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

In the matter of an Appeal against the Judgment dated 10th February 2014 delivered by the High Court of the North Western Province in appeal bearing No. NWP/HCCA/KUR/36/2009 (F); D.C. Kuliyapitiya Case No. 15148/L.

S.C. Appeal No:
38/2016

SC/HCCA/LA No:
144/2024

NWP/HCCA/KUR
36/2009 (F)

D.C. Kuliyapitiya Case No:
15148/L

1. Warnakulasooriya Vinsel Thamel
(Deceased)
1A. Pandiwela Lekamge Janaka Pandiwela,
2. Pandiwela Lekamge Janaka Pandiwela,
Both of Pahalagama, Udubaddawa.

PLAINTIFFS

Vs.

1. Warnakulasooriya Stanley Joseph Thamel,
2. Warnakulasooriya Suji Nilosha Thamel,
3. Warnakulasooriya Suraj Dinuka Thamel,
All of Pahalagama, Udubaddawa.

DEFENDANTS

AND BETWEEN

1. Warnakulasooriya Vinsel Thamel,
(Deceased)
1A. Pandiwela Lekamge Janaka Pandiwela.
2. Pandiwela Lekamge Janaka Pandiwela,
Both of Pahalagama, Udubaddawa.

PLAINTIFF-APPELLANTS

Vs.

1. Warnakulasooriya Stanley Joseph Thamel,
2. Warnakulasooriya Suji Nilosha Thamel,
3. Warnakulasooriya Suraj Dinuka Thamel,
All of Pahalagama, Udubaddawa.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Warnakulasooriya Stanley Joseph Thamel,
2. Warnakulasooriya Suji Nilosha Thamel,
3. Warnakulasooriya Suraj Dinuka Thamel,
All of Pahalagama, Udubaddawa.

DEFENDANT-RESPONDENT-APPELLANTS

Vs.

1. Warnakulasooriya Vinsel Thamel,
(Deceased)
1A. Pandiwela Lekamge Janaka Pandiwela.
2. Pandiwela Lekamge Janaka Pandiwela,
Both of Pahalagama, Udubaddawa.

PLAINTIFF-APPELLANT-RESPONDENTS

Before **:** Janak De Silva, J.

: K. Priyantha Fernando, J.

: Sampath B. Abayakoon, J.

Counsel **:** Dr. Sunil F. A. Cooray instructed by Sudarshani Cooray for the Defendant-Respondent-Appellants.

: Niranjan De Silva with Navindu Mendis instructed by Manjula Balasooriya for the Plaintiff-Appellant-Respondents.

Argued on : 30-06-2025

Written Submissions : 02-03-2017 (By the 1A and 2nd Plaintiff-Appellant-Respondents)

: 06-06-2016 and 05-08-2025 (By the Defendant-Respondent-Appellants)

Decided on : 17-10-2025

Sampath B. Abayakoon, J.

This is an appeal preferred by the defendant-respondent-appellants (hereinafter referred to as the defendants) on the basis of being aggrieved by the judgment pronounced on 10-02-2014 by the High Court of the North Western Province holden in Kurunegala while exercising its civil appellate jurisdiction.

When this matter was considered for the granting of Leave to Appeal on 19-02-2016, this Court granted leave on the questions of law as set out in sub-paragraphs a, b, and c of paragraph 17 of the petition dated 21-03-2014.

In addition, the learned Counsel for the 1A and the 2nd plaintiff-appellants-respondents (hereinafter referred to as the plaintiffs) was also allowed to submit a consequential question of law for determination.

The said questions of law read as follows,

1. Have Their Lordships of the Provincial High Court erred in law when forming the question "whether deed No. 376 can revoke deed of gift No. 2234 dated 06-06-1982", as one of the main questions to decide the case, as it was not an issue framed by the respondents at the trial stage.

2. Have their Lordships of the Provincial High Court erred in law by going against the inveterate practice of our Courts to decide the case upon on the framed issue and not upon the entire pleadings of the submissions of the Counsel.
3. Have their Lordships of the Provincial High Court erred in law when failing to appreciate the District Court judgment when it is in length that there is no issue as to whether the persons are governed by the common law or the Kandyan law in the framed issues.
4. Whether the deed No. 376 was successful in revoking deed No. 2234 without a decision of a Court of law.

