] [1995] 2 Sri LR 34

n *Abdul Kalyoom and others* v. *Mohomed Mansoor* [54](1988) 1 SLR 361, the Court of Appeal held that:

> Tenancy rights being personal do not pass to the tenant's heirs but under the Rent Laws special provision has been made for such tenancy rights to pass to successors eligible under the special statutory criteria-section 18 of the Rent Restriction Act and now section 36 of the Rent Act of 1972. While under S. 18 of the Rent Restriction Act succession to the tenancy would depend upon the eligible person giving written notice to the landlord, under S. 36 of the Rent Act, no such notice is required. The eligible person succeeds to the tenancy without such notice.

The Act has given a wide interpretation to the words 'spouse' and 'child' by recognising marriages by habit and repute and customs. The word 'spouse' includes the husband or wife as the case may be and in the case of marriage by habit and repute or according to custom, any contracting party to that marriage, and the word 'child' includes a child of parents who have contracted a marriage by habit and repute or according to custom.

2.3.3 Protection of Tenants (Special Provisions) Act No. 28 of 1970

The Protection of Tenants (Special Provisions) Act is a unique piece of legislation which made provision for the protection of tenants against ejectment by landlords resorting to force. The special protection conferred to tenants by this Act is explicable by reference to pubic policy, a substantial element of which is the peculiar vulnerability of tenants in the circumstances envisaged by the Act[55]. Initially, the legislature intended this Act to be operative only for a period of two years. Subsequently, it was extended to thirteen years and thereafter eighteen years after the date of its commencement[56]. However, it

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[54] [1988] 1 Sri LR 361

[55] G.L. Peiris, *The Law of Property in Sri Lanka, Volume Two, Landlord and Tenant* (Colombo: Lake House Investments, 1976).

[56] Section 12.

was included in this report to highlight the special protection it afforded to tenants.

The preamble to the Act states that it is an Act to prevent landlords from ejecting tenants by resorting to threats, violence and harassment, by discontinuing or withholding amenities, by interfering in the use and occupation of premises or by other means.

The Act expressly prohibits a landlord or other person from using or threatening to use any force, violence or restraint or inflicting or threatening to inflict any harm, damage or loss on the tenant or any person in occupation of the rented premises. The landlord is also prevented from causing damage to or removing or tampering with any part of the premises with a view to inducing the tenant or other person to vacate the premises or to make any payment in excess of the authorised rent.[57]

The Act also prohibits a landlord from withholding without reasonable cause any amenities or facilities previously provided to the tenant. Unless there is a reasonable cause not to do so, the landlord must maintain any essential supply or service previously provided to the tenant.[58] The Act also prohibits the landlord from interfering with the occupation of the premises by the tenant.[59]

Most importantly, the Act provides that no ejectment of a tenant should be made other than by through an order of the Court.[60] Where a tenant has been ejected other than through an order of the Court, the Act empowers the Commissioner for National Housing to hold an inquiry for the purpose of deciding whether or not the tenant or person in occupation has been ejected from the premises. Where the Commissioner decides that there has been an ejectment, the tenant or the person in occupation is entitled to have the use and occupation of the premises restored to him. To this end, the Commissioner can make an order that vacant possession of the premises be

57 Section 2.
58 Section 3.
59 Section 4.
60 Section 5.

restored to the tenant, and those who fail to comply with the order can be ejected. The procedure for ejectment is also spelt out in the Act.[61]

An amendment brought to this Act[62] in 1982 augments the power of the Commissioner to protect tenants by ensuring that the premises they live in is maintained properly. It empowers the Commissioner to perform certain acts if, upon holding an inquiry, he is satisfied that the landlord or any other person has damaged or tampered with the property, discontinued facilities previously provided to the tenant, failed to maintain any essential supply or prevented access to the premises by the tenant or person in occupation. In these situations, the Commissioner can require the landlord to repair the damage, restore such amenity or facility, repair and maintain in proper condition the essential supply or service or allow access to the premises by the tenant or person in occupation.

Where the landlord fails to comply with the order within the period specified by the Commissioner, the Commissioner can either direct the tenant, or where the tenant is unable to do so he can direct the Common Amenities Board, to repair the damage. The Commissioner can also give police protection to those carrying out the repairs. Where the tenant effects the repair, the Commissioner, upon hearing the tenant and the landlord, determines the amount reasonably incurred by the tenant in effecting the repairs. The amount determined would be deducted from the rent in such number of instalments as the Commissioner determines. Where the Common Amenities Board effects the repairs, the Board is empowered to recover the costs from the landlord.

A noteworthy feature of this Act is that its protection is extended to tenants as well as persons in occupation of the premises. The term 'persons in occupation' has been defined to include any person in lawful occupation of the premises with the consent of the tenant or landlord or a person to whom the premises or a part thereof has been lawfully sublet by the tenant.

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61 Section 6.

62 Act No. 11 of 1982.

In the case of *R. Weerakoon* v. *I.A.C. Fernando*[63], a tenant complained to the Commissioner of National Housing that he had been wrongfully ejected by his landlord otherwise than by an order of the Court. The Commissioner held an inquiry to decide whether the tenant's complaint was true. The Fiscal returned that the tenant was ejected by him in consequence of a writ issued by the Court in favour of the landlord. It was argued that the tenant was not a person in occupation within the meaning of the Act, as once the judgement was entered against him in a court, he could no longer be considered as a person in lawful occupation of the premises. Weeramantry J. held that:

> It becomes clear that the law protects a tenant until the final determination of a court of law that he be ejected. Till such time he is in lawful occupation of the premises. It is true he is not in occupation upon a contract of tenancy but his continued occupation till final judgement is one which the law expressly protects and is by no means an illegal occupation.

Moreover, the term 'eject' has also been given a wide interpretation to include, in relation to the tenant or a person in occupation of any premises, depriving, by using direct or indirect method, the right of such tenant or person to use and occupy the whole or any part of the premises.

In *R. Weerakoon* v. *I.A.C. Fernando*[64], the Court held that:

> the truth or otherwise of the allegation (that there has been a dispossession otherwise than upon an order of court) is indeed a matter which the Commissioner would be called upon to determine, but the fact that such an allegation has been made places upon the Commissioner the duty to hold an inquiry into the matter and determine whether there has been a dispossession or not in the manner alleged …. Where the facts are disputed, the mere circumstance that such a certificate (by the Fiscal that he has ejected the tenant in consequence of a writ issued by court) exists is not

[63] 76 NLR 111, p. 115.

[64] Ibid. p. 113.

> conclusive, nor does it in any way deprive the Commissioner of his jurisdiction to inquire into the matter.

Provisions in this Act guaranteed the rights of tenants to a satisfactory level. It ceased to be operative eighteen years after the date of its commencement and is no longer in force.

2.3.4 Ceiling on Housing Property Law No. 1 of 1973

The Ceiling on Housing Property Law regulated the ownership, size and cost of construction of houses. The primary aim of this law was to restrict the number of houses and property which could be privately owned. This was consistent with the economic policies of the Government at the time. It "emphasises the element of social responsibility as a factor opposed to the absolute character of private ownership of property."[65]

It restricted the maximum number of houses which could be owned by an individual who is a member of a family "to such number of houses which together with the number of houses owned by the other members of that family is equivalent to the number of dependent children, if any, in that family, increased by two."[66] The maximum number of houses which could be owned by an individual who is not a member of a family was restricted to two.[67] The number of houses which could by owned by a corporate or unincorporated body of persons was to be determined by the Commissioner for National Housing.[68]

In addition, this Law restricted the floor area of houses, the maximum extent of land on which houses could be constructed and the cost of constructing houses.

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65 G.L. Peiris, *The Law of Property in Sri Lanka, Volume Two, Landlord and Tenant* (Colombo: Lake House Investments, 1976).

66 Section 2(1).

67 Section 2(2).

68 Section 2(3).

A house was defined by the Act as an independent living unit, whether assessed or not for the purpose of levying rates, constructed mainly for residential purposes and having a separate access — and through which unit access could not be had to any other living accommodation. It included a flat or tenement but did not include sub-divisions of or extensions to a house which was first occupied as a single unit of residence or a house used mainly for a purpose other than residential for ten years.

The Court has interpreted the meaning of the term 'house'. In *Abeysekara* v. *Wijetunge*[69], the Court held that an objective test must be applied in determining whether the premises was an independent living unit constructed mainly or solely for residential purposes. The premises in question was a wayside boutique constructed for the purpose of business. The Court held that it was not a house within the meaning of Section 47.

The Law conferred substantial advantages on tenants by giving them the opportunity to purchase any surplus houses. The Law required the owners of houses in excess of the permitted number of houses to reduce their excess number of houses. The owners were required to make a declaration of the houses they owned and to specify the details of the houses they wished to retain. Where the owner decided not to retain the surplus houses, the tenants of these houses had to be informed of this fact.

The tenants of surplus houses were given the opportunity to purchase them within a specified period. Surplus houses not so disposed of within the specified period were vested in the Commissioner for National Housing. Where the Commissioner decided to sell a house so vested in him, it first had to be offered to the tenant, if there was any. The Commissioner was also given the power to transfer to the tenant certain houses vested in him, if he deemed it just and equitable in the circumstances of the case.

In *Thurairajah* v. *Bibile, Chairman, Board of Review, Ceiling on Housing Property Law and Others*[70], the Court held that in assessing the eligibility

[69] [1982] 2 Sri LR 737.

[70] [1992] 1 Sri LR 116.

of a person to purchase an excess house from the Commissioner, the Act requires an assessment of whether such a person was a tenant of the former owner. The argument that any tenancy would meet this requirement does not accord with the scheme of the statute. The statutory context has to be reviewed in light of the impact on other provisions of the statute. It was held that a sub-tenant does not have priority over the tenant whose prior claim is statutorily recognised under Section 12(2) of the Act. For the purpose of this application the petitioner must prove his eligibility under this statute. Equitable consideration may apply only when the person who has a right to purchase in the first instance does not exercise such a right.

The ceiling on housing property was removed by the Ceiling on Housing Property (Special Provisions) Act No. 4 of 1988. Persons and corporations were then free to own any number of housing properties. Consequently, the benefits given to the tenants in relation to purchasing surplus houses were withdrawn. In this way, after the operation of the Act (that is, after 1 January 1987) tenants were precluded from making applications under the principal enactment, the Ceiling on Housing Property Law.

However, the Special Provisions Act did not affect the past operation of the principal enactment prior to 1 January 1987. Similarly, any offence committed or liability incurred under the principal enactment prior to 1 January 1987 was kept intact. Any action or proceeding commenced under the principal enactment, and pending or not been completed on 1 January 1987, was allowed to be carried on as if the principal enactment had not been amended by the Special Provisions Act.[71]

In *Jiffry* v. *Colombage and Others*[72], the Supreme Court considered the application of the Special Provisions Act. An appeal was made to the Board of Review established under the Ceiling on Housing Property Law against a decision made by the Commissioner of National Housing dated 8 September 1995. The Board of Review set aside the order of the Commissioner on the basis that the tenant could not have made an application in respect of the

[71] Sections 4(a), (b) and (c) of the Ceiling on Housing Property (Special Provisions) Act No. 4 of 1988.

[72] [2003] 1 Sri LR 119.

premises after 1 January 1987 in view of the provisions of the Ceiling on Housing Property (Special Provisions) Act. Section 3 of that Act specifically precludes an application being made by the tenant in terms of the principal Act after 1 January 1987. In this instance, the application was made by the tenant on 21 December 1994. The decision of the Board of Review was dated 25 August 1999 and this was challenged by the Petitioner.

The Court held that the Commissioner could have made the order in question in view of Section 4(c) of Act No. 4 of 1988 which allows proceedings pending under the principal enactment to be carried on even after 1 January 1987. The Court observed that the proceedings before the Commissioner were pending since the declaration made under the Act by the owners was false or incorrect. In this way, all proceedings with regard to the declaration made by the appellant and the other co-owner had been concluded as far back as 31 May 1985. The premises was a permitted house which the owners were entitled to retain. In the circumstances, the Supreme Court held that there was no basis whatsoever for the tenant to make an application in 1994 in respect of these premises. According to the material available, he succeeded to the tenancy only in 1992 — long after the period for making an application lapsed under the provisions of Act No. 4 of 1988.

2.3.5 Urban Development Authority Act No. 70 of 1979

The Urban Development Authority (UDA) was established by the Urban Development Authority Act to promote integrated planning and implementation of economic, social and physical development of certain areas declared by the Minister as urban development areas. The UDA has wide powers to carry out its mandate.

The functions of the UDA within a development area include:[73]

a) the formulation and implementation of an urban land use policy in such areas;

[73] Section 8 of the Urban Development Authority Act.

b) carrying out building, engineering and other operations and undertaking of any work in connection with the infrastructure development of such areas;

c) acquisition of and holding any movable or immovable property or disposition of any movable or immovable property acquired or held by it;

d) the formulation of and execution of housing schemes in such areas; and

e) the clearance of slum and shanty areas and undertaking of the development of such areas.

To carry out its mandate, the UDA has the power to acquire land or interest in land vested in a local authority. The UDA is not liable to pay compensation in respect of such land or interest in such land, building or other structure therein.[74] Where the land so acquired has been given on rent, lease or permit to third parties, their interests are severely affected, especially in the absence of any provision for payment of compensation or provision of alternative housing.

