

The Background and Impact of Prescription (Special Provisions) Act, No. 05 of 2016

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Introduction

The Sri Lankan Legal system identifies the Roman-Dutch Law as its common law. However, several modifications and additions were done to its common law by the British who influenced such laws as the law of prescription.¹ Under the Roman Dutch law, prescription is based on the factors that the title holder being negligent in his title and the possessor's active ascertain of the title² and this rationale has been embodied in the Prescription Ordinance No. 22 of 1871. This Ordinance codified the English law relating to this subject. The Act though amended several times has retained most of its original features.

Background of this Act

- *This is a Special provisions Act*

The legislature has power to make special provisions Acts for the purpose of addressing special needs and to act immediately

¹Cooray L.J.M., "An Introduction to the Legal System of Sri Lanka", A Stampfordlake publication, 1972, 47-51pgs.

² David L. Carey Miller, "Three of a Kind? Positive Prescription in Sri Lanka, South Africa and Scotland" Electronic Journal of Comparative Law, Vol. 12.1 (May 2008), <http://www.eicl.org>, page 5

regarding an emergency or where immediate action is necessitated. However that kind of special provisions Acts can override the general law relevant to that field for a particular time period. With this regard the Prescription (Special Provisions) Act No. 05 of 2016 falls under above mentioned category and it override the general principles of law relating to prescription and prescriptive rights which are embodied under Section 3 and 10 of the Prescription Ordinance No. 22 of 1871 for a short time period. Therefore, It should be bare in mind that when this Act is going to be operated the general law of prescription will be non operative for a particular time period as declared by the Act.

- *30 years of Internal Armed Conflict in Northern and Eastern provinces of Sri Lanka*

Sri Lanka being affected by 30 years of internal armed conflict with the LTTE, ended the conflict in 2009. However even after the war was finished it faced many difficulties and specially problems relating to Lands situated in those provinces. One of the major issues that came to the front core was regarding the prescriptive rights over those lands situated in the war torned areas. A major reason for enacting this legislation was to address Prescriptive land issues which occurred during the periods of 1983 to 2009. During the said period most of the people who lived in these areas fled/departed with their properties and

immigrated to other countries or settled down on different parts of the country for the primary purpose of saving their life and limb. Ipso facto it should be remembered that the people who deserted with the possession of their properties did so to save their lives. The long title of the Prescription (Special Provision) Act, No. 05 of 2016 clearly points out the backdrop or the causes that necessitated this legislation.³ Also The Act by its preamble further emphasizes and points out the ultimate purpose of the Act.⁴

At the parliamentary debate on the Bill Hon. Dr. Jayampathy Jayawickrama⁵ pointed out that the LTTE had some control in some of these areas of North and East during the period of War. Therefore the people who lived in those areas faced difficulties in order to seek justice from courts due to the dangerous threats of the LTTE. The LTTE settled some people in those areas arbitrarily and They gave several land parcels to some people under their sponsorship. Under these circumstances people who departed with

their lands, failed to take actions against the LTTE due to the fear of being getting killed. Therefore, the 10 year time period which is applicable regarding the assertion of prescriptive rights should not be applied to them and if so applied they will be in a disadvantaged position. Though the government has delayed to take these issues into account and remedy them it should be appreciated that at least they have tried to do something even if it is a somewhat of a delayed response. This Act was clearly introduced to render the Justice for such victims of war.

- *Recommendations of Lessons Learnt and Reconciliation Commission report*⁶

The LLRC report which was published to report on the post-war conflict of Sri Lanka introduced a set of recommendations for the reconciliation process and the protection of human rights. Under chapter 6 titled 'land issues: return and settlement' discusses most of the land issues that has occurred in the north and east and one of such issue is the problem with regard to prescriptive rights. It should be highlighted that by reserving a specific chapter for the discussion of land issues during the period of war has made it clear that land issues plays a vital role in the reconciliation process. This chapter highly focuses on enacting, operating and regulating

³ "An Act to enable special legal provisions to be made in respect of persons who were unable to pursue their rights in court for the recovery of any immovable property including land due to the activities of any militant terrorist group which prevailed in Sri Lanka and for matters connected therewith or incidental thereto"

⁴ "Whereas certain persons have been disadvantaged and thereof unable to pursue their rights in court for the recovery of any immovable property including land due to the activities of any militant terrorist group during the period commencing on May 1st, 1983 and ending on May 18th, 2009"

⁵The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1155pg

⁶ The report on Commission of inquiry on Lessons Learnt and Reconciliation , November 2011, 200-242Pgs.

suitable laws and rules for granting justice to the victims who have been disadvantaged during the period of War. Therefore, this piece of legislation can be identified as one of the responses made to the recommendations which were made in the LLRC report and can be pointed out as a little ray of sunshine showcasing the little success regarding its other recommendations.