The plaintiffs-appellant-respondents (hereinafter referred to as the plaintiffs), in their action instituted before the District Court of Kuliyapitiya of the plaint dated 03-11-2005 have prayed for a declaration that two deeds bearing No. 376 and 377 be declared null and void, and for a declaration that the 2nd plaintiff is entitled to the land in suit subject to the life interest of the 1st plaintiff, among other reliefs sought.

During the pendency of the action, the 1st plaintiff has passed away, and the 2nd plaintiff has been substituted in place of the 1st plaintiff as well.

It has been averred in the plaint that the 1st plaintiff, being the owner of the subject matter of the action, gifted the same by the deed of gift No. 2234 dated 04-06-1982 to the 2nd plaintiff subject to his life interest.

It has been claimed that on or about July 1998, the defendants, after making certain false representations and by misleading the 1st plaintiff, obtained his signature for several documents, and the 1st plaintiff came to know subsequently that two deeds, namely, deed No. 376 and 377 dated 03-07-1998, had been prepared and registered. The deed No. 376 had been prepared as a revocation of the deed of gift No. 2234, while deed No. 377 has been prepared as a deed of gift by the 1st plaintiff to the defendants.

It had been the position of the plaintiffs of the action that this was not a willful act of the 1st plaintiff and the said deed Nos. 376 and 377 were null and void, and have no force in law.

In paragraph 8 of the plaint, they have set out the reasons as to why they claim as such in the following manner.

a. The deeds had not been prepared in accordance with section 2 of the Prevention of Frauds Ordinance.
b. The defendants of the action obtained the signature of the 1st plaintiff by misleading him and by providing false and incorrect facts.
c. The 1st plaintiff signed the said deeds as a result of the misunderstanding of the matters as stated above.

At the trial, the parties have admitted the corpus of the action and the jurisdiction of the Court, and also of the fact that the 1st plaintiff was the owner of half share of the land mentioned in the schedule of the plaint. It has also been admitted that the 1st plaintiff has signed the deed of gift No. 2234 (P-03) mentioned in the 3rd paragraph of the plaint. An admission also has been recorded to the effect that deed No. 376 and 377 have been executed as stated in paragraph 6 of the plaint.

It is clear from the issues raised by the parties that the plaintiffs have relied on the matters stated in paragraph 8 of the plaint, as reproduced above, to claim that the questioned deeds No. 376 and 377 are null and void. The issues raised by the defendants show that they have relied on the said two deeds on the basis that the said deeds are deeds executed in accordance with the law, and it is the defendants who are entitled to the land mentioned in the schedule of the plaint as stated in their answer.

After the trial, the learned District Judge of Kuliyapitiya of his judgment dated 05-02-2009 has determined that the main question need determination would be whether the questioned deeds, namely, deed No. 376 dated 03-07-1998 marked P-04, which is a deed of a revocation of a gift, and deed No. 377 of the same date marked P-05, which is a deed of gift written in favour of the defendants, are legally valid deeds.

After having analyzed the evidence led before the Court, the learned District Judge has determined that the said two deeds are deeds executed in accordance with the relevant provisions of the Prevention of Frauds Ordinance, and hence, they are legally valid deeds. It has been determined that the plaintiffs have failed to provide sufficient evidence to establish that the said deeds were prepared fraudulently or by misrepresentation of facts to the 1st plaintiff, and therefore, the plaintiffs' contention as to the said allegations has not been established.

The learned District Judge has also considered the contention that the executer of the deeds marked as P-03, P-04, and P-05, the 1st plaintiff of the action, was not a person governed under the provisions of Kandyan Law, and hence, he had no legal status to revoke the deed marked P-03 on his own accord. He has also observed that the deed of gift marked P-03, namely, deed No. 2234, was not an irrevocable deed of gift.

However, it has been determined that there was no issue before the trial Court as to whether the 1st plaintiff had a right to revoke the deed P-03 on his own accord, and an issue whether the 1st plaintiff was a person governed under the provisions of Kandyan Law or not are matters that should have been put in issue and substantiated by the plaintiffs, if they sought a judgment as prayed on that basis. In view of the above, the learned District Judge has decided to disregard the contention as to the validity of the revocation of P-03 by the deed marked P-04 argued on the said basis.