Where the UDA requires other land, it has the power to declare an area as a development area and to acquire land in that area under the provisions of the Land Acquisition Act. For the purposes of the Land Acquisition Act, such acquisition is deemed to be for a public purpose. In some instances, in paying compensation for the land acquired, the Act fails to provide for the payment of compensation based on the market value on the date of acquisition.[75]

It provides that in the case of an acquisition where the intention to acquire the land has been published within five years of the date on which the land was declared as forming part of a development area, payment of compensation is as follows: the market value of the land on the date of declaring it as forming

74 Section 15 of the Urban Development Authority Act.

75 Section 16 of the Urban Development Authority Act.

part of a development area, increased by 50 per cent of the difference between that market value, and

a) in the case of land, the immediate possession of which is not required,[76] the market value of the land on the date on which a notice under Section 7 of the Land Acquisition Act is made for parties to submit their nature of interest in the land and claims for compensation;

b) in the case of land, the immediate possession of which is required (a declaration under the proviso of Section 38 of the Land Acquisition Act has been made), the market value of the land on the date of publication of such an order declaring that immediate possession of the land is required.

This provision deprives landowners of payment of fair compensation in respect of the lands acquired.

In *De Silva* v. *Atukorale, Minister of Land, Irrigation and Mahaweli Development*[77], land was acquired under Section 16 of the UDA Act, and an order under the proviso to Section 38 of the Land Acquisition Act was made to the effect that possession of the land was immediately required. The acquisition was challenged by the landowner, and pending the case no action was taken to develop the land. In appeal, the Supreme Court held that:

> the true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfilment of the stipulated conditions. It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

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[76] That is, a declaration under the proviso of Section 38 of the Land Acquisition Act No. 9 of 1950 has not been made.

[77] [1993] 1 Sri LR 283.

The Court ordered that the land be divested to the original owners.

The UDA has the power to clear slums and shanty areas to undertake development projects in such areas. However, the Act does not provide that the residents be provided alternate housing or be paid compensation. The Act also fails to provide guidelines to be followed in clearing slums and shanty areas. Often slum dwellers are given no or inadequate notice that their dwellings are to be cleared.

2.3.6 Urban Councils Ordinance No. 61 of 1939

The Urban Councils Ordinance establishes Urban Councils for the purpose of local government which are given wide powers for the fulfilment of their functions. Some of the provisions of the Ordinance impinge upon the right to housing.

The Ordinance empowers Urban Councils to acquire lands or buildings for the general purposes of the Council without indicating the specific purposes for which any land or building is to be applied. Such acquisition must be done under the Land Acquisitions Act.[78] This lack of transparency leaves room for abuse of process and irrelevant considerations being taken into account in deciding whether a particular land or building is required for the purposes of the Council.

Where land belonging to a person becomes necessary for public use in connection with widening, diverting or improving a thoroughfare, the Urban Council can enter into an agreement with the owner for compensation to be paid for such land and for any building, boundary wall, gateway, fence or tree standing on the land. Payment of compensation can take several forms: the owner can be allowed to possess the ground of the former thoroughfare; he can be granted other land in exchange; he can be paid money or compensated; or he can be compensated by way of two or more of these methods. The land vests in the Council without a formal transfer thereof. If the Urban Council cannot agree with the owner of the land on the compensation, where the

[78] Sections 41 and 42 of the Urban Councils Ordinance.

owner cannot be found or where the Council does not deem it advisable to enter into an agreement with the owner, such land can be acquired under the Land Acquisition Act.[79]

Where a house, building or a boundary wall adjoining a street or thoroughfare is deemed by the Urban Council to be in a ruinous state (whether dangerous or not) or likely to fall down, the Council can arrange for a hoarding or fence to be put up in order to protect people using that street or thoroughfare. The Council can then notify the owner or occupier to immediately demolish or repair the house, building or wall. Failure to do so within three days of the notice, or failure to complete the work with due diligence, leaves the Council to carry out such work and cause the owner or occupier to pay the expenses.[80]

Where land situated on a building limit demarcated by a road is acquired for the purposes of widening that road, the manner in which the amount of compensation is determined is specified in the Ordinance and is similar to that under the Pradeshiya Sabhas Act (discussed below in 2.3.8).

2.3.7 National Housing Development Authority Act No. 17 of 1979

The National Housing Development Authority Act established the National Housing Development Authority (NHDA), the powers and functions of which include:[81]

a) The preparation and execution of proposals for:

   i) the erection, improvement and extension of any flat, house or other living accommodation or any building for residential purposes;

   ii) the sale, lease, mortgage or rental of such flat, house or other living accommodation or building;

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79 Section 51 of the Urban Councils Ordinance.

80 Sections 60 and 61 of the Urban Councils Ordinance.

81 Section 5 of the NHDA Act.

iii) the clearance and redevelopment of slums, shanties, tenements and other buildings which are congested, unsightly or unsanitary;

iv) the resettlement of persons displaced or likely to be displaced by any of the operations of the Authority.

b) Management of all lands, flats, houses and other living accommodation and buildings vested in the Authority;

c) Provision of loans to enable persons to purchase flats, houses and living accommodation, to purchase lands to construct flats and houses, and to construct flats, houses and other living accommodation.

d) Establishment of new housing estates, encouragement of self-help housing projects and the provision of amenities for the inhabitants of such estates or projects including transport and other services.

e) The acquisition, lease or hire, mortgage, pledge, sale or other disposal of any movable or immovable property.

Where privately owned land is required by the NHDA for carrying out a housing object, such land can be acquired under the provisions of the Land Acquisition Act upon a certificate issued by the Minister that such land is so required. For the purposes of the Land Acquisition Act, such purpose shall be deemed to be a public purpose.[82]

In *Kingsley Fernando* v. *Dayaratne*[83], land was acquired for a housing object to be carried out by the NHDA in accordance with the master plan for Ragama prepared by the UDA. According to this plan a major portion of the land was to be developed and alienated to members of the public for the specific purpose of constructing houses. The development to be carried out by the NHDA included the provision of roads, the widening of existing roads and the provision of water and electricity. A portion of this land adjacent to the

[82] Section 6 of the NHDA Act.

[83] [1991] 2 Sri LR 129.

housing project was handed over to the UDA to develop the housing project on a commercial basis and the Petitioner claimed that this was illegal. The Petitioner submitted that the land was acquired for a housing object under Section 6(1) of the NHDA Act and that a housing object should be restricted to residential buildings or other construction connected with residential buildings. The Supreme Court held that it is legal to hand over to the UDA a portion of land acquired for a housing object for the provision of commercial facilities necessary to serve the increasing population of the town.

The payment of compensation to the owners of land acquired in this way is different from that under the Land Acquisition Act. In the case of an acquisition where the public notice of the intention to acquire the land is published at any time within a period of three years from the appointed date (1 April 1979), the market value of the land for the purpose of determining the amount of compensation to be paid is deemed to be the market value of the land on 22 July 1977, increased by a reasonable amount on account of improvements effected to the land after that date.[84]

Where a loan granted by the NHDA under Section 5(c) is defaulted, the Act makes detailed provisions for recovery of such loans.[85] The powers of the NHDA regarding loans include the power to cancel a loan, require additional security, appoint a manager to take possession of the mortgaged land, manage the mortgaged land and receive benefits from it or sell it.

The NHDA Act makes provision for the recovery of possession of premises let by the NHDA to its employees and others. In the case of houses let to employees, the occupation of the building by the employee must cease on the lawful termination of his employment by the NHDA. Where the employment of the occupier is terminated without notice, the employee is entitled to remain in occupation for 14 days after the date of termination of his employment, giving some security of tenure to the former employee.[86]

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84 Ibid.

85 Part VI of the NHDA Act.

86 Section 63 of the NHDA Act.

The power of the NHDA to clear and redevelop slums and shanties is not accompanied by a provision that the slum dwellers should be resettled beforehand. This affects the housing rights of the people in slums and shanties and is a violation of the Government's obligations under several international covenants through which the Government has undertaken to protect the housing rights of the people.

2.3.8 Pradeshiya Sabhas Act No. 15 of 1987

The Pradeshiya Sabhas Act established Pradeshiya Sabhas which are the local authorities for each Pradeshiya Sabha area. The Pradeshiya Sabhas are charged with the regulation, control and administration of all matters relating to public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and all amenities within the area.[87]

Section 19 of the Act contains a list of powers of the Pradeshiya Sabhas and the rest of the Act makes detailed provision for how such powers may be exercised. Only the provisions which affect the right to housing are considered below.

Under Section 27 of the Act, Pradeshiya Sabhas can construct or improve roads, bridges, tunnels or other thoroughfares. In doing so, the Pradeshiya Sabhas must make due compensation to owners or occupiers of properties required for such purposes or to any person whose legal rights are thereby infringed.

Where the land of any person is required by the Pradeshiya Sabha for the widening or improvement of a thoroughfare, it can enter into an agreement with the owner for the payment of compensation by allowing him to possess the ground of the former thoroughfare, by granting other land in exchange, by payment of money or by any two or more of these methods. Such land vests in the Pradeshiya Sabha without a formal transfer thereof. A certificate

[87] Section 3 of the Pradeshiya Sabhas Act.

issued by the Chairman of the Pradeshiya Sabha suffices in respect of lands granted by it.[88]

Where an agreement on compensation cannot be entered into, where the owner cannot be found or where the Pradeshiya Sabha deems it not advisable to enter into an agreement with the owner, it can take possession of the land and provide compensation as prescribed in Section 128 of the Act which triggers the application of the Land Acquisition Act.[89]

With regard to houses in a ruinous and dangerous state, the Act makes provisions similar to those under the Urban Councils Act examined above.

The Act makes detailed provisions for the construction of buildings along thoroughfares. Where land situated along a thoroughfare is acquired for the purpose of widening that road, the Act makes special provision for the determination of compensation to the exclusion of the provision of the Land Acquisition Act.[90] No compensation will be paid for construction done after the constitution of the Pradeshiya Sabhas and in contravention of Section 49. The value attached to land (excluding buildings) is the market value of the land at the time of the acquisition. Where only part of a particular land is acquired,

a) if the remaining portion is a building of the same character as the building which is to be acquired, the market value assigned to the land shall be one half of the value at the time of similar land in the vicinity possessing a road frontage; and

b) if the remaining portion of such premises is not sufficient in depth for the purpose mentioned in (a) above, the market value assigned to the land is the value at the time of similar land in the vicinity possessing a road frontage.

88 Sections 28(1) and (2) of the Pradeshiya Sabhas Act.

89 Section 28(3) of the Pradeshiya Sabhas Act.

90 Section 53(1) of the Pradeshiya Sabhas Act.

The Act goes on to provide that any increase in the value of other land or buildings belonging to the owner which is likely to increase from any widening of the road should also be considered in determining the amount of compensation.[91] This provision is arbitrary in that it allows different amounts to be paid as compensation where the owner of the land to be acquired has only one land along the thoroughfare and where he has several lands. It also fails to assess compensation based only on the land to be acquired.

The Act also provides that no compensation will be paid in respect of the compulsory nature of the acquisition.

Where it appears to a Pradeshiya Sabha that a house is so overcrowded that it is dangerous or prejudicial to the health of its occupiers or that of the neighbourhood, and the occupiers consist of more than one family, the Pradeshiya Sabha can institute action before a Magistrate to reduce such overcrowding. The Magistrate can make such an order as he may think fit and each of the people permitting such overcrowding shall be guilty of an offence and liable on conviction to a fine not exceeding Rs. 100 for each day after the date of the order during which the overcrowding continues.[92]

This provision is in violation of the right to adequate housing as recognised by several international covenants to which Sri Lanka is a party. At the very minimum, the right to adequate housing requires the Government to not deprive its citizens of the right to housing. Where the Government takes such measures to prevent the overcrowding of a house, it has an obligation to provide alternate accommodation to the other residents of that house. Rendering them liable to be guilty of an offence is a clear violation of their rights.

91 Section 53(1)(d) of the Pradeshiya Sabhas Act.

92 Section 98 of the Pradeshiya Sabhas Act.

2.3.9 National Housing Act No. 37 of 1954

The National Housing Act created the office of the Commissioner for National Housing. The Act declared certain objects to be housing objects, including:[93]

a) the construction of buildings for residential purposes or any other purpose connected with housing objects;

b) the manufacture or supply of building materials;

c) the provision of roads, water, electricity, gas and sewerage;

d) the administration, management or control of buildings and building schemes;

e) the provision of amenities for the inhabitants of a housing scheme;

f) the development of land in order to carry out a housing object;

g) the grant of assistance to carry out housing objects by lending money, undertaking guarantees etc.

The Act empowers the Commissioner to carry out any housing object declared by the Act. It makes provision for the promotion of housing and building development by establishing building societies, housing bodies and housing companies. Such entities are also empowered by the Act to carry out housing objects. The Act also provides for the grant of assistance by the Government for such development.

The Commissioner can carry out a housing object on any land by agreement with all the owners of that land or, in the absence of such agreement, by agreement with the majority of the owners. Where the Minister certifies that any land should be acquired by the Government to carry out a housing object,

93 Section 2 of the National Housing Act.

such land will be acquired under the Land Acquisition Act and made available to the Commissioner.[94]

Section 49A of the Act provides a list of instances in which land can be acquired by the Minister. One such instance is where a premises consists of land which is mortgaged to a person and on which there is a building occupied by the mortgagor or where such premises has been sold in execution of a mortgage decree while the mortgagor was residing in the premises. In such instances, upon acquisition of the land, the Commissioner can let the premises to the mortgagor on such terms as will enable him to become the owner of the land after making a certain number of monthly payments as rent.[95]

A similar provision is made in the case of acquiring land which is mortgaged as security for a loan granted by the National Housing Fund and where the mortgagor has not complied with the terms and conditions of the loan.[96]

The Act also makes provision for the disposition of State land in order to carry out a housing object. Such disposition is subject to conditions that may be imposed by the Minister as well as those contained in the Act. Section 50 of the Act specifies that in disposing State land, the Minister must have regard:

a) to the interests of the public generally including those persons requiring housing accommodation; and

b) to the following policy considerations: except in special circumstances it is desirable that houses constructed should be let at a reasonable rent to individuals who are citizens of Sri Lanka, they should be so let on such terms as will enable the occupiers to become the owners of such houses after making a certain number of monthly payments as rent.[97]

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94 Sections 42 and 49 of the National Housing Act.
95 Section 49A(3) of the National Housing Act.
96 Section 49A(3)A of the National Housing Act.
97 Section 50 of the National Housing Act.

