

Significant Legislative Innovations in the Law of Property in Sri Lanka

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Development takes place within the legal framework of the country. Recent changes in the Law of Property has changed some aspects of this legal matrix. This article describes the basic highlights in these changes. M. Sanmuganathan was the Secretary to the Minister of Constitutional Affairs and has taught Law at the University of Sri Lanka. He is now Chairman of the People's Bank and Additional Secretary, Ministry of Trade.

Two recent enactments of the National State Assembly, of considerable social and legal significance, have received surprisingly little attention from lawyers. The Common Amenities Board Law¹ and the Apartment Ownership Law² were both introduced in the Assembly by the Minister of Housing and Construction, Mr. Pieter Keuneman, and they are a concomitant to his earlier Ceiling on Housing Property Law³ which restricts the number of residential units that a person may own and which, therefore, compels the disposal by owners of their surplus residential units. These surplus residential units are not necessarily confined to conventional dwellings such as bungalows. They include also flats and apartments in a building complex. If, therefore, the objectives of the Ceiling on Housing Property Law were to be achieved, it was imperative that legislation be introduced for the establishment and regulation of the separate ownership of sections of a single building or building complex.

There were also reasons of a more general nature, which prompted the legislature to enact these Laws, in particular the Apartment Ownership Law. All over the world, including Sri Lanka, there has arisen a demand in recent times that sections of a single building or building complex (e.g. residential flats and apartments, shops and offices) should be available for separate ownership. Many factors have combined to bring about this development. They are, principally, the pressure of population growth on the land available in or

near cities resulting in a chronic accommodation shortage, the urge which most people have to own their own homes, and a desire among many to enjoy the advantages made possible by sharing important living amenities in common, such as nursery schools, laundry facilities, tennis courts, etc.

The enactment of the Apartment Ownership Law has brought Sri Lanka into line with development elsewhere. Until its enactment, Roman-Dutch Law as applicable in Sri Lanka, following the classical Roman Law, did not permit the separate ownership of buildings and parts thereof.⁴ As Mr. Justice Bristows said in a South African case⁵, "horizontal layers of the earth's surface cannot, with us, as they can in England, be separately owned".

Obstacles to Ownership

It is unnecessary in an article of this nature to dwell at length on the legal obstacles in the way of such ownership. Suffice it to say that the main obstacles appear to have been threefold. Firstly, the well-known principle of accession, according to which whatever was built upon the soil acceded to the soil and formed part of it, so that regardless of the intention of the person building the structure, if the method of annexation was such that it could not be removed without damage to itself or the land, the principle of accession applied. The second obstacle lay in the conception of ownership. Ownership was looked upon as being indivisible and

to be the unrestricted and exclusive control which a person has over a thing including all rights of use and abuse. If, therefore, the subject matter of ownership was one and indivisible one could not allow different parts to be owned by different people. Because if any one person were to exercise his right of destruction, the whole would be destroyed thereby negating other people's so-called ownership. And, applying this reasoning to the parts of a building, the logical conclusion was plain. One cannot destroy parts of a building without normally destroying the whole and, therefore, there could be no separate ownership by different individuals of parts of a building. The third legal obstacle was the method of defining the boundaries of land as the possible objects of ownership. In our legal system land as the object of ownership had been defined two-dimensionally by reference to vertically open-ended boundaries on the surface. In respect of the third or horizontal dimension, ownership was in theory undefined and unlimited. To 'put it differently, the owner of land was conceived as owning a piece of the earth's crust defined two-dimensionally by boundaries on the surface, but including an open-ended and undefined column of air space above and of earth below. This two dimensional method of defining land as the object of ownership, leaving the vertical dimension undefined and unlimited meant that lawyers were loth to concede that the earth could be divided in law into layers so as to enable one person to be the owner of ground lying beneath that of another or that layers or strata of air space were capable of separate ownership.

1. No. 10 of 1973.

2. No. 11 of 1973.

3. No. 1 of 1973.

4. The Condominium Property Act, No. 12 of 1970 enabling this type of ownership had been enacted by the Parliament of Ceylon (as it then was), but it was never brought into operation. Section 22 of the new Apartment Ownership Law repeals the Condominium Property Act.

5. *Coronation Collieries vs. Malan* 1911 T.P.D. at page 591.