After having considered the evidence, the learned District Judge has determined that the plaintiffs have failed to prove their case, and had answered the issues raised by the plaintiffs in the negative while answering the issues of the defendants in the affirmative. Accordingly, the action of the plaintiffs had been dismissed and the counterclaim of the defendants had been allowed.

When the judgment of the learned District Judge of Kuliyapitiya was appealed against by the plaintiffs, the learned Judges of the High Court, after having considered the facts placed before the Court, as well as the relevant law, have proceeded to pronounce the impugned judgment on 10-02-2014.

It appears that the learned Judges of the High Court have considered whether deed No. 376 (P-04) can legally revoke the deed of gift No. 2234 (P-03) and whether the said deed No. 376 and 377 (P-05) are from its very beginning null and void.

It has also been considered whether the action filed by the plaintiffs to get the deeds P-04 and P-05, which were deeds executed on 03-07-1998, has been prescribed as the action should have been instituted in that regard within 3 years of the execution of the deed in terms of section 10 of the Prescription Ordinance.

Having considered whether the 1st plaintiff who executed the deed marked P-03 in favour of the 2nd plaintiff had any right to revoke the same by way of another deed, it has been decided that although there was no specific issue in that regard, it was a matter that should have drawn the attention of the learned District Judge.

The learned Judges of the High Court have considered the well settled law that although a deed of gift is generally irrevocable, it can be revoked with the permission of a competent Court.

It has been determined that the principles of Kandyan Law where a person who is subjected to Kandyan Law can revoke a deed of gift on its own motion does not apply in this instance as the 1st plaintiff, namely Warnakulasooriya Vinsel Thamel, was not a person subjected to Kandyan Law of property. It was the view of the learned Judges of the High Court that since the case has been initiated to challenge the validity of deeds marked P-04 and P-05, the Court can look into such a matter.

It has been determined that the 1st plaintiff cannot revoke the deed of gift P-03 which was in favour of the 2nd plaintiff on his own motion, and accordingly, the judgment of the learned District Judge of Kuliyapitiya should stand set aside.

After having set aside the judgment, the learned Judges of the High Court have proceeded to re-answer the issues raised between the parties in line with the above determinations and in favour of the plaintiffs of the action giving reliefs in favour of the 2nd plaintiff of the action.

At the argument of the appeal before this Court, the main contention of the learned Counsel who represented the defendants was that the question whether the 1st plaintiff was governed under the provisions of the Kandyan Law or not was never a matter raised as an issue by either party or pleaded in the plaint or the replication.

It was argued that matters that were not in issue cannot be subjected to a subsequent appeal, and therefore, the learned Judges of the High Court have erred by going on a voyage of discovery as they did in the appellate judgment. It was also submitted that, even in the evidence, the Notary who executed the two deeds has stated that he executed the deed of revocation on the basis that the plaintiff was a person governed under the provisions of Kandyan Law.

It was also pointed out that after determining that the action to set aside the two deeds marked as P-04 and P-05 had been prescribed in terms of section 10, the appeal should have been dismissed by the learned Judges of the High Court on that ground alone, and the plaintiffs could not have maintained the action before the District Court. It was submitted that the judgment of the learned High Court Judges should be set aside and the judgment of the learned District Judge of Kuliyapitiya should be affirmed.

It is quite apparent to me that the question whether the 1st plaintiff, after having executed a deed of gift in favour of the 2nd plaintiff could have revoked it in the manner it has been done, was a matter that was not specifically put in issue on the basis that being a non-Kandyan he could not have done so.

It is also clear that when the plaintiffs instituted proceedings before the District Court, they have challenged the deeds marked P-04 and P-05 not on the incapacity of the 1st plaintiff to revoke the deed of gift which was in favour of the 2nd plaintiff, but on the basis that the deeds P-04 and P-05 were not deeds prepared in accordance with section 2 of the Prevention of Frauds Ordinance, and on the premise that they were deeds executed due to false representation made to the 1st plaintiff by the defendants.

It is clear from the evidence led before the District Court and the judgment of the learned District Judge, the question whether the 1st plaintiff could have revoked the deed of gift marked P-03 on his own motion without invoking the jurisdiction of a competent Court in that regard has not come up by way of any issues, but has drawn the attention of the learned District Judge. On the basis that there had been no issues raised as to whether the 1st plaintiff comes under the provisions of Kandyan Law or not, the learned District Judge has decided not to consider the validity of the deed of cancellation of the gift on such a basis.