In *Hopman and Others* v. *Minister of Land Development and Others*[98], the proceedings for the acquisition of land were initially commenced at the request of the 5th respondent and the land was acquired under Section 49 of the National Housing Act for the purpose of being made available for the carrying out of a housing object. Under Section 2 of the Act, a housing object includes the construction of buildings for residential purposes. The land was vested in the National Housing Department and thereafter the Commissioner for National Housing gave possession of the land to the 5th, 6th and 7th respondents pending the formal disposition thereof under Section 50 of the National Housing Act. The appellant alleged that the acquisition was *mala fide* as it was done at the behest of the 5th respondent, a Cabinet Minister, who was using political power for himself and for the 6th and 7th respondents who were his brother and brother-in-law. It was also contended that the acquisition was not for a housing society or for a public purpose.

The Supreme Court held that the submission that the acquisition was not for a housing society was irrelevant. While Part III of the National Housing Act provides for the establishment of building societies, housing bodies and building companies to carry out housing objects, individuals are also competent, with the assistance of the Commissioner for National Housing, to carry out such objects. Section 49 of the NHDA Act provides that land acquired should be made available to carry out the housing object to the Commissioner or to 'any other person' by being disposed of under the succeeding provisions of the Act. The Court held that under this Section, the 5th, 6th and 7th respondents would be eligible to receive land for a housing object in their individual capacity. The object of the respondents' application was to construct buildings for a residential purpose which was held to constitute a public purpose.

The Court further stated that there is no evidence of *mala fides* on the part of the relevant Minister and that the allegation of *mala fides* was based on the mere fact that the 5th respondent was a Minister. This case shows how political power can be used to benefit from the Act.

98 [1994] 2 Sri LR 240.

An instrument of disposition of State land can be cancelled for failure to comply with a condition of disposition or failure to pay money due to the State. The Act ensures due process in the cancellation of the instrument of disposition. It provides that cancellation can be done after affording an opportunity to the grantee to show cause against the proposed cancellation. In the event of cancellation, the Government Agent of the area would request in writing that the person in possession or occupation of the land must vacate the same within a time specified therein. Failure to do so renders the occupant liable to be evicted from the land under the provisions of the Land Development Ordinance. However, the Act provides that the grantee or any other person is not entitled to any sum by way of compensation, damage or otherwise by reason of the cancellation of the instrument.[99]

Where a house has been granted by the Commissioner or building society, housing body or housing company, the occupier is bound to vacate the house upon the lawful termination of the occupation. Where the occupier occupies the house by reason of his employment with the landlord, his occupation of the house terminates on the date of lawful termination of his employment. Where his employment is terminated without notice, he must vacate the house within 14 days of the actual date of termination.[100] This provision is similar to that under the NHDA Act discussed above and provides some security of tenure to employees of the landlord.

[99] Sections 54, 55 and 57 of the National Housing Act.

[100] Section 32 of the National Housing Act.

PART III:

LAND LAWS IN SRI LANKA

3.1 Land ownership indicators

It is estimated that the total land area in Sri Lanka is approximately 6.56 million hectares and the per capita land availability is 0.3 hectares. The extent of arable land is estimated to be 2.9 million hectares which is approximately 45 per cent of the total land area of the country.[101]

According to the *Report on Consumer Finances and Socio-Economic Survey* conducted by the Central Bank of Sri Lanka in 2003/2004, 91 per cent of households owned land. Of the total number of households sampled, 47 per cent owned only their homestead lands while 27.8 per cent owned both homestead and agricultural lands. A sectoral data analysis of this survey showed that the proportion of households which owned land was significantly higher in the rural sector with 96 per cent of households owning lands compared to 89 per cent in the urban sector. In the estate sector, only 20 per cent owned land.

The Central Bank attributed the increase in the number of households owning land to government policies promoting housing development and

[101] *Mahinda Chintana: Vision for A New Sri Lanka, A Ten Year Horizon Development Framework 2006–2016, Discussion Paper* (Colombo: Ministry of Finance and Planning).

to the availability of various low-interest credit schemes from both public and private sector financial institutions.[102]

Table 5

Ownership of lands by utilisation and sector
As a percentage of households

Type of use	Sector			
	Urban	Rural	Estate	All sectors
Homestead land	85.1	93.7	15.5	88.7
Agricultural land	6.3	41.4	0.7	35.4
Commercial/industrial land	3.3	2.2	0.7	2.3
Unutilised land	9.9	14.7	3.0	13.5

The Central Bank's survey also revealed that the average size of agricultural landholdings per household was greater in the North Central and North Western provinces which have relatively low population densities.

Table 6

Average land size per household by utilisation and province[(a)]

Type of use	Western	Central	Southern	Northern[(b)]	Eastern	North Western	North Central	Uva	Sabara gamuwa	All provinces
Agriculture	43.0	54.9	75.5	36.3	108.5	136.1	224.4	124.3	79.0	86.2
Homestead	21.5	27.3	37.0	27.8	30.6	43.9	61.3	39.6	44.2	34.1
Unutilised	7.6	7.4	17.0	49.4	23.1	16.8	29.9	32.6	12.8	16.0
Total	74.4	91.5	130.4	113.5	162.3	199.5	319.2	197.9	139.0	138.3

[(a)] The size of land ownership of landless households was considered to be zero.
[(b)] Excluding Killinochchi, Mannar and Mullaitivu districts.

[102] *Report on Consumer Finances and Socio-Economic Survey 2003/2004, Part 1* (Colombo: Central Bank of Sri Lanka, 2005), p. 94.

The survey also revealed that 40 per cent of lands owned by households were less than 40 perches in size. 11 per cent of agricultural lands were less than 40 perches and over 50 per cent were less than 1 acre, a significant factor to be considered when formulating agriculture policy. It was also observed that 22 per cent of unutilised lands were more than 1 acre in size. Most lands which were used for industrial or commercial activities and homesteads were relatively small. Over 35 per cent of homestead lands were less than 20 perches and the proportions of industrial and commercial lands less than 20 perches in size were 28 per cent and 42 per cent respectively.

Table 7

Land ownership by utilisation and size

As a percentage of the number of lands

Type of land						
Size (perches)	Agri-cultural	Industrial	Com-mercial	Home-stead	Unutilised	Total
1-19	3.8	27.8	42.1	35.5	18.5	25.9
20-39	7.5	7.4	17.1	27.9	20.0	14.6
40-79	15.8	7.4	15.7	21.3	19.9	14.7
80-119	13.1	24.1	9.3	9.2	11.3	10.3
120-159	11.1	9.3	5.1	1.5	7.9	3.9
160+	48.6	24.1	10.6	4.7	22.4	30.6
Total	100.0	100.0	100.0	100.0	100.0	100.0

The survey indicated that the proportion of households owning land rose with income level. A similar positive correlation was also observed between the average size of agricultural lands per household and income. It appeared that the poorest segment of households owned a relatively greater area of unutilised land.[103]

[103] Ibid., p. 95-96.

The Central Bank reports that significant changes haves taken place in the areas of housing and access to public utilities and other household amenities over the past decade. The findings of its survey confirmed further improvements in the quality of housing and housing stock, and changes in household preferences for more sophisticated household amenities and services.[104]

3.2 Land policy

As with housing policy, Sri Lanka does not have a well-formulated overall land policy. As will be illustrated below, various land policies have been adopted by successive governments.

Under the ancient Sinhalese tenure system, all lands were owned by the King and peasants were allowed to use the lands at the pleasure of the King. Under British rule, the Crown claimed title to unoccupied land including all forest and uncultivated lands and land not specifically granted to individuals.[105] The Crown Lands Encroachment Ordinance No. 12 of 1840 was enacted to settle these lands. Thereafter, parcels of Crown lands were sold to Europeans and the local aristocracy. Under the colonial schemes, peasants sold their private lands to land speculators and were given land in the Dry Zones. However, these schemes were not successful. Subsequently, small holdings of State lands were given to peasant proprietors and small-scale colonisation schemes commenced in the Wet Zone.[106]

The Land Development Ordinance (LDO) was enacted in 1935 to provide for the systematic development and alienation of Crown land. Lands were granted to individuals subject to restrictions on mortgaging, leasing or fragmenting the lands. Lands could be disposed of only with the written consent of the Government Agent. The Land Commission of 1958 recommended

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104 Ibid., p. 96.

105 For example, grants by the Governor to officials and capital entrepreneurs by Letters Patent.

106 R.K.W. Goonesekere, *Select Laws on State Lands* (Colombo: Law and Society Trust, 2006).

the removal of these restrictions and the facilitation of a free land market. A subsequent government adopted this recommendation and amended the LDO[107] by removing the restrictions on land dispositions. The Sale of State Lands (Special Provisions) Act[108] empowered the Land Commissioner, subject to certain conditions running with the land, to sell State lands for the purposes of agricultural development. However, this Act was repealed by Land Development (Amendment) Act No. 27 of 1981 which revived many of the provisions of the original LDO.[109]

The failure of the peasant colonisation schemes of the British era to generate agricultural production and employment to expected levels saw the revival of this concept by the socialist Government elected in 1972. In keeping with the socialist policies of the Government, land reform laws were introduced in 1972 restricting the amount of agricultural land that could be owned by individuals and companies. Lands in excess of the ceiling imposed by the Land Reform Law were vested in the Land Reform Commission — the main objective of which was to utilise agricultural lands to increase productivity and generate more employment. With the change of government and consequent change of policy, the ceiling was lifted and legislation was introduced to vest in the Government the lands vested in the Land Reform Commission and to enable their free transfer to landless citizens of Sri Lanka.[110]

Under the Thirteenth Amendment to the Constitution, rights in and over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement are placed in the Provincial Council List and thus fall within the purview of the Provincial Councils to the extent contained therein.

The recent Land Ownership Bill of 2003 attempted to lift the restrictions attached to grants and transfers of State lands made under the Land Development Ordinance and the Land Grants (Special Provisions) Act for the dispersal of ownership of lands by the transfer of ownership of State lands to the citizens of Sri Lanka. The Bill made provision for permit holders and

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107 See Act No. 16 of 1969.

108 No. 43 of 1973.

109 R.K.W. Goonesekere, 2006.

110 Ibid.

grantees of State lands under the aforesaid laws to apply for a certificate to be issued granting full ownership of the land, free of all encumbrances.

However, the constitutionality of this Bill was challenged in the Supreme Court[111] on the preliminary grounds that the Bill was not referred to the Provincial Councils first and was therefore inconsistent with Article 154(G)(3) read with Item No. 18 of List I of the Thirteenth Amendment to the Constitution.

According to Article 154(G)(3) of the Constitution, no Bill with regard to any matter set out in the Provincial Councils List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council. The Court held that no such reference was made to the Provincial Councils. The Bill, being in relation to a matter set out in the Provincial Councils List, was held not to become law unless it had been referred by the President to every Provincial Council as required by Article 154(G)(3) of the Constitution. The Supreme Court further held that several provisions of the Bill were inconsistent with the Constitution and required it to be passed by a special majority. Thereafter, the Bill was withdrawn from the Order Paper of Parliament.

The Supreme Court took note of the fact that throughout, land has been held in trust by the State. The Court stated that:

> From time immemorial, land has thus been held in 'Trust' for the people in this island; now a Republic. The principle that State land is held in public trust could be clearly seen in the Land Development Ordinance and the Land Grants (Special Provisions) Act, where land was allocated to landless persons while reserving certain control by the State over such land. Moreover, even at the time of the establishment of Provincial Councils in 1987, although the subject of land was devolved to the Provincial Councils, it did not defer from

[111] SC (FR) Applications Nos. 26/2003 to 36/2003.

> the policy that the land is being held in Trust for the people by the State.[112]

The Court held that it is now apparent that the process of alienation of State land which is held in trust by the State for the public benefit is prescribed in Appendix II of the Ninth Schedule and Article 33(d) of the Constitution. It was held that the Land Ownership Bill is clearly suggestive of a different process of alienation of such land, thereby infringing the process provided by the Constitution, and for this reason the provisions of the Bill are inconsistent with the Thirteenth Amendment to the Constitution read with Article 33(d) of the Constitution, which would need to be passed by the special majority under the provisions of Article 84(2) of the Constitution.

There have been several failed attempts to formulate an overall land policy for Sri Lanka. Although as far back as 1979 a Land Use Policy Planning Division of the Ministry of Land and Land Development was established, no noteworthy progress has been made.[113] In 1990, a Presidential Task Force on Land Distribution and Utilisation was appointed, and in 1995 a Committee of Experts was appointed to formulate a policy framework on land and agriculture.

A draft National Land Use Policy was formulated recently which looks into three areas: agriculture and food security; land and the people; and land and nature. The draft Policy recommends the establishment of a National Land Commission in relation to the Thirteenth Amendment to the Constitution under which all line ministries would be placed. It also proposes the removal of restrictions in making grants and permits under the Land Development Ordinance and the Land Grants (Special Provisions) Act.[114]

A draft National Land Policy has also been produced which deals with the identification of land resources and mapping of lands, land conservation

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[112] Ibid.

[113] *Landlessness and Land Rights in Post-Tsunami Sri Lanka* (Colombo: Centre for Policy Alternatives, 2005).