- *Transitional Justice process after 2009 up to the present*

Post-war situation of Sri Lanka highly accentuated the need for Transitional Justice to the war victims who were either directly or indirectly affected. In order to achieve Transitional Justice, the process that is going to be put in place must address a wider variety of issues. Lands are a scarce entity and it is a vital human want. The Lands which are located in the North and East which were directly affected by the war remains a vital part and parcel of the people who lived there before the war. They departed with these lands since they did not have any other option. Under these circumstances this Act can be highlighted as a direct response to the Sri Lankan Post-War Transitional Justice process which deals with these issues relating to Land matters in North and East. This Act gives special attention, protection and rights to the persons who have been disadvantaged and have been unable to pursue their rights in court of law for the recovery of any

immovable properties including disputed lands in the north and east.

- *For achieving the development goals of developing state⁷*

Sri Lanka being a developing country that depends mainly on its agricultural based economy needs to utilize most of its agriculturable lands. Compared to other agricultural lands, lands situated in the North and East has a greater yield of crops and vegetables. Also when it comes to the tourism industry the North and East has the most beautiful sea shores in the island and it is of utmost importance that the rights over these lands be cleared and protected.

Impact of this Act

- *The applicability of the Act?*

This piece of legislation specifically focuses on a particular set of people who have been either directly or indirectly affected during the period of war and therefore being unable to pursue their rights in a court of law for the recovery of any immovable property including lands due to the activities of any militant terrorist group during the period commencing on May 1st, 1983 and ending on May 18th, 2009 as described in the preamble.

- *Who is a disadvantaged person?*

⁷The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1099pg

The Act defines a disadvantaged person as a person who was unable to pursue his rights in a court in which he was by law enabled to pursue such rights, as a result of the circumstances which prevailed due to the activities of any militant terrorist group during the period commencing on May 1st, 1983 and ending on May 18th, 2009. According to this definition this Act will be applied to a specific set of people who were affected in the said time period. Section 2(1)⁸ states the right to sue for immovable property including the land of a disadvantaged person. To give an example under this context 'A' is a disadvantaged person at the time 'B' commences to possess 'A's' land and Prescription will not begin to run against 'A' as long as 'A' continued to be a disadvantaged person.

According to this example it is evident that 'A' became disadvantaged due to a reason which was out of his/her control. This goes with the general rationale of the prescription law because here the person is unable to protect his/her interest not because he/she is sleeping on his/her rights but due to factors beyond his/her control is prevented from

⁸If at the time, when the right of any person to sue for the recovery of any immovable property including land shall have accrued, such person was a disadvantaged person, possession of the aforesaid immovable property including land by any other person shall not be taken as giving such other person any entitlement specified in section 3 of the Prescription Ordinance (Chapter 68) to such immovable property including land by virtue of such possession, so long as the first mentioned person remained a disadvantaged person.

taking necessary actions to protect such interests.

Another point that was raised regarding this Act at the Parliamentary debate was the discretion that a judge has when it comes to interpreting a disadvantaged person. As the Act does not provide any guidelines under which the discretionary powers of a judge may be exercised this may lead to prejudices against some individuals.⁹ So, it is recommended that some guidelines be given with regard to interpreting a disadvantaged person.

- *What is meant by the 'activities of any militant terrorist group'?*¹⁰

The definition given to the words 'activities of any militant terrorist group' is not that clear or at times may create difficulties in deciding whether a particular instance will fall under such an interpretation. For an example *"If your neighbours were found dead one morning, you may have fled the area. You will not be able to prove that those were only due to the 'activities of a militant terrorist group' and how does one define that?"*¹¹ This has to be looked at and there should be a

⁹The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1097pg

¹⁰Activities of any militant terrorist group means 'any act which is defined as a "terrorist act" in the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005, as amended by Act, No. 3 of 2013'

¹¹The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1089pg

better interpretation given to the above phrase.

- *Does this legislation affect state lands?*

This legislation does not in any way has any application with regards to state owned lands and is only applicable with regard to private owned lands. This is clearly stated under section 5¹² of the Act as under no situation is anyone able to claim prescriptive rights over these lands.