The title of the Apartment Ownership Law is unfortunate in that it fails to indicate that the relevant form of ownership under the Law itself is also applicable to sections in a building, which are to be used for commercial purposes. (e.g. as shops or for office accommodation) or for industrial purposes. In defence of the draftsman of the Law, however, it must be stated that the problem of finding or of devising appropriate terminology to describe the rights and duties involved in the ownership of sections of a building coupled with joint ownership of common property, has proved an intractable problem in several countries. A cursory examination of the legislation in other countries reveals that a wide variety of terms are in use, none of which is self-explanatory wholly adequate. Among those in common use, the following are the more familiar: apartment ownership (Belgium and in the United States Federal Housing Administration's "Model Act") dwelling ownership (Federal Republic of Germany) ownership of flats (England Australia and New Zealand); horizontal ownership (Spain and throughout Latin America); ownership by storeys or floors (Switzerland) strata titles (the provinces of British Columbia and Alberta in Canada); ownership of air-space; indissoluble co-ownership (France); sectional title (South Africa); unit ownership (in some parts of the U.S.) and condominium ownership or, simply condominium (Italy and in most states of the United States).

The Apartment Ownership Law enables the owners of a property "comprising land with a building or buildings of more than one storey and having more than one independent unit of residential or non-residential accommodation" which is referred to as "Condominium Property"⁶ to have a plan called the condominium plan registered with the Registrar of Lands, dividing the property into independent units. Generally, speaking, the Apartment Ownership Law is an enabling law in that an owner of a Condominium Property may, if he so desires, divide the building into independent units. In certain circumstances, however, namely in the case of an owner of a Condominium Property, whose ownership involves residential units affected by the

Ceiling on Housing Property Law, registration of a Condominium Plan and the consequent division of the property into independent units is compulsory.⁷ Upon registration of the Condominium Plan each unit depicted in the Plan together with the common elements appurtenant thereto can be dealt with separately.

Some of our fundamental legal conceptions changed

It is not the purpose of this article to discuss the socio-economic significance of the Apartment Ownership Law; nor is it intended to give a mere rehash of the provisions of the Law or discuss the various practical problems which will arise in establishing and administering a condominium scheme. What is important to note is the legal significance of the Law. The Apartment Ownership Law had introduced at least three radical innovations into our Law of property and, in doing so, it has changed some of our fundamental legal conceptions, in particular those relating to ownership, co-ownership and land as the object of such ownership.

In the first place, the Apartment Ownership Law has created a new composite thing or *res*, unfortunately not given a specific name in the Law, as the object of a new composite form of ownership. For the sake of convenience, the new composite *res* will be dealt with first and then with the newly established composite real right in it.

The concept of this unspecified *res* is cardinal to an understanding of the Law. It is basically a unit which is defined in section 26 as a permanently enclosed space designed for independent use occupying the entirety or part of one or more floors in a building of more than one storey, provided that such enclosed space has a direct exit to a road, together with its undivided share in the common elements apportioned to that unit in accordance with the quota of that unit. Thus, this new thing or *res* created by the Law consists of two different components, namely, a unit and a share in common property. These are linked together by the Law and could only be dealt with together.⁸ Although the Law makes it possible for persons to acquire, separately, ownership of a

specific unit of a building, it is essential to bear in mind that a unit, *by itself*, can never be the sole object of ownership under the Law. The object of the new composite real right which the Law creates is *always* a unit coupled with an undivided share in the common elements which, in turn, includes an undivided share in the land on which the building stands, halls, corridors, lobbies, stairways, entrances and exits, foundations columns, girders, beams and roofs of the building and also basements, gardens and parking areas of the condominium property.

Secondly, the Law has also created a new and very important real right in the newly established composite *res*. By providing for the acquisition and regulation of separate ownership in a unit coupled with joint ownership of certain common property, the Law has in fact created a composite form of ownership which differs in important respects from our common law conceptions both of ownership and of joint ownership. The scheme of the Law is to provide that an individual may acquire separate ownership in units and further that the owner of these units shall own the common elements in undivided shares. It will be readily apparent that ownership in the composite *res* consists in the amalgamation of separate ownership into a new unitary real right.

It must be emphasised, however, that the new composite right is compounded of elements which differ significantly both from normal ownership and from normal co-ownership.

Individual ownership of the conventional kind is, in theory the most far-reaching right in property known to our law, carrying with it the most extensive powers of control and disposition over a thing compatible with the social order. It normally involves extensive rights of enjoyment free from interference from others.