[114] *Memorandum on Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster* (Colombo: Centre for Policy Alternatives, Colombo).

and development, land acquisition and land distribution for industrial, residential, commercial, social and religious activities. It also provides for the establishment of a National Land Commission and a special court to resolve land issues.[115]

Recently, a Ten Year Horizon Development Framework was presented for discussion under the Mahinda Chintana. This Framework proposes that national land policy will provide an appropriate policy framework to ensure quality practices in land use, food security, economic development and the maintenance of land. It states that the land policy of the country should address: the need for more equitable distribution of land ownership; the need for clear title to guarantee ownership; security of tenure for all; and a system of land management which will support sustainable land use patterns and rapid release of land for development. It suggests that land policy should rest under three pillars: agriculture and food security; land and people; and land and tenure — the same divisions within which the draft National Land Use Policy was formulated.[116]

Both the National Land Use Policy and the National Land Policy remain in draft from and have not been finalised to date. There is, however, a National Involuntary Resettlement Policy within which a framework has been established to plan and implement the resettlement of those who are affected by the acquisition of land by the State for development purposes.[117]

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115 Ibid.

116 *Mahinda Chintana: Vision for A New Sri Lanka, A Ten Year Horizon Development Framework 2006–2016, Discussion Paper* (Colombo: Ministry of Finance and Planning).

117 *Memorandum on Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster* (Colombo: Centre for Policy Alternatives, Colombo).

3.3 Land laws in Sri Lanka

3.3.1 Land Acquisition Act No. 9 of 1950

The Land Acquisition Act is one of the most significant pieces of legislation with regard to land rights as it 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[118] to accommodate the needs of the State and to some extent to safeguard the rights of the public.

The objective sought to be achieved by this Act was analysed by the Supreme Court in the case of *De Silva* v. *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*.[119] In this case, His Lordship Justice Fernando held that:

> The purpose of the Land Acquisition Act was to enable the State to take private land, in the exercise of its right of eminent domain, to be used for a public purpose, for the common good; not to enable the State or State functionaries to take over private land for personal benefit or private revenge.

A major drawback of this Act is that it does not require the Minister to disclose the public purpose for which the land is required, leaving considerable room for arbitrary decisions to be made that are contrary to public interest. Early judicial thinking was that the Minister is not obliged to state the public purpose. However, in the case of *Manel Fernando and Another* v. *D.M. Jayaratne and Others*[120], the Supreme Court held that where the Minister decides that a particular land is required for a public purpose, he must disclose that public purpose. Mark Fernando J. held that:

> The Minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should

[118] By Acts Nos. 39 of 1954, 22 of 1955, 28 of 1964, 20 of 1969, 48 of 1971, 8 of 1979 and 13 of 1986.

[119] [1993] 1 Sri LR 283.

[120] 2000(1) Sri LR 112.

> withhold this from the owners who may be affected? … In my view, the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A Section 2 notice must state the public purpose — although exceptions may perhaps be implied in regard to purposes involving national security and the like.

This decision marks a vital step forward in curbing arbitrary acquisitions of land by bringing ministerial accountability into the process of land acquisitions.

The Act aims to maintain procedural due process in carrying out land acquisitions, and to that end it spells out the specific procedure to be followed in the State acquiring private lands.

Part I of the Act provides for preliminary investigation and declaration of the intended acquisition. Section 2 of the Act empowers the Minister of Land to decide whether any property is required for public purposes and, if so, requires the Minister to direct acquiring officers of the respective areas or districts to cause the publication of notices mentioned in Section 2(2) of the Act. Thereafter, the acquiring officer or authorised officer can survey the land, demarcate and set out boundaries, place marks and cutting trenches and do all other necessary work to ascertain whether the land is suitable for the public purpose.[121] Once the Minister considers that particular land or servitude over particular land is suitable for a public purpose, the acquiring officer of the district shall cause the notice of pending acquisition to be exhibited in a conspicuous part of the land or near the land.

Section 4 ensures the right of landowners to be heard and provides them the opportunity to object to the acquisition or present their grievances. It provides that landowners should object to the acquisition within the period specified in the notice exhibited by the acquiring officer. Once an objection is made, the Secretary or Additional Secretary of the Ministry of Land or an

[121] The Legislature had been mindful of the privacy and rights of the public by adding a proviso to Section 2(3) preventing all officers from entering any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so.

appointed officer would consider the objection and the person objecting is ensured of his right of being heard. The Secretary makes recommendations to the Minister on the objections of the owners. Thereafter, the Minister himself considers the objections and arrives at a decision on whether to acquire the land or not.

The Act prohibits an owner from alienating a land within 12 months of the exhibition of notices under Section 2 or 4.[122]

Once the aforesaid initial steps are concluded, the Minister may make a declaration that the particular land or servitude is required for public purposes and such a declaration should be published in the Gazette and exhibited on or near the land.[123] Thereafter, any person interested in the land to be acquired is given the opportunity to notify the acquiring officer of the nature of his interest in the land and the particulars of his claim for compensation, including the amount of compensation.

Part II of the Act provides for inquiries into claims and reference to courts and the award of compensations. An acquiring officer holds an inquiry into, *inter alia*, the market value of the land, claims for compensation and the interest of the parties claiming compensation[124], and makes a determination as to the persons entitled to compensation, the nature of their interest and the amount of compensation.[125]

A claimant whose claim has been disallowed either wholly or partially can apply within 14 days of the decision to the acquiring officer to refer the matter to the District Court.

Part III of the Act establishes a Board of Review to which a claimant can appeal on the grounds that the compensation determined under Section 17 is insufficient. Such an appeal must be submitted within 21 days of the date on which the order of the acquiring officer was received by the claimant. Where

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122 Section 4A.

123 Section 5.

124 Section 9.

125 Section 17.

the claimant is not satisfied with the decision of the Board of Review, he may appeal to the Court of Appeal on a question of law within 21 days of the decision of the Board. In *Hewage* v. *Weerawansa and Others*[126], the Court of Appeal held that any party to appeal to the Board of Review is entitled to appeal to the Court of Appeal within 21 days of the decision of the Board and that such an appeal can be made only on questions of law.

The time allowed for referring a claim to the District Court or the Court of Appeal, or an appeal to the Board of Review, is considerably less when compared with the time allowed to appeal against orders and judgements of the District Courts. It could be said that the imposition of time restrictions is to facilitate the speedy disposal of the appeal and timely completion of the process of acquisition. The practical experience is that in cases of large-scale development projects and road expansion projects, the appeal process delays the completion of the entire project.

Upon the final determination of the compensation, this would be paid in the manner set out in Part IV of the Act. Part VI of the Act deals with the assessment of compensation payable to owners of lands and servitudes. Compensation is calculated based on the market value of the land or servitude and is proportionate to the claimant's interest in the land. No additional compensation is allowed in consideration of the compulsory nature of the acquisition.[127] However, the claimant is entitled to compensation for any damages sustained because of the severance of the land from his other land, for damages sustained because of the acquisition of the land injuriously affecting his adjoining land or immovable property thereon, for loss of earnings from any business carried out on the land and for any reasonable expenses of effecting any change of residence caused by the acquisition of the land.[128]

The basic principle on which compensation is assessed is the market value of the land or servitude which, *prima facie*, is just and fair. This is also the case for the payment of compensation for damages suffered because of the

[126] 2003(3) Sri LR 49.

[127] Section 46(1).

[128] Section 46(1)(i) to (iv).

acquisition. However, the important factor which defeats the spirit of this section is the date on which compensation is calculated. Sections 45 and 46 expressly provide that the relevant date in calculating the amount of compensation is the date of publication of the notice in the Gazette under Section 7. In most cases, the actual acquisition or taking of possession occurs years after publishing the Section 7 notice — at which time the value of the property has considerably increased, raising serious concerns about the adequacy of compensation.

Section 47 contains another controversial provision: where only part of a land will be acquired, the amount by which the market value of the remaining part of the land is likely to increase because of such an acquisition shall be deducted from the compensation assessed under Section 46.

Provision for making a vesting order and taking possession of the land acquired is made in Section 38 of the Act. By order published in the Gazette, the Minister directs the acquiring officer or any other authorised officer to take possession of the land for and on behalf of the State. Under the proviso to Section 38, where it becomes necessary to take immediate possession of the land on the grounds of an urgent requirement, the Minister can make such an order at any time after the notices under Section 2 or 4 have been exhibited.

Lands acquired under this Act can be divested in limited circumstances. The Minister in charge of the subject of land can divest the land irrespective of the fact that the land has been absolutely vested with the State and the possession of the land has actually been taken by the State, provided he satisfies himself that no compensation has been paid, the land has not been used for a public purpose after possession has been taken by the State, no improvements to the land have been made after taking possession and the persons interested in the land have consented in writing to take possession of the land immediately after the divesting order is published in the Gazette.[129]

[129] Section 39A.

Judicial thinking with regard to the divesting of land has been that where a land is no longer required for a public purpose or has not been used for a public purpose for a considerable period of time, the State cannot continue to hold the properties of the public and accordingly such land should be divested.

In *De Silva* v. *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*[130] it was held that Where the element of public benefit faded away at some stage of the acquisition proceedings, the policy of the Act as evinced by Sections 39 and 50 was that the proceedings should terminate and the title of the former owner restored. However, where the public purpose was so urgent as to require immediate possession, necessitating a section 38 proviso (a) order, the land could not be restored if the public purpose was found to have evaporated after possession was taken. The Act was amended in 1979 to enable relief to be granted even where possession had been taken. The court held that:

> The Act contemplates a continuing state of things; it is sufficient if the lack of justification appears at any subsequent point of time; this is clear from paragraph (b) of section 39A (2). If the land has not been used for a public purpose after possession has been taken, there is then an insufficiency of justification; and the greater the lapse of time, the less the justification for the acquisition.

In *K.T.D.S.N. De Silva and Others* v. *Salinda Dissanayake, the Minister of Land Development and Minor Agriculture Export and Others*[131], the Supreme Court held that where no steps have been taken for a long period of time to implement a proposed project on a land in respect of which a Section 2 order has been made, an application for *mandamus* in respect of an omission to divest the acquired land could be filed in the Court of Appeal.

[130] [1993] 1 Sri LR 283.

[131] 2003(1) Sri LR 53.

3.3.2 The Prescription Ordinance No. 22 of 1871

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.

Any action filed beyond the time period set out in the Ordinance is considered as time barred and cannot be maintained, and thus special attention should always be drawn to the provisions of this Ordinance. This report will only analyse the provisions of the Prescription Ordinance which are relevant to land and property rights.

a) Term of prescription for lands and other immovable property

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. It is uncommon to see cases where a plaintiff claims prescriptive title under this Section.

This Section lays down a three-tier test to determine prescriptive title to a land.

1. Undisturbed and uninterrupted possession

Firstly, the claimant must prove undisturbed and uninterrupted possession of the land or immovable property.

Having physical possession of the property is an essential requirement. In *Matilda Peiris* v. *Clara Fernando*[132], the Privy Council held that the Plaintiff's claim to a prescriptive title failed for want of proof of physical possession for the requisite period on the part of himself and his predecessors in title. The court was of the view that the crucial question to be decided is the question of physical possession. A claimant of prescriptive title can support his claim on the footing of another's possession of the property in question, for example, through a lessee[133], agent or servant.

The scope of the term 'uninterrupted' possession was examined in *Fernando* v. *Wijesooriya*[134] where the court held that:

> An essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity; and 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.

In *Simon Appu* v. *Christian Appu*[135], court held that:

> Possession is interrupted if the continuity of possession is broken 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

[132] 47 NLR 409.
[133] *Podisingho* v. *Jaguhamy* 26 NLR 87.
[134] 48 NLR 320
[135] 1 NLR 288.

> it; or by occupying it himself for a certain time and using it for his own advantage if the party prescribing is not in occupation.

In *Simon Appu's* case[136], the court also analysed the concept of 'undisturbed' possession and held 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 into a disconnected and divided user.

The court proceeded to distinguish the terms 'undisturbed' and 'uninterrupted' possession. Lawrie A.C.J. interpreted the terms as follows:

> A disturbance is something less than an interruption; it is a disturbance if, for a time, someone succeeds in getting partial possession, not to the entire exclusion of the former possessor, but jointly with him.

In *Bandulahamy* v. *Don Charles*[137], A was in possession of a field. B sued A in the Village Tribunal and obtained a judgement against A which was never executed. It was held that A's possession was interrupted by the decree entered against him. It was further held that possession is not to be taken as disturbed by mere actions, but an action in which a person is condemned to pay for his possession deprives his possession of that particular character that it must have in order to give rise to prescriptive rights.

2. Title adverse to or independent of that of the claimant

The Section itself illustrates the second requirement of adverse possession. It provides that possession unaccompanied by payment of rent or produce, or by performance of service or duty, or by any other act by the possessor from which an acknowledgement of a right existing in another person, would fairly and naturally be inferred.

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[136] Ibid.

[137] (1913)2 Matara Cases 87.

Adverse possession does not require that the party in possession should intend to assert a title adverse to the whole world. It is sufficient that the possession be adverse only to the claimant. An occupation which began in a subordinate capacity can be converted into adverse possession by an overt act or a series of acts indicative of a challenge to the owner's title[138].

In *Orloff* v. *Grebe*[139], 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.

In *Perera* v. *Menchi Nona*[140], a person entered into possession of a land with the consent of the owner. His descendants continued to possess the land without acknowledging the rights of the owner and were in possession for more than ten years. It was held that such possession does not give them prescriptive title as the character of the occupation would be presumed to continue unaltered until, by some overt act on the part of the occupiers, the owners or their successors were appraised that the occupation was thereafter to be adverse to their rights.

3. Possession for ten years

The claimant must prove possession for ten years before bringing the action.