However, when the matter was argued before the High Court, the learned Judges of the High Court have considered this as a relevant question upon which the matter should have been decided.

It was the contention of the learned Counsel for the defendants that the question of applicability of Kandyan Law is a question of mixed facts and law, and only a pure question of law can be considered for the first time in an appeal, and hence, such a matter could not have been considered at the stage of the appeal without having put the matter in issue at the trial stage.

In support of his contention, he cited the case of **Arulampikai Vs. Thambu (1944) 45 NLR 457 at 461**, which stated:

> "*Under our procedure all the contentious matters between the parties to a civil suit, is so to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and I do not think that under our procedure it is open to a party to put forward in the Court below under someone or other of*

the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below is put forward in appeal for the 1st time, the cautions indicated in the case of Tasmania (1890) 15 AC 223 may well be observed."

It is abundantly clear to me from the plaint and the issues raised by the plaintiffs before the District Court that they relied purely on their pleadings in paragraph 8 of the plaint, which I have reproduced earlier in the judgment. They have claimed that the disputed deeds should stand null and void on that basis and nothing else. The defendants have raised their issues based on the same paragraph 8 of the plaint claiming that the deeds relied on by them are deeds executed in accordance with the Prevention of Frauds Ordinance and the Notaries Ordinance. Although it is settled law that issues need not be confined to the pleadings alone, there should be an issue or issues on a particular matter that needs determination by the trial Court so that the opposing party is put on notice. In such a situation the opposing party should be in a position to raise his or her own issues countering such an issue.

In the instant action, it has not been put in issue by the plaintiffs whether the 1st plaintiff who executed the initial deed of gift marked P-03 could have revoked the same by executing the deed marked P-04 or whether the 1st plaintiff is not a person governed under the provisions of Kandyan law. As a result, there was no necessity for the opposing party to raise issues defending the validity of the deeds marked P-04 and P-05 on such a basis, other than claiming that their deeds are valid.

It is the 2nd plaintiff who has given evidence in order to assert the position taken up by the plaintiffs. In his evidence-in-chief a question has been asked whether the 1st plaintiff was a person subjected to the provisions of Kandyan Law, for which he has answered that he is unaware.

The plaintiffs have called two other witnesses in order to establish their case. The Registrar of the District Court of Kuliyapitiya has been called to produce a case record. The other witness called has been the Notary who executed the challenged deeds marked P-04 and P-05.

He has testified that he executed the said deeds. When he was subjected to cross-examination by the defendant's Counsel, several questions had been put to him to show that the Notary executed the deed of cancellation of the previous deed of gift on the basis that the executant of the cancellation namely Warnakulasooriya Vincent Thamel was a person governed under the provisions of Kandyan law and that was the reason for him to prepare the said deed as previous deed of gift had no specific statement that it was an irrevocable deed of gift.

This line of friendly questioning by the defence Counsel, irrespective of the fact that there were no issues on such a basis may be having taken a hint from the question asked from the 2nd plaintiff by the Counsel who represented the plaintiffs. Even after such evidence being placed before the Court, no application has been made to record any further issues.

When the case for the plaintiffs was closed, only the 1st defendant had given evidence for the defence to assert that the deeds upon which they claim title are valid.

In the judgment of the District Court, it clearly appears that the learned District Judge has considered the facts and the relevant law in that regard in relation to the issues placed before the Court for determination by the parties.

Under the circumstances, I find it relevant to consider the case of **Dona Podi Nona Ranaweera Menike Vs. Rohini Senanayake (1992) 2 SLR 190**, where it was held:

1. A matter that has not been raised before might, nevertheless, be a ground of appeal on which the appellate court might base its decision provided it is a pure question of law; or, if the point might have been put forward in the Court below under one of the issues raised, and the Court is satisfied,
    i. That it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial.

ii. That no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal.

The matter is not one depending simply on the issue whether the new point was one of law, on the other hand, or a question of fact or a mixed question of law and fact, on the other.

In the averments of the plaint, the plaintiffs had not averred that they are not persons subjected to the Kandyan Law and therefore, the 1st plaintiff could not revoke the deed of gift marked P-03 on his own motion.