6. Section 2 of the Apartment Ownership Law, No. 11 of 1973.

7. Section 3 (2), (3) and (4).

8. Section 11.

However, the rights of the separate owners in respect of the statutory ownership of the units are subject to extensive limitations. Thus, for instance, the separate owner may not permit or cause to be permitted the occupation of the unit by any number of persons in excess of the number prescribed by the Minister,⁹ or use the unit for any purpose other than for that for which the unit is, according to the Condominium Plan, intended to be used,¹⁰ or keep any animal or bird in the unit except with the express written consent of the chief occupier of all the units,¹¹ etc. Yet, despite these limitations, it is submitted, that there is no sufficient reason for denying to the separate ownership in the units, created by the Law, the status of genuine ownership.

Far reaching modifications of the common law concept of ownership

In regard to the joint or co-ownership of the common elements, the Law has also introduced far-reaching modifications of the common law concept of co-ownership. Thus, for instance, in the ordinary case of co-ownership, the parties are able to bring the relationship to an end by means of a partition action. This is not the case under the Law. The statutory joint ownership of the common elements can only be terminated in accordance with the provisions of section 20 of the Law and, moreover, section 23 expressly states that the Partition Act shall not apply to any land or building comprised in any registered Condominium Plan.

A further innovation is to be found in section 10(a) of the Law in terms of which "no person acquiring an interest in any unit of a registered Condominium Property on a deed or instrument shall be entitled to such interest unless such deed or instrument is registered in the register of Condominium Property". In other words, the passing of title is dependent upon registration.

9. Section 19 (e).
10. Section 19 (k).
11. Section 19 (i).

One other feature of the Law may be noted: section 9(3), which deals with the effect of registration of a Condominium Plan, enacts that upon registration of a Condominium Plan, each unit depicted therein together with the common elements appurtenant thereto shall be deemed to be absolutely owned by the person described in the Plan as the owner of the Condominium Property without prejudice to the right of any other Person to obtain monetary compensation for any loss suffered as a result of any interest he had in the Condominium Property before such registration being adversely affected. This means that the mortgagee's right to a hypothecary decree by which the property mortgaged is specially bound and liable to be sold towards the payment of moneys outstanding on the loan is abrogated, and in these circumstances it is doubtful whether the Minister's desire that state and private lending institutions should actively encourage the construction of apartment houses by granting loans on easy terms will be realised.

A weakness of the law

One of the weaknesses of the Apartment Ownership Law is its failure to provide for the mandatory creation of a central administrative body to manage the affairs of the community, including the settlement of disputes amongst owners and occupiers of sectional units. This is in contrast to the position prevalent elsewhere. Thus, for instance, under the Sectional Titles Act, No. 66 of 1971 in South Africa, a corporate body made up of all the sectional holders, automatically comes into being as soon as the property developer alienates a section, and is charged with the principal task of adopting resolutions pertaining to the maintenance and administration of the common property within the limits set out in the Act. Amongst the matters with which such a body is concerned are the nature of the steps to be taken for the maintenance and repair of the property, insurance of the building and the collection of contributions from individual owners. Under our Apartment Ownership Law, however, these functions may be exercised either by a voluntary association of the owners of all the

units or by the Common Amenities Board, established under the Common Amenities Board Law. But, there is no obligation on the part of the owners of the units to form themselves into an association or to seek vest the control, maintenance and management of the common amenities or common elements in the Common Amenities Board. The Board consisting mainly of officials such as the Commissioner of National Housing, Director of Water Supply, and the General Manager of the Ceylon Electricity Board, etc., may come to manage the common amenities or common elements of a condominium property in one of two ways; if not less than 75% of the owners or occupiers of the residential or non-residential units covered by the Law request the Board to take over the management, administration, maintenance, etc. of the common amenities or common elements, or, if the Board itself *ex mero motu* is of the opinion that the management of the common amenities or common elements is unsatisfactory and that it should intervene to manage these.

Changes in land law inevitable with changing economic considerations

These are the principal features of the two laws. Of the two, the Apartment Ownership Law is undoubtedly the more important. There will, no doubt, be many purists who have reservations about the innovations introduced by the Apartment Ownership Law because they see them as subverting what are regarded as virtually sacrosanct and immutable principles. But, changing economic considerations must inevitably bring about changes in the land law, and in so far as this Law facilitates the construction of flats and apartments to meet the growing demand for them, it is timely and welcome. It remains for us to work co-operatively with what we have, and, by making constructive suggestions, to ensure improvements as our experience of the Law's actual working widens and deepens. Indeed, we may only learn fully what the real problems are as the years go by.