In *Samuel* v. *Dharmasiri*[141], it was held that a judgement-debtor against whom a decree for ejectment has been entered acquires a right to a decree under Section 3 of the Prescription Ordinance if, despite attempts made at execution of writ, he continues to remain on the land for a period of over ten years after the date of the decree without doing any act by which he directly

[138] G.L. Peiris, *The Law of Property in Sri Lanka, Volume One* (Colombo: Lake House Investments, 1976).

[139] (1907)10 NLR 183.

[140] (1908)1 Leader 74.

[141] 58 CLW 76; 62 NLR 505.

or indirectly acknowledges a right in the judgement-debtor or any other person.

According to the proviso to Section 3, the period of ten years only begins to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

b) Possessory actions

Under Section 4 of the Ordinance, a person who has been dispossessed of any immovable property otherwise than by a process of law can institute action against the person dispossessing him at any time within one year of such dispossession. Upon proof of such dispossession within one year before the action was brought, the plaintiff is entitled to a decree against the defendant for the restoration of such possession without proof of title.

In *Dingiriya* v. *Payne*[142], it was held that where a lessee of immovable property who has been in possession is dispossessed of such property by a purchaser of the same from the lessor otherwise than by process of law, the lessee is entitled to be restored to possession under Section 4 of Ordinance No. 22 of 1871 even though such purchaser may have a better title to the property.

This Section aims to restore possession, and such restoration is done by the mere proof of dispossession within one year before the action was brought. The claimant need not prove title to the land in order to obtain a decree under this Section.

c) Other actions

According to Section 10 of the Ordinance, any action in respect of any cause of action not expressly provided for, or expressly exempted from the operation of this Ordinance, shall be commenced within three years of the time when such cause of action shall have accrued.

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[142] (1908)11 NLR 105.

For example, in *Ranasinghe* v. *De Silva*[143], it was held that an action for a declaration that a notarially executed deed is null and void is prescribed within three years of the date of execution of the deed, according to Section 10 of the Prescription Ordinance.

d) Disabilities

The provisions of Section 13 of the Ordinance set out certain disabilities: infancy, idiocy, unsoundness of mind, lunacy and absence beyond seas. If a person is subject to any of these disabilities, the possession of immovable property by any other person does not entitle him to claim prescriptive title against the person subject to the disability. However, the period of ten years required by Section 3 will commence from the death of the person subject to the disability or from the termination of such disability, whichever occurs first.

The effect of this Section is diminished to a degree by the proviso to Section 13 which states that when a person who claims prescriptive title to a property has been in possession of the property for 30 years, it shall be taken as conclusive proof of title in the manner provided by Section 3 of this Ordinance, notwithstanding the disability of any adverse claimant.

e) Application to the State

Section 15 of the Ordinance provides that "[n]othing contained in the Prescription Ordinance shall in any way affect the rights of the State…".

However, in the case of *A.G.* v. *Wilson and Another*[144], the Court of Appeal held that:

> Upon examination of the pre-existing rights of the Crown under the Roman Dutch Law it would appear that there was no immunity for

[143] 78 NLR 500.

[144] 1997(2) Sri LR 349.

the Crown from the rules of limitation in respect of its alienable rights but there was immunity only in respect of inalienable rights.

From time to time, Sri Lankan courts have interpreted the provisions of the Prescription Ordinance literally in support of the smooth functions of the courts and to reduce the burden of the courts from unnecessary litigations. The tendency is to try issues relating to prescription as issues of law and to dismiss the cases without adjudication of the substantial rights of the parties.

3.3.3 Primary Courts Procedure Act No. 44 of 1979, Section 66

Chapter VII of the Primary Courts Procedure Act No. 44 of 1979 is widely used to settle land disputes resulting from breaches of the peace, popularly known as 'Section 66 applications'. The Chapter consists of 11 Sections which are more comprehensive than the provisions contained in the repealed Administration of Justice Law Act No. 44 of 1973.

The objective of these provisions is to settle minor disputes relating to land which result from breaches of the peace without resorting to civil courts, and the inquiry envisaged by these provisions is intended to be of a summary manner. They are intended to provide a speedy resolution of the dispute and the Act specifies that the inquiry be concluded within three months and the order of the judge be delivered within one week of the conclusion of the inquiry.[145]

The existence of a dispute likely to cause a breach of the peace is the foundation for the exercise of jurisdiction under this Chapter. In such circumstances, under Section 66(1) of the Act, the proceeding before the Magistrate's Court may be instituted either by the police officer inquiring into the dispute[146] or by any party to such dispute.[147] Section 66 (2) provides that where an information is filed in a Primary Court under Subsection (1), the Primary Court has the jurisdiction to inquire into and make a determination or order relating to the dispute regarding which the information is filed.

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145 Section 67.

146 Section 66(1)(a).

147 Section 66(1)(b).

Early judicial thinking was that the Magistrate assumes jurisdiction upon forming an opinion as to the existence of a breach of the peace. In *Kanagasabai v. Mylvanagam*[148] it was held that Section 62 of the Administration of Justice Law confers special jurisdiction on a Magistrate to make orders to prevent a dispute affecting land escalating and causing a breach of peace and that the Section requires that the Magistrate should be satisfied, before initiating proceedings, that a dispute affecting land exists and that such dispute is likely to cause a breach of the peace.

However, where actions are instituted under Section 66(1)(a) of the Primary Courts Procedure Act, it is the police officer who determines that there is a breach of the peace, and after information regarding the dispute is filed in the Primary Court, the judge assumes jurisdiction to inquire into the matter.

In the case of *Puncinona* v. *Padmasena*[149], Ismail J. held that:

> Where the information is filed under Section 66(1)(a) of the Primary Courts Procedure Act by a Police Officer, a Primary Court is vested with jurisdiction to inquire into the dispute. The Police Officer is empowered to file the information only if there is a dispute affecting land and the breach of the peace is threatened or likely.

In *Velupillai and Others v. Sivanathan*[150] the Court of Appeal held that:

> Under Section 66 (1)(a) of the Primary Courts Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. In terms of Section 66 (2) the Court is vested with jurisdiction to inquire into and make a determination on

[148] 78 NLR 289

[149] [1994] 2 SLR 117.

[150] [1993] 1 Sri LR 123

> the dispute regarding which information is filed either under Section 66 (1)(a) or 66 (1)(b).

However, when the information is filed by a party to the dispute under Section 66(1)(b) of the Act, the judge assumes jurisdiction upon being satisfied of the existence of a dispute owing to which a breach of the peace is threatened or likely. In the aforesaid case of *Puncinona* v. *Padmasena*[151], it was held that:

> However, when information is filed by a party to the dispute under Section 66(1)(b) it is left to the judge to satisfy himself that there is a dispute affecting land owing to which a breach of the peace is threatened or likely. As observed in *Velupillai and Others* v. *Sivanathan*, "… when an information is filed under Section 66(1)(b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely."

It is also the duty of the Magistrate to encourage the settlement of the dispute before holding an inquiry into the matter. In *Ali v. Abdeen*[152], it was held that:

> Thus, it is to be observed that the Primary Court Judge was under a peremptory duty to encourage or make every effort, so to say, to facilitate dispute settlement, before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of the court order. It was obligatory on the Primary Court as a condition-precedent to holding an inquiry, to have made a conscious endeavor to have composed or ironed out the differences between the parties-a duty which, in this instance, had been neglected. … That is a preliminary requirement which has to be fulfilled before the jurisdiction of the Primary Court exists to

[151] Ibid.

[152] [2001] 1 Sri LR 413

> hold an inquiry under section 66(7). When Parliament has enacted that provided a certain situation exists, then a tribunal may have certain powers it is clear that the tribunal will not have those powers unless that situation exists. The making of an endeavor by the court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under sec. 66(7) began, that is, to consider who had been in possession.

The aim of Part VII of the Primary Courts Procedure Act is to resolve 'disputes affecting land'. Section 75 of the Act provides that such disputes include disputes:

a) as to the rights of possession of any land or part of a land and building thereon;

b) as to the boundaries thereof;

c) as to the rights to cultivate any land or part of a land or;

d) as to the right of the crops or produce of any land or part of a land or;

e) as to any right in the nature of a servitude affecting the land.

It should be noted that this definition is not exhaustive and the courts are empowered to give wider interpretation and include disputes which have not been specified above.

Section 68 provides that where the dispute relates to the possession of any land, the judge holding the inquiry must determine who was in possession of the land on the date of the filing of the information under Section 66 and make an order as to who is entitled to possession of such land or part thereof. Such an order shall declare that the persons specified therein are entitled to possession of the land in the manner specified in such an order until such persons are evicted from there under an order or decree of a competent court.

Where at an inquiry into a dispute relating to the right to the possession of any land the judge is satisfied that any person who has been in possession of the land has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under Section 66, he may make a determination to that effect and an order directing the said party be restored to possession.[153]

In *Iqbal* v. *Majedudeen and Others*[154], it was held that the phrase 'forcibly dispossessed' in Section 68(3) means that dispossession had taken place against the will of the persons entitled to possess and without the authority of the law.

It is noted that the provisions of Section 68 of the Act empower the Court to prevent unlawful elements from dispossessing persons from properties by illegal means. The protection offered is broad in that even trespassers are given the same protection.

In *Ramalingam* v. *Thangarajah*[155], Sharvanada J. held that:

> Under Section 68, the Judge is bound to maintain the possession of such person even if he be a rank trespasser as against any interference even by the rightful owner. He is not to decide any question of title or right to possession of the parties to the land…. This Section entitles even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information. That person is entitled to possession until he is evicted by due process of law.

A noteworthy feature of Chapter VII of the Act is that by the said provisions, the Magistrate is not called upon to decide on the title to the land but only the question of who was in actual possession of the land.

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153 Section 68(3).

154 [1999] 3 Sri LR 213.

155 [1982] 2 Sri LR 663.

In the aforesaid case of *Ramalingam* v. *Thangarajah*[156], it was held that:

> A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information. He is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession.

Where the dispute relates to any other right relating to land other than the right to possession, Section 69 requires the judge to determine who is entitled to such right and make an order accordingly.

The significance of the provisions of Part VII of this Act is that orders made under this part do not affect or prejudice any right or interest in any land or part of a land which any person may establish in a civil suit. The Act casts a duty upon the judge of the Primary Court who commences to hold an inquiry under this part to explain the effect of those sections to the persons concerned in the disputes.

This is an important piece of legislation which provides equal protection to all persons possessing lands irrespective of proof of actual title. Such protection is granted until such time that a competent court determines the title. In the interim, orders made under these provisions maintain law and order and the rights of persons relating to immovable properties. They prevent arbitrary dispossessions of persons from lands and aim at preserving the *status quo ante* until a determination is made by a competent court and an eviction, if any, is made in accordance with the law.

[156] Ibid.

3.3.4 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 principal aim of the Act was to place restrictions on the extent of agricultural land that could be owned by individuals and to utilise agricultural lands to increase productivity and generate more employment.

According to Section 2 of the Law, which summarises the purposes for its enactment, it provides that:

The purposes of this Law shall be 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;

b) to take over agricultural land owned by any person in excess of the ceiling and to utilise such land in a manner which will result in an increase in its productivity and in the employment generated from such land.

By Section 3 of the Law, the Legislature placed a ceiling on agricultural lands which may be owned by a person in the following manner:

a) Where the land consists exclusively of paddy land, the ceiling is 25 acres;

b) Where the land does not consist exclusively of paddy land, the ceiling is 50 acres, so the total extent of any paddy land, if any, comprised in such 50 acres shall not exceed the ceiling on paddy land (that is, 25 acres).

Any agricultural land owned by any person in excess of the ceiling would vest in the Land Reform Commission with the commencement of the said Law and be deemed to be held by the person who owned such lands under a

statutory lease from the Commission. Thus, with the operation of the Law, the individual owners lost their rights, title and interest to their properties which were in excess of the ceiling imposed by this Law, and the said properties, by operation of law, were vested in the Land Reform Commission.

Upon the lands being vested in the Land Reform Commission under the said Law, the Commission will have absolute title to the said lands without any encumbrances. When the property is vested with the Commission, a statutory lease is created, the terms and conditions of which are governed by Section 15 of the Law.

The servitudes and rights of tenant cultivators were given special protection in that such rights would not be affected by the change in ownership of the land.[157]

Where any alienation had been effected on or after 29 May 1971 to defeat the purpose of this Law, the Commission has the power to declare that the said alienation is null and void and has no force or avail in law.

The Law also makes provision for the ejectment of unlawful occupiers of land subject to a statutory lease, and the Magistrate's Court is empowered to issue *ex parte* orders to eject the unlawful occupants from the agricultural lands held on statutory leases. The Fiscal of the Court would immediately execute the writ and report to the Court.

Chapter II of the Law makes provision for the use of the lands and/or alienation of the lands vested with the Commission for agricultural development and animal husbandry, construction of residential houses, farm or plantations managed by the Commission, and for public and other purposes. The Law has specific provisions prohibiting the alienation of lands by the Commission to persons who are not Sri Lankan citizens.[158]

[157] Sections 9 and 10.

[158] Section 23.

Part III of the Act makes provision for the payment of compensation by the Commission in respect of agricultural lands vested in it. The Law provides for the manner in which compensation should be calculated.

Once land is vested with the Commission, the Chairman of the Commission should publish a notice requiring persons entitled to make claims to submit their claims to the Commission. Upon the receipt of compensation claims, the Commission would refer the same to the Chief Valuer for his determination of the compensation payable and claimants are entitled to give the Chief Valuer evidence of the value of the land.

Upon the receipt of the determination of the Chief, the Commission makes an award as to the compensation payable. If it deems it necessary, the Chairman of the Commission or other authorised officer may, with notice to claimants, have an inquiry. The said provision of Section 31 shows that the Commission is not bound to have an inquiry before awarding the compensation and that the provision gives wider power to the Commission and restricts the rights of the claimants.