Although the plaintiffs have come before the Court on a different basis challenging the deeds marked P-03 and P-04, it is my considered view that the learned District Judge should have drawn his attention to the relevant legal provisions in order to determine whether the 1st plaintiff could have revoked his own deed of gift by the deed of revocation marked P-04, when the case was determined in favour of the defendants effectually giving legal effect to the deed of revocation marked P-04. It needs to be noted that it is the duty of a trial judge to settle issues relevant to the determination of the matter before the Court and the issues need not be confined to the pleading only when framing such an issue relevant to the determination of an action.

It needs to be noted that the right for a person to subsequently revoke his own deed of gift is an exception to the rule. It is well settled law that in terms of our Common Law, a deed of gift is usually irrevocable.

The exception is the right for a person who is governed under the provisions of the Kandyan Law to revoke such a deed of gift on his own free will unless he has specifically stated in the deed of gift that the deed is irrevocable.

It is also well settled law that although a deed of gift is generally irrevocable, it is revocable through an action filed before a competent Court in that regard.

It was held in **Dona Podi Nona Ranaweera Menike Vs. Rohini Senanayake (Supra):**

a. Although a gift is generally irrevocable it is revocable,

   i. if the donee failed to give effect to a direction as to its application (donatio sub mode), or
   ii. on the ground of the donee's ingratitude or
   iii. if at the time of the gift the donor was childless but afterwards became the father of a legitimate child by birth or legitimation.

   A donor is entitled to revoke a donation from account of ingratitude,

   i. if the donee lays manus impias (impious hands) on the donor
   ii. if he does him an atrocious injury
   iii. if he willfully causes him great loss of property
   iv. if he makes an attempt on his life
   v. if he does not fulfill the conditions attached to the gift
   vi. other equally grave causes

b. Other conveyances not made out of pure liberality like a conveyance *propter nuptias* are irrevocable on account of the donee's ingratitude or on account of appearance of progeny by birth or legitimation.

I find that the learned Judges of the High Court have correctly discussed the principles of Kandyan Law and its applicability to the deed of revocation in question, the irrevocability of a deed of gift under common law principles and the mode of revoking such a deed.

High Court has considered that such a revocation is not automatic, and it requires a decision of a competent Court. However, none of these are matters where evidence has been led before the trial Court or put in issue.

Therefore, I am in agreement with the learned Counsel for the defendants that these are matters mixed facts and law and matters that cannot be considered for the first time in appeal when there was no evidence on offer to come to such findings.

However, I am mindful that the learned Judges of the High Court have been very much aware of the fact that if the judgment of the District Court is allowed to stand as it is, it would in effect give legal sanctity to a deed executed by a person who cannot revoke a deed of gift in the manner as it was done by executing the deed of revocation marked P-04. I find that it was in that context the learned Judges of the High Court have decided to allow the appeal, set aside the judgment of the District Court, and also to answer the issues raised afresh, so that the judgment would be in favour of the appellants.

I am of the view that there was no legally tenable basis before the High Court to proceed on such a path for the reasons as considered aforesaid. I find that the only option that should have been considered by the learned Judges of the High Court was to explore the possibility of ordering a retrial if it was prudent to do so, which I think a matter that this Court should not venture into.

For the reasons as considered above, I find no basis to agree with the judgment of the learned Judges of the High Court.

Accordingly, I answer the questions of law no. 1, 2, 3 in the affirmative, while answering the 4th question of law raised on behalf of the plaintiff holding that this was not an issue under which the issues were framed before the trial Court.

However, although the appellate judgment is set aside, I am of the view that the judgment of the learned District Judge of Kuliyapitiya where the plaint of the plaintiffs had been dismissed and the counterclaim of the defendants had been allowed by answering their issues in their favour cannot also be allowed to stand in its totality for the reasons earlier discussed.

Accordingly, while allowing the judgment of the learned District Judge on the dismissal of the plaint, I set aside the part of the judgment where the learned District Judge has allowed the counterclaim of the defendants by answering the issues raised by them in their favour.

Therefore, I hold that the claim of the plaintiffs before the District Court and also the counterclaim by the defendants should stand dismissed, and no party shall be entitled to any relief by the District Court.

The appeal is partly allowed up to the above extent.

There will be no costs of the appeal.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court