- *Is this a retrospective legislation what kind of implication does it have on a secondary occupant of property ?*

This Act has a retrospective effect as it dates back to May 1st of 1983. Therefore anyone who has asserted any prescriptive rights over these lands will have to relinquish them as the law does not recognize them. However, there may be prejudices to people who have tried to assert prescriptive rights in a bona fide manner. If it is going to be so there rights may be violated and this needs some kind of attention. Under such circumstances a bona fide person who tries assert a prescriptive title over the land must be compensated for improvements made on such lands and should also be compensated for necessary expenditures that he/she had to

¹²The provisions of this Act shall not apply to or in respect of any land which has been granted under the provisions of the Land Development Ordinance (Chapter 464), the Land Grants (Special Provisions) Act, No. 43 of 1979, or the State Lands Ordinance (Chapter 454).

incure in order to maintain and protect these lands. The above is not taken into account in the Act and it is suggested that this be taken into account.

In the parliamentary debate it was extensively argued that there might be some serious issues that may arise when it comes to reconciliation of secondary occupants. As these occupants should also be relocated if these lands are to be given back to its original owners. With this regard The Hon. M.H.M Salman MP pointed out¹³ that we should adhere to the strict ***Pinheiro Principles***¹⁴ when it comes to doing so. There might be some issues that may surface relating to the projects carried out under the 'Uthuru Wasanthaya' and 'Nagenahira Navodhaya' programmes as under those projects the rights and interests of the original owners were not taken into account.

- *'Two years to litigate' is it sufficient?*

Under section 4 it states that a disadvantaged person who was unable to pursue his/her rights for the recovery of any immovable property including land, shall be entitled to institute an action to avail himself of the benefits conferred by this Act within two years after the coming into operation of this Act.

¹³The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1011-1112 pgs

¹⁴United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, <http://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>

However, in the parliamentary debate¹⁵ it was suggested that the above mentioned time period should be only a one year, however as most of the owners have fled the country and the documents relating to these lands have also been mostly lost or destroyed it was not practical to limit the time period to a year.

Due to the lack of awareness, education and poverty of the people even the two year time period may not at times be sufficient for these people to assert and protect their rights and interest over these lands.

- *Fraudulent transactions regarding these lands*

There might have been instances where these lands might have been subjected to fraudulent transactions¹⁶ as the true owners of these lands may not have been in a position to stop such fraudulent acts. Therefore, it is important to consider the validity of transactions relating to these lands in the above said time periods. There should be a mechanism to evaluate the authenticity of the documents relating to these lands.

- *Rights of Possessors*

The law prioritizes the rights of processors and this has been a long standing principle from the times of the Romans. Under the Act no mention has been made regarding the rights

of the current processors of such disputed lands. It must be regarded that as long as no one else is able to prove a better title than the occupant of a particular land he/she can protect his/her interest against all the rest who has an inferior claim. Therefore the Act must take this point into account and introduce a mechanism to protect the rights of the current possessors.

- *The need for a Special court to solve these problems.*¹⁷

It has to be highlighted that since this is a special provisions Act there should have been a separate adjudicative body be created specially to resolve the matters that will arise out of this Act. As we all are aware that there is a great delay in giving judgments due to the enormous litigations that a District court has to deal with. Therefore to give faster remedies for these disputed lands and to its occupants, owners or other persons interested therein it is incumbent that a separate adjudicative body or an institution be established. As another solution for this problem it might be worthwhile to establish a institution to investigate on the initial claims brought forward by the individuals where that body or institution can decide to bring the claim to a court of law or not. Under this kind of a mechanism some undue delays maybe stopped. It could also be argued that if these

¹⁵The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1101pg

¹⁶The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1097pg

¹⁷The Sri Lankan Parliamentary debates (Hansard) Official report on 06th of April 2016, 1111pg

claims are not resolved in a proper manner that may it self lead to another ethnic conflict as the rights of the original owners and the secondary ocupants has to be proportionaly settled.

Conclusion

The above Act though with its inherit defects adresses a very important area of post war transitional justice. It tries to reconcile the existing tension over the rights and intersts of the lkands situated in the nort and east. However for better implementing these provisions public awareness regarding these laws should be made high. The above mentioned waek points should also be addressed. In the process of resitution it should be made sure that the true owners of these lands be restored with their ownership and if not so it may lead to serious reprecusions.

References

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