If on the day immediately preceding the day on which any agricultural land was vested with the Commission there existed a lease with an unexpired period of at least 15 years, the compensation payable will be apportioned between the lessor and the lessee in the ratio of 40:60.

Where any person is dissatisfied with the amount of compensation awarded to him under Section 31, such person may appeal against the award to the Board of Review constituted under the Land Acquisition Act. The Board of Review is vested with the jurisdiction to entertain, hear and decide such appeal.

Part III A of the Law which was inserted by amending Act No. 39 of 1981 deals with the vesting in the Commission of estate lands owned or possessed by public companies and contains provisions similar to those under Part III. Parts IV, V and VI of the Law set out the provisions for the establishment, power and functions of the Land Reform Commission, its staff and finance and accounts.

The Land Reform Law was introduced to address the needs of the era of 1970-77, and with the lapse of time since then, the limitation imposed by the Law on the ownership of property has been lifted.

3.3.5 The Land Grants (Special Provisions) Act No. 43 of 1979

The socialist Government that governed Sri Lanka from 1970-77 enacted the Land Reform Law No. 1 of 1972 by which restrictions were placed on the extent of land that may be owned by individuals. The lands owned in excess of the ceiling imposed by the Land Reform Law were vested in the Land Reform Commission. Upon the change of government in 1978, the Land Grants (Special Provisions) Act was enacted with a view to achieving two objectives: firstly, to make provision for the vesting in the State of agricultural or estate land which is vested in the Land Reform Commission; and secondly to grant agricultural or estate lands free of charge to citizens of Sri Lanka who are landless.

Section 2 of the Act empowers the Minister to vest in the State any agricultural or estate land which is vested in the Land Reform Commission under the Land Reform Law. The vesting is to be done by the Minister by an order published in the Gazette. In doing so, the Minister should have regard to the need to augment the area of land available to the State for the purposes of distribution, and the vesting must be done with the concurrence of the Minister in charge of the subject of Land Reform.

The Act confers authority upon the President to transfer free of charge the lands so vested in the State to any citizen of Sri Lanka who is over 18 years of age.[159] Prior to such transfer, the President shall have regard to the fact that the prospective transferee does not own any land, the level of income of the family of the prospective transferee and the capacity of the prospective transferee to develop such land. These considerations are aimed at ensuring that the landless, low-income group is benefited.

[159] Section 3.

The granting of State land to persons is subject to the conditions stipulated in Section 5 of the Act, which include the requirement that the lands should not be disposed except with the prior written consent of the Land Commissioner. If the transferee fails to comply with any of the conditions stipulated in Section 5, the title to such land reverts to the State. The conditions subject to which the land was granted run with the land and bind all successors of the grantee. The Government Agent or an authorised officer can enter the land at any time to ascertain whether the conditions subject to which the transfer was made are being complied with.

The grantee of State land is entitled to nominate, either by last will or by a document executed as provided in the Act, a successor who shall be entitled to succeed to his rights to such land upon the death of the grantee.[160] Where the grantee fails to nominate a successor, or where the nominated successor is dead, the rights of the grantee devolve in the manner provided in Section 10. In such situations, the land devolves on the surviving spouse of the grantee, and failing such spouse, on one only of the relatives of the grantee in the following order: sons, daughters, grandsons, granddaughters, father, mother, brothers, sisters, uncles, aunts, nephews, nieces. The oldest is preferred to the others where there is more than one relative (a relative by blood and not by marriage) in any group.

This provision has proven to be problematic for several reasons. Firstly, the devolution of rights under this Section runs contrary to the basic principles of succession enumerated in the Matrimonial Rights and Inheritance Ordinance, as well as the succession rules under Thesawalamai, Kandyan and Muslim law. Under general law, upon the death of a person the surviving spouse is entitled to succeed to one half of the property of the deceased while children succeed to the other half. This principle is maintained, though with minor variations, in the three personal laws as well. However, under Section 10, the entirety of the rights of the grantee devolves on the surviving spouse. Only upon the failure of the spouse are the children considered, and even so, only one child can succeed to the rights of the grantee. In contrast, under general law all children are equally entitled to succession rights.

[160] Section 9.

Secondly, the order of succession is discriminatory towards women. In every class of relatives, the male is preferred to the female. For example, in the case of children, sons are preferred to daughters. If a deceased grantee has a son and a daughter, only the son can succeed to the rights of the deceased. Where a deceased grantee has an elder daughter and two younger sons it is the eldest son who has the right to succeed.

Thirdly, where there are more than two relatives in one group, only the oldest succeeds to the rights of the deceased, and where there are only two relatives in any group, the older is preferred.

The administration of this Act is entrusted to the Land Commissioner.

3.3.6 The Land Resumption Ordinance No. 4 of 1887

This Ordinance is one of the main pieces of legislation enacted under British Rule with a view to having greater control over unutilised lands in Sri Lanka. It aims at more effective usage of State lands by using these for commercial cultivation. The Preamble to the Ordinance states that it is an Ordinance relating to lands alienated by the Crown which are abandoned by the owners.

According to Section 2(1) of the Ordinance, where it appears to the Government Agent that any lands in Sri Lanka alienated by or on behalf of the State have been abandoned by the owner for eight years or more, and such owner or any person lawfully claiming under him cannot be ascertained, the Government Agent, with the sanction of the Land Commissioner, can declare that if no claim to such land is made to him by or on behalf of any person able to establish a title thereto within the period specified in such notice (being not less than 12 months), such land shall be resumed by the State. Such a declaration must be done by publishing a notice and posting it on the land as specified in Section 2(2). Prior to publishing such notice, there is a duty cast upon the Government Agent to make all reasonably diligent inquiry to ascertain the owners of such lands.

After the notice referred to in Section 2(1) is published, and if no claim is made in pursuance of such notice, the Government Agent shall make a report to

the Minister of the proceedings taken by him. Such report shall contain a description of the land, together with the boundaries thereof, and shall state that no claim has been made thereto. Upon the receipt of such report, it shall be lawful for the Minister to make order that such land shall be resumed by the State. The land would thereupon be resumed by and become the property of the State, free from all encumbrances.

Where a claim to the land is made after the publishing of the notice under Section 2, the Government Agent shall call upon the claimant to establish his claim, inquire into such claim and record all such evidence as may be adduced before him in support thereof. The Government Agent shall thereafter make a report to the Land Commissioner of the proceedings taken by him. Such report shall contain a description of the land, together with the boundaries thereof, and shall set forth the nature of the claim made in respect thereof, the evidence taken in support of such claim and the finding of the Government Agent thereon.[161]

Where the Land Commissioner is satisfied that the claimant has rights to the land, all proceedings under the Ordinance will cease and if the Commissioner has some doubt about the claim of the claimant, the Commissioner can refer the matter to the District Court and the District Judge shall exercise his ordinary civil jurisdiction in investigating any claim under this Ordinance.[162]

Where the District Judge, or the Court of Appeal in the event of an appeal, decides that the claimant's right has been established, all further proceedings in respect of such land under this Ordinance shall cease. However, if the courts decide otherwise, the Minister is empowered to make an order that the land shall be resumed by the State, and the same shall thereupon be vested in and become the property of the State, free from all encumbrances.[163]

Where the decision has been made to resume the land and the Government Agent has produced notification of resumption under Section 7 of the Ordinance, the District Court would immediately issue a writ of possession

[161] Section 4.

[162] Sections 5 and 11.

[163] Section 6.

directing the Fiscal of such Court to put and place such Government Agent or his nominee in possession of such land and, if the need arises, to remove from there any person refusing to vacate it. The Ordinance makes penal provisions against persons who obstruct the Government Agent or the Fiscal.

While Section 9 sets out provisions to appraise the value of the resumed property, Section 10 provides that if, within 30 years of the date of the notification of resumption being published in the Gazette, any person shall establish to the satisfaction of the Minister that he is entitled to be paid such appraised value or any part thereof, the appraised value shall be paid to that person.

3.3.7 The State Lands (Recovery of Possession) Act No. 7 of 1979

The State Lands (Recovery of Possession) Act[164] makes provision for the recovery of possession of State lands from persons in unauthorised possession or occupation thereof.

This Act is a procedural piece of legislation which was enacted with the objective of securing the rights of the State against unauthorised occupants and, to this end, it has introduced a procedure which enables the State to rapidly recover the possession of the properties.

In *Ihalapathirana* v. *Bulankulame, Director-General, Urban Development Authority*[165], it was held by the Court of Appeal that:

> Indeed, in all instances where a person is in unauthorised occupation or possession of State Land, such person could be ejected from the land in an appropriate civil action. The clear object of the State Lands (Recovery of Possession) Act is to secure possession of such land by expeditious machinery without recourse to an ordinary civil action.

[164] Amended by Act Nos. 58 of 1981, 29 of 1983, 29 of 1983, 50 of 1987, 45 of 1992, 60 of 1993, 29 of 1997.

[165] 1988(1) Sri LR 416.

The procedure in ejecting unauthorised occupants commences with the publication of a notice under Section 3(1) of the Act which is known as the Quit Notice.

Where the competent authority is of the opinion that any land is State land and that any person is in unauthorised possession or occupation of such land, that authority may serve a notice on such person. Where the competent authority considers such service impracticable or inexpedient, it should exhibit such notice in a conspicuous place in or on the land requiring such person to vacate it with his dependants, if any, and to deliver vacant possession of such land to such competent authority or other authorised person on or before a specified date. The date to be specified in such notice shall be a date not less than 30 days from the date of the issue or the exhibition of such notice.

In *Gunaratne (Alexis Auction Rooms)* v. *Abeysinghe (Urban Development Authority)*[166], it was held that the requirement of giving of notice under Section 3(1) of the State Lands (Recovery of Possession) Act to vacate and hand over possession is mandatory and must be complied with.

The Act gives little or no protection to unauthorised occupants, and according to Section 3(1)A, no person shall be entitled to any hearing or to make any representation in respect of a notice under Section 3(1).

Where a Quit Notice has been served or exhibited under Section 3,

a) the person in possession or occupation of the land to whom such notice relates or any dependants of such person shall not be entitled to possess or occupy such land after the date specified in such notice, or to object to such notice on any ground whatsoever except as provided for in Section 9.

b) the person in possession or occupation shall together with his dependants, if any, duly vacate such land and deliver vacant

[166] [1988]1 Sri LR 255.

> possession thereof to the competent authority or person to whom he is required to do so by such notice.[167]

In *Senanayake* v. *Damunupola*[168], the Supreme Court examined the scope of this Act in light of Section 3. Their Lordships held that:

> The State Lands (Recovery of Possession) Act No. 7 of 1979 came into force on 25 January 1979. It was amended by Act No. 58 of 1981. This Act has not repealed the Crown Lands Encroachment Ordinance (Chapter 465). It was enacted to make provision for the recovery of possession of 'State lands' as defined in the Act from persons in *unauthorised possession or occupation* thereof and matters connected therewith or incidental thereto. It is clear that this Act was intended to obtain an order of ejectment from the Magistrate's Court where the *occupation or possession was unauthorised*. Where a person is authorised to occupy or possess State Land which includes buildings, and where the authorisation has come to an end or has ceased to be of any force or effect, his occupation or possession becomes unauthorised. This position is made clear by Section 9 which provides for the scope of the inquiry before the Magistrate and the only plea a person summoned could urge in defence.

Section 5 of the Act makes provision for the ejectment of persons who do not comply with the Quit Notice and for the handover of the property to the competent authority. The competent authority can make an application to the Magistrate's Court on whose locality the land is situated for the recovery of possession of such land and for an order of ejectment of such person in possession or occupation, and his dependants, if any, from such land. Upon receipt of the application made under Section 5, the Magistrate shall immediately issue summons on the person named in the application to appear and show cause as to why such person and his dependants, if any, should not be ejected from the land as prayed for in the application for ejectment.[169]

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[167] Section 4.

[168] [1981]2 Sri LR 621.

[169] Section 6.

In issuing the summons, the procedure set out in Criminal Procedure Code should be followed.

If on the summons returnable date the person on whom such summons was issued fails to appear or informs the Court that he has no cause to show against the order for ejectment, the Court shall immediately issue an order directing such person and his dependants, if any, to be ejected immediately from the land. Where such person states that he has cause to show against the issue of an order for ejectment, the Magistrate's Court may proceed immediately to hear and determine the matter or may set the case for inquiry on a later date.

The scope of the inquiry before the Magistrate is detailed in Section 9. It provides that the person on whom the summons has been served shall not be entitled to contest any of the matters stated in the application except if such person establishes that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law, and that such permit or authority is in force and not revoked or otherwise rendered invalid.

In the case of *Muhandiram* v. *Chairman, No. 111, Janatha Estate Development Board*[170], it was held by the Court of Appeal that:

> [Section 9(1)] reveals that at an inquiry of this nature, the person on whom the summons has been served has to establish that his possession or occupation is upon a valid permit or other written authority of the State granted according to the written law. The burden of proof of that fact lies on that particular person on whom the summons has been served and appears before the relevant Court…. Unless [he] had established before the learned Magistrate that he was in occupation of the land stated in the schedule to the application on a valid permit or other written authority of the State, he cannot continue to occupy the said land and in terms of the State Lands (Recovery of Possession) Act, No. 7 of 1979, the Magistrate has

[170] [1992]1 Sri LR 110.

> to make an order directing [him] and his dependants to be ejected from the land.

In this way, according to the said Section, it is only if the person who is in possession establishes that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law, and that such permit or authority is in force and not revoked or otherwise rendered invalid, that he will not be ejected from the property. The unauthorised occupants are not entitled to raise any other issue other than the aforesaid defences.

If after inquiry the Magistrate is not satisfied that the person showing cause is entitled to possession or occupation of the land, he shall make an order directing such person and his dependants in occupation of such land to be ejected immediately from such land. No appeal shall lie against any order of ejectment made by a Magistrate.[171]

Where a person fails to comply with the order of the Magistrate, the Magistrate can, on the application of the competent authority, direct the Fiscal or a police officer to eject from the land to which the order relates all persons bound by the order and to deliver possession of such land to such competent authority or his representative.

Any person who re-enters, except under a valid permit or other written authority of the State granted in accordance with any written law, any land within a period of ten years of his being ejected there from in the execution of an order of the Magistrate shall be guilty of an offence under this Act and shall be liable on conviction after summary trial before a Magistrate to imprisonment for a term which may extend to five years, or to a fine which may extend to Rs. 1 000, or to both such fine and imprisonment.[172]

The proceedings before the Magistrate will have priority over other cases of that Court, and as per Section 6A of the Act every application made under

[171] Section 10(2).

[172] Section 11 A(1).

Section 5 shall be finally disposed of within a period of two calendar months from the date of such application. Where the Court makes an order directing a person to be ejected from the land, the Court shall make such orders to ensure that such person is ejected within three months of the date of application.

The procedure set out above aims at securing the speedy granting of possession of State lands occupied by unauthorised occupants to the State. However, what is disturbing about this procedure is that it fails to afford any protection to the occupants. Firstly, it completely shuts out inquiries and the possibility of making representations to the competent authority to assert their rights. Provisions for an inquiry before the Magistrate are made only in situations where the occupants fail to comply with the Quit Notice. In this way, law-abiding citizens who comply with the Quit Notice are completely denied of any protection, while those who resist the Quit Notice are given a limited opportunity to state their case. This procedure runs contrary to the norms of natural justice. Secondly, there is no appeal procedure against the decision of the competent authority, allowing arbitrary or erroneous decisions to stand. Even the Magistrate cannot question the decision of the competent authority.

In *Farook* v. *Gunewardene*[173], it was held that:

> When the Legislature has made express provision for any person who is aggrieved that he has been wrongfully ejected from any land to obtain relief by a process described in the Act itself, it is not for this Court to grant relief on the ground that the petitioner has not been heard. Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written authority of the State and (b) special provisions have been made for aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land.

[173] [1980]2 Sri LR 243.

An equally disturbing factor is that even at the inquiry before the Magistrate, the occupant can get an order in his favour only if he proves that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is still in force. There is no room for considering any other explanation or difficulty of the occupant.

However, in *Muhandiram* v. *Chairman, No. 111, Janatha Estate Development Board*[174], the Court of Appeal was sympathetic towards the occupant who had constructed a house on State land for occupation, and held that:

> [t]his Court, after consideration of the fact that this respondent-petitioner has put up a substantial house and is in occupation of the house, directs the learned Magistrate not to issue a Writ of ejectment till 31 March 1992. This period is given by this Court as some sort of relief to the respondent-petitioner, so that he could take steps to find out alternative accommodation before he is finally ejected or if he is so desirous, he may explore the possibility of getting a permit from the relevant authority to continue to occupy this land. But under no circumstances, this period should be extended beyond 31 March 1992.

While the thinking of the Court is welcomed and it is hoped that the same will be followed by the Magistrates, it should be noted that even to obtain such relief, the occupant must fail to comply with the Quit Notice and proceedings be instituted in Court. As stated earlier, law-abiding citizens who comply with the Quit Notice are not given any opportunity to bring their grievances to the attention of the competent authority and to obtain a grace period to find alternate accommodation or any other such relief.

The Act enables the person who was ejected to file action for declaration of title against the State. Section 12 provides that:

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[174] [1992]1 Sri LR 110.

> Nothing in this Act contained shall preclude any person who has been ejected from a land under the provisions of this Act or any person claiming to be the owner thereof from instituting an action against the State for the vindication of his title thereto within six months from the date of the order of ejectment.

While this Section attempts to provide some relief to the occupant, the remedy is available only those who are vigilant about their rights, in that only six months is granted to institute such action. Where a person has instituted action to vindicate his title, and a decision has been made in his favour, such person is entitled to recover reasonable compensation for the damage sustained by reason of his having been compelled to deliver up possession of such land.[175]

In the case of *Farook* v. *Gunewardene*[176], it was held by the Court of Appeal that:

> It is significant that there is no provision … to place the person ejected in possession of the land when the action has been decided in favour of the person ejected, even though that person has vindicated his title to the land. It appears, therefore, that the intention of the Legislature was that once the competent authority had decided that any land was State land even after the person claiming to be the owner vindicates his title to the land, he was not to be restored to possession of the land, but only entitled to recover reasonable compensation for the damage sustained including the value of the land by reason of his having been compelled to deliver up possession of such a land.

In this way, even where occupant has successfully vindicated his title, he is only entitled to reasonable compensation for the damage sustained as a result of being compelled to deliver the possession of the land. He is not entitled to be restored possession. This provision allows an arbitrary and erroneous decision of the competent authority to stand despite the fact that the occupant has established title to the land.

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[175] Section 13.

[176] [1980]2 Sri LR 243.

3.3.8 The State Lands Ordinance No. 8 of 1947

The State Lands Ordinance makes provisions, *inter alia*, for the granting and disposition of State lands in Sri Lanka. It empowers the President to make absolute or provisional grants of State lands, to sell, lease or otherwise dispose of State lands, and to issue permits for the occupation of State lands.[177]

Special grants or leases of State lands may be made at a nominal price or rent, or gratuitously for any charitable, educational, philanthropic, religious or scientific purpose, or for any other purpose which the President may approve.

Every disposition of State land is to be effected by an instrument of disposition executed in the manner set out in the Ordinance. The Ordinance also provides for the making of regulations prescribing conditions which may be attached to the disposition of State land.[178] However, the President may at any time mitigate or release any of the terms, covenants and conditions set out in any lease, permit or licence issued under this Ordinance and may at any time, by agreement with the grantee, vary or modify any such terms, covenants or conditions.[179] The President also has the power to extend the time allowed for a grantee to perform any act or fulfil any condition or covenant set out in the instrument of disposition.

Where a permit or licence is personal to the grantee, the same determines by the death of the grantee and all improvements made on the land by the grantee become the property of the State. No compensation is payable in respect of such improvements.[180]

Where a grantee of any permit or licence has failed to observe any conditions attached thereto, the Government Agent has the power to cancel such permit or licence and eject the grantee. A claim for compensation or damages does not lie in such cases.

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177 Section 2.
178 Section 8.
179 Section 14.
180 Section 16.

The Ordinance makes restrictions on the grantee to alienate the land. Where in the instrument of disposition it is stated that the grantee shall not dispose of the land without the prior consent of the President or any authorised officer of the Government, any disposition contrary to such consent or sanction is void.[181]

The Ordinance also makes provision for the vesting of State land for purposes of administration in any naval, military, air force or local authority, subject to such terms and conditions as may be specified in the vesting order.[182] Where State land is so vested in any local authority, such land so vests in the local authority only for the purpose specified in the vesting order or, where no such purpose is specified, for the purpose of administration only. The right and title to the soil of such land remains at all times with the Republic. The vesting order may be revoked in limited circumstances provided for in the Ordinance. The Ordinance makes similar provision for the vesting of State lands in Village Councils. It also empowers the Minister to declare that any State land constitutes a reservation for public purposes specified in the Ordinance.[183] Under this Ordinance no person shall acquire any prescriptive title to State reservations by possession or use and the State is not liable to pay compensation for improvements effected on reservations.

The Ordinance vests the administration and control of the foreshore in the State and makes provision for regulations to be made for the restriction and control of the use of the foreshore by members of the public.[184]

The regulation and control of the use of the water of lakes and public streams is also vested in the State.[185] The occupier of land on the bank of any public lake or public stream shall have the right to use the water in that lake or stream for domestic, farming or agricultural purposes. However, permission from the Government Agent or a prescribed officer must be obtained prior to diverting

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181 Section 19.
182 Part III of the Ordinance.
183 Part VI of the Ordinance.
184 Part VIII of the Ordinance.
185 Part IX of the Ordinance.

water and constructing or maintaining any work or bridges in or upon the bank of any public lake or stream.[186]

The administration of the Ordinance is charged to the Land Commissioner who is subjected to the general direction and control of the Minister.

3.3.9 Land Development Ordinance No. 19 of 1935

The Land Development Ordinance is one of the main laws under which State land is alienated for systematic development. The Ordinance creates the post of Land Commissioner who is charged with the implementation of the Ordinance.

The Ordinance provides for the mapping out of State land for purposes specified therein, such as for village expansion, human resettlement, forest reserves and development to towns, and for a scheme and diagram to be prepared.[187]

Chapter III of the Ordinance provides for the alienation of State land to citizens of Sri Lanka. The persons to whom State land would be alienated are selected by what is known as a 'Land Kachcheri'. Alienation of State land is done in two stages.[188] Firstly, a permit is issued authorising a person to occupy the land. The permit holder is required to pay the purchase amount as determined by the Land Commissioner in annual instalments within a period of ten years, with provision to extend the time limitation by a further two years upon the permit holder proving that the failure to pay was due to sickness, crop failure or other unavoidable cause. The land in respect of which the permit is issued will be surveyed and the permit shall be registered free of charge. In the second stage, the permit holder will be issued a grant in respect of the land, subject to the fulfilment of three conditions. The permit holder must have paid the purchase price and all other sums, he must have complied with the conditions subject to which the permit was issued and he must be in occupation of and fully develop to the satisfaction of the Government

186 Sections 75 and 77.
187 Sections 8 and 9.
188 Section 19.

Agent irrigation land for a period of three years (or high land for a period of one year). In addition, the land may be granted subject to special conditions which will run with the land and will bind the original owner, his successors and all owners of the land.[189]

All grants are registered free of charge. Every grant on which land is to be alienated contains the extent and a description of the boundaries of the land, and a copy of the plan is made available to the grantee upon payment of the prescribed fee.[190]

Every grant of State land is subject to the condition that the owner of the holding shall not dispose of a divided portion or an undivided share of the holding which is less than the minimum fraction specified in the grant, except with the prior approval of the Government Agent. The owner of a holding can lease such holding only in prescribed circumstances and cannot mortgage the holding to any person other than a licensed commercial bank or an institution specified in Section 43. Permit holders are prohibited from disposing of land alienated to them on permits. However, they may mortgage the interest in the land to any registered society of which they are a member.[191]

In *N.Sellathangam* v. *A.Assanarlebee and Another*[192], the Supreme Court held that:

> Where a grantee of land under the land Development Ordinance transfers the land to a person without obtaining the prior written consent of the Government Agent as required by section 42, the transfer is null and void and does not have the effect of passing any right or title to the transferee. In such a case, the succession devolves according to the rules in the Third Schedule.

Succession to lands granted under this Ordinance is governed by Chapter VII thereof. Upon the death of a permit holder, his or her spouse is entitled

189 Sections 35 and 37.
190 Sections 30 and 31.
191 Section 46.
192 59 NLR 350

to succeed to the land, whether or not he or she has been nominated as successor by the permit holder and notwithstanding any default of payment of any instalment of the purchase price. The conditions of the permit become applicable to the spouse. Where such spouse fulfils the terms and conditions of the permit, he or she becomes entitled to a grant of the land. However, such spouse would not have the power to dispose of the land and cannot nominate a successor to the land. Upon the death of the spouse or upon his or her re-marriage, the person who was nominated as the successor by the deceased permit holder, or who would have been entitled to succeed as his or her successor, shall succeed to the land. Similar rights are given to the spouses of owners of holdings. Upon the failure of the spouse to succeed to the land or upon his or her death, the person nominated as the successor by the deceased permit holder or owner becomes entitled to succeed to the land.

In this way, the surviving spouse is given a life interest in the property, and at the same time the descendants of the original permit holder or grantee or his nominee are also given the opportunity to succeed to the land upon the termination of the life interest of the spouse.

The Ordinance restricts the persons who may be nominated as successors to those mentioned in Rule 1 of the Third Schedule to ensure that the land in respect of which a permit or grant was issued remains within the close relations of the permit holder or grantee.

A nomination made by an unmarried owner of a holding or a permit holder becomes null and void upon the marriage of such owner or permit holder. A nomination of a successor can be cancelled at any time and a new nomination can be made. To be valid, a nomination must have been registered by the Registrar of Lands.

Where a spouse of a deceased permit-holder or owner of a holding fails to succeed to the land, it devolves on the nominated successor.[193] Where a successor has not been nominated, it devolves among the relatives of the deceased in the order provided in the Third Schedule: sons, daughters,

[193] Section 49.

grandsons, granddaughters, father, mother, brothers, sisters, aunts, uncles, nephews, nieces.[194] Again, in any of these groups, males are preferred to females and the older are preferred to the younger. For example, where a permit holder dies leaving two sons and a daughter, it is the elder son who is entitled to succeed to the land. Where there are two or more persons of the same age who are equally entitled to succeed, the Government Agent can nominate only one such person to succeed to the holding and such decision of the Government Agent is final.[195] The order of succession discriminates against daughters, who, though they may be the oldest in the family, are deprived of their inheritance rights because they are females.

The Third Schedule does not make a distinction between legitimate and illegitimate children. It states that 'relatives' of the deceased permit holder or holder of a grant means relatives by blood and not by marriage.

In *Gunawardena* v. *Rosalin*[196], the deceased grantee of State land nominated his sister as the life-holder. Upon the death of the grantee, his sister claimed that his widow and their son who is the nominated successor were in unlawful possession of the land since the death of the grantee. The Court held that since the sister of the deceased did not enter into possession of the land within the prescribed period of six months in Section 68(1) of the Land Development Ordinance, the deceased's son succeeded to the holding by virtue of Section 70.

The grant or permit is liable for cancellation where there is no person lawfully entitled to succeed or such person is not willing to so succeed. Similarly, where a condition attached to the permit has not been observed, the same can be cancelled. Where the permit has been cancelled, the Ordinance makes provision for the ejectment of all the persons in occupation of the land.

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194 Section 72 and Rule 1(b) of the Third Schedule to the Land Development Ordinance.

195 Rule 2 of the Third Schedule to the Land Development Ordinance.

196 62 NLR 213.

3.3.10 Partition Law

The main purpose of filing a partition action is to partition the land or to distribute the proceeds of the sale among the co-owners. The Partition Law is an important piece of legislation given the nature of land disputes in Sri Lanka. A large number of disputes relating to land arise due to difficulties in using co-owned lands in common — such lands forming part of a significant portion of privately owned lands. The Partition Law allows owners of such lands to settle their disputes by legal means.

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.[197]

The Partition Act is a procedural piece of legislation which sets out the procedure for partitioning lands and is generally considered to be a comprehensive piece of legislation. The Act provides for procedures from the institution of partition action to the delivery of possession of the property.

Judgements obtained from partition cases bind and operate against the entire world (judgements *in rem*), not only against the parties to suit. This special character assists in the resolution of many land disputes with finality.

Where any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of the Act.[198] The partition action can be instituted by presenting a plaint to the District Court within the local limits of whose jurisdiction the land which is the subject matter of the action is situated.

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[197] Amended by Acts Nos. 5 of 1981, 6 of 1987, 32 of 1987 and 17 of 1997.

[198] Section 2.

Section 4 of the Act sets out the requirements of the plaint in a partition action, which include the name, extent and value of the land, description of the land, names and addresses of persons entitled to or who claimed to be entitled to any rights or interests in the land and the title and pedigree. Along with the plaint, the Plaintiff must file in the Court in triplicate an application for registration of action as a *lis pendens* addressed to the Registrar of Lands. It is very important to register the *lis pendens* in correct volume/folio of the respective Land Registry, and failure to file a *lis pendens* affects the validity of the final judgement.[199]

Section 12(1) of the Act requires that after a partition action is registered as a *lis pendens* under the Registration of Documents Ordinance, and after the return of the triplicate referred to in Section 11, the Plaintiff in the action shall file or cause to be filed in Court a declaration under the hand of an Attorney-at-Law certifying that all such entries in the Register maintained under that Ordinance as related to the land constituting the subject matter of the action have been personally inspected by that Attorney-at-Law after the registration of the action as a *lis pendens*. The declaration should also include a statement of the names of every person found upon inspection of those entries to be a person whom the Plaintiff is required by Section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid Register, that address.

This Section aims at ensuring that all necessary parties are before the Court prior to determining the substantial rights of the parties, and the burden of ensuring the same is placed on the Attorney-at-Law for the Plaintiff.

Sections 16, 17 and 18 of the Act deal with preliminary survey which is considered the most important step in a partition action. The preliminary survey is executed on a commission being issued under the provisions of Section 16 of the Act. It is noteworthy that the entire partition action is restricted to the corpus surveyed at the preliminary survey.

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[199] *Victor Perera v. Don Jinadasa,* 65 NLR 451.

Once the aforesaid preliminary steps are concluded and summons served, the defendant in the action is entitled to file a statement of claim setting out the nature and extent of rights, shares or interests to, of or in the land to which the action relates. Where the defendant disputes any averment in the plaint relating to the devolution of title, a pedigree showing the devolution of title must be filed together with the statement of claim.

In view of the amendment to Section 19 of the Law by Act No. 17 of 1997, the defendant is required to submit a memorandum nominating persons to be his legal representatives in the event of his death pending action. This Section is intended to secure the continuation of the action without delay due to the death of the parties in suit.

The Partition Law also provides for the addition of parties who claim interest to the land before the surveyor and any persons disclosed by the defendants in their statement of claims. The Act permits the Court to add any person as a party before the judgement is delivered.[200]

After the preliminary steps are concluded, the case will be called in open court to fix the case for trial, and at the trial the Court shall examine the title of each party and shall hear and receive evidence in support thereof. The Court shall try to determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates.

If a defendant fails to file a statement of claim by the due date, the trial may proceed *ex parte* as against such party in default, and such defaulted party is not entitled, without the permission of the Court, to raise any contest or dispute the claim of any other party to the action at the trial, in view of the provisions of Section 25(2) of the Law. However, the Court has jurisdiction to permit a party in default to participate in the trial after notice to the parties to the action — if the Court is satisfied that his claim is *bona fide*. The Court may also make an appropriate order as to whether such a party shall file a statement of claim and pay costs, or order the pre-payment of costs.

[200] Section 69.

The duty of the Court to investigate the title

In view of the finality attached to a partition decree, the Court is required to investigate the title of each person in detail.

In the case of *Kumarihamy* v. *Weeragama*[201], it was held that an agreement, which is entered into in a partition action affecting only the rights of the parties, *inter se*, and which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is obnoxious to the Partition Ordinance.

In *W.G. Roselin* v. *H.G. Maryhamy*[202], the Supreme Court held that:

> The submission of learned President's Counsel for the plaintiff-respondent is that there was no need for an examination of title in view of the settlement that was entered into by the parties. In the case of *Kumarihamy* v. *Weeragama*[203], it was held that an agreement entered into in a partition action is binding on the parties and is not obnoxious to the Partition Ordinance if the agreement affects only the rights of parties *inter se* and is expressly made *subject to the court being satisfied that all parties entitled to interests in the land are before Court* and are solely entitled to that land. Therefore where an agreement is entered into, the Court has to be satisfied only *as to whether the agreement is between all the parties having interests in the land*. In the event of such agreement the respective shares or interests to be given to each party are based upon the compromise that is reached and not on an examination of title.

In this way, from these findings it is clear that even when parties are settling their disputes, the Court still has to satisfy as to the title of the respective parties before entering its decree and judgement. The aforesaid position on the investigation of title is very important in protecting the rights of persons

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201 43 NLR 265.

202 [1994]3 SLR 262.

203 43 NLR 265.

who are not parties to the suit. It also prevents litigants from compromising the rights of others to their gains and benefit.

Interlocutory decree

At the conclusion of the trial of a partition action, or on such later date as the Court may fix, the Court shall pronounce judgement in open court, and the judgement shall be dated and signed by the judge at the time as pronouncing it. As soon as possible after the judgement is pronounced, the Court shall enter an interlocutory decree in accordance with the findings in the judgement, and such decree shall be signed by the judge.[204]

By interlocutory decree, the Court can, *inter alia*, order the following:

a) a partitioning of the land;

b) a sale of the land in whole or parts;

c) a sale of a share or portion of the land and a partition of the remainder;

d) that any share remains un-allotted;

e) that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties.

If the land sought to be partitioned cannot be partitioned effectively, the Court generally makes an order to sell the land and to distribute the proceeds among the co-owners according to their rights and interests, and gives directions to auctioneers accordingly.

After entering the interlocutory decree, the Court can issue a commission to divide the land for sale or partition among the parties.[205]

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[204] Section 26.

[205] Section 27.

According to Section 31 of the Partition Law, the surveyor shall, having proceed to the land, prepare a scheme of partition in conformity with the interlocutory decree and with any special directions contained in his commission, demarcating the divided portions on the land by means of such boundary marks as are not easily removed or destroyed. He or she shall inform the parties present of the returnable date of his commission as fixed under Section 27.

Section 32 of the Act provides that the surveyor should return his commission, explaining, *inter alia*, the manner in which the land has been partitioned — stating the names of the parties, the nature and extent of their respective shares and interests and where any such extent is less than the minimum extent required by any written law relating to sub-division of land for development purposes, a statement to that effect, the dates on which the land was partitioned, and, where a lot is allotted in common to several parties, specifying each party's share of that lot.

While Section 32 of the Partition Law also provides for a surveyor to make reports on improvements and assess the value of improvements, Section 33 permits the surveyor to allot the lands or buildings which have been improved by parties to respective parties as far as is practicable, or that portion of the land which has been so improved or built upon, as the case may be.

After the surveyor makes a return to the commission, the Court shall call the case in an open court and shall fix a date for the consideration of the scheme of the partition proposed by the surveyor. The date so fixed shall be a date not earlier than 30 days after the receipt of such return by the Court.[206]

The Court may, after summary inquiry, confirm with or without modification the scheme of partition proposed by the surveyor, and enter the final decree of partition accordingly.[207]

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206 Section 35.

207 Section 36.

Finality of interlocutory and final decree

According to Section 48(1) of the Partition Law, subject to Sub-Section (5) of this Section, the interlocutory decree entered under Section 26 and the final decree of partition entered under Section 36 shall, subject to the decision on any appeal which may be preferred there from (and in the case of an interlocutory decree, subject also to the provisions of Sub-Section (4) of this Section), be good and sufficient evidence of the title of any person as to any right, share or 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 to which such decree relates, notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court or the fact that all persons concerned are not parties to the partition action. The right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever, other than those specified in that decree.

Prohibition to alienate pending partition suit

Section 66 of the Partition Ordinance makes provisions that after registration of a *lis pendens* in a partition action, no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates can be made until the final determination of the action.

Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of Section 66 shall be void. However, in the event of the partition action being dismissed, any such voluntary alienation, lease or hypothecation shall be deemed to be valid. Any assignment of a lease or hypothecation effected prior to the registration of a *lis pendens* of such partition action shall not be affected by the provisions of this section.

Under Section 75 of the Partition Act, dismissal of a partition action in respect of any land under Sections 9, 12, 29, 62, 65 or 70 shall not operate as a bar to the institution of another partition action in respect of that land. A dismissal of a partition action under Sections 29, 62, 65 or 70 shall not affect the final

and conclusive effect given by Section 48 to the interlocutory decree entered in such action.

The said provisions have enabled litigants who failed to see the case through for various reasons to return to Court and seek redress. Another special feature of partition actions is that in cases where the Plaintiff fails to prosecute the case, the defendant can proceed to prosecute the case.

Action for damages

Section 49 of the Partition Law provides that any person not being a party to a partition action, whose rights to the land to which the action relates have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action, may, by separate action instituted not later than five years from the date of the final decree in the partition action, recover damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued, and where the whole or any part of such damages cannot be recovered from any such party recover such damages or part thereof from any other person who has benefited by any such act of such party.

By enacting this provision, the legislature has intended to protect the rights of persons who are not parties to the suit. In this way, a person who has lost his rights as a result of a decree entered in the partition action can, by separate action, claim damages.

Appeals

Subject to the provisions of Sections 36A and 45A, an appeal lies to the Court of Appeal against any judgement, decree or order made or entered by any court in any partition action.[208]

[208] Section 67.

Where any judgement is obtained by fraud, collusion or deceit, any person who is aggrieved by such a judgement or order can make an application to the High Court of the Provinces by application of *restitutio in integrum* and revision.

Partition Law is a piece of legislation which sets out the procedures for partitioning lands held in common. The nature of the procedures set out in the Act has led to long delays and the incurring of greater expenses in prosecuting cases. There is a need to introduce or make provisions to expedite the process without hampering the nature of title derived from partition cases.

PART IV:

CONCLUSION

In Sri Lanka, a proper institutional framework has been put in place which is capable of guaranteeing, protecting and enhancing proprietary rights and the right to adequate housing. Separate ministries are dedicated to looking into housing and land issues. Among the many other institutions addressing these matters are the Department of Housing, the Commissioner of National Housing, the National Housing Development Authority and the Urban Development Authority — all of which are empowered to design housing projects and carry out housing objects. In addition, there are several institutions both at the central government level and at the provincial level entrusted with powers to deal with land issues.

Nevertheless, the housing and land projects and objects carried out by these institutions do not form part of an overarching, well-thought-out and well-formulated policy which seeks to address housing and land issues. Instead, most of them are *ad hoc* policies designed to cater to specific instances or issues. Sri Lanka is in need of overarching housing and land policies which aim to enhance the quality of life of the people through the provision of adequate housing and access to land.

The laws dealing with housing cover a wide range of issues. As examined earlier, several laws have been enacted to grant protection to tenants. With a view to solving the housing shortage, a ceiling was fixed on the number of houses that can be owned by one person. Some laws have created institutions to carry out housing projects, while others have entrusted local authorities

to execute such projects. Similarly, there are many laws which are aimed at granting State lands for the use and benefit of the public. There are other laws which have imposed a ceiling on the extent of land that can be owned by one person, with excess agricultural land to be vested in the State to be used in such a manner that increases productivity and generates more employment.

The application of the laws dealing with housing and land issues to internally displaced persons has caused considerable difficulties and hardships to them. A majority of these laws have been enacted well before the conflict began and are not designed to cater to the special circumstances of the internally displaced persons. When applied to properties of displaced persons, these laws cause grave injustices and hardships to the displaced. Notwithstanding the fact that displacement due to the conflict has been occurring for over two decades, no amendments to these laws have been brought in to cater to the special circumstances of the internally displaced.

Similarly, these laws have not been enacted using a rights-based approach. This is especially the case with regard to the payment of compensation for land acquired by the Government, issues relating to security of tenure and the provision of alternative accommodation. The present laws should be brought into line with the right to adequate housing and relevant international law and standards.

In embarking upon this task, as a first step, the right to adequate housing should be included in the Sri Lankan Constitution. Attempts have been made by successive governments to include the right to adequate housing and other socio-economic rights in the Constitution, but so far these have failed. Such inclusion would render these rights justiciable in a court of law, and would immensely contribute to the full realisation of the right to adequate housing for the citizens of Sri Lanka.

Housing Rights for Everyone, Everywhere...

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