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

Premalal Leelananda Thilakaratne,
"Sinha Sevana",
Batahira Kalatuwawa,
Thummodara.

Plaintiff

SC Appeal No. 138/2009
SC(HC) CALA 248/2009
WP/HCCA/AV/45/2008 (F)
D.C. Awissawella No. 486/L

Vs.

Hewa Hakuruge Wijaya Nandasiri Kumara,
Batahira Kalatuwawa,
Thummodara.

Defendant

AND

Hewa Hakuruge Wijaya Nandasiri Kumara,
Batahira Kalatuwawa,
Thummodara.

Defendant - Appellant

Vs.

Premalal Leelananda Thilakaratne,
"Sinha Sevana",
Batahira Kalatuwawa,
Thummodara.

Plaintiff - Respondent

AND BETWEEN

Premalal Leelananda Thilakaratne,
"Sinha Sevana",
Batahira Kalatuwawa,
Thummodara.

Plaintiff - Respondent - Appellant (deceased)

Weerajissara Anuruddha
Thilakaratne,
No. 09, Unagaswewa,
Suchirathagama Road,
Anuradhapura.

Substituted
Plaintiff - Respondent - Appellant

Vs.

Hewa Hakuruge Wijaya Nandasiri
Kumara,

Batahira Kalatuwawa,
Thummodara.

Defendant - Appellant - Respondent (deceased)

1A. Wanarajage Sunethra Pushpakumari Munasinghe,
1B. Sirikumarage Mahesh Kumara Sirikumara,
1C. Sirikumarage Savindu Suresh Sirikumara,
All of
No. 15A,
Batahira Kalatuwawa,
Thummodara.

Substituted Defendants - Appellants - Respondents

Before: **Justice A. L. Shiran Gooneratne**
Justice Janak De Silva
Justice Sampath B. Abayakoon

Counsel: Sudath Jayasundara instructed by Dhammika Pathirana for the **Substituted Plaintiff-Respondent-Appellant.**

Rohan Sahabandu, PC with Chathurika Elvitigala, Sachini Senanayake and Pubudu Weerasuriya instructed by A. Perera for the **Substituted Defendant-Appellant-Respondents**.

Argued on: 07/03/2025

Decided on: 07/08/2025

A. L. Shiran Gooneratne J.

1. Procedural History

[1] By Plaint dated 17/10/1988, the Plaintiff-Respondent-Appellant filed Case No. 486/L in the District Court of Awissawella against the Defendant-Appellant-Respondent. The Appellant sought *inter alia*, a declaration of title to the land described in the schedule to the Plaint, along with an enjoining order in the first instance, and then an interim injunction to restrain the Defendant from destroying the vegetation and attempting to construct a house on the said land.

[2] In paragraphs 2, 3 and 4 of the Plaint, the Plaintiff states that one Yakdessalage Nonna has acquired prescriptive rights by long possession, and that she became the owner of the land described in the schedule to the Plaint. He claims that said Nonna, by Deed of Gift bearing No. 1040 dated 30/09/1980, gifted the land to the Plaintiff subject to her life interest, and that she continued to be in possession and occupation of the land independent of all other interests.

[3] In paragraph 5 of the Plaint, the Plaintiff states that on or about 05/09/1988, the Defendant entered the land forcibly and unlawfully and commenced cutting down trees and constructing a house.

[4] On 07/02/1990, the Plaintiff moved for a commission and accordingly, Plan No. 2188, made by N.A. Somaratna, licensed surveyor, dated 28/07/1993, along with the surveyor's report, was duly filed of record.

[5] The Defendant by answer dated 05/09/1994, claimed that he is in possession of Lot No. 3, in Plan bearing No. 2188, and claimed title on the basis that the said Lot No. 3 is a divided portion of the land more fully described in the schedule to the Answer. The Defendant prayed for a dismissal of the Plaint and claimed Rs. 10,000/- as damages.

[6] At the trial, the Defendant, with permission of court, filed an additional list of documents and witnesses. The new list contained the Deed of Revocation No. 39, dated 02/01/1998, and the Notary Public who attested the said deed was listed as a witness.

[7] At the conclusion of the trial, the learned District Judge by Judgment dated 31/05/2002, decided in favor of the Plaintiff and granted the reliefs prayed for in the Plaint.

[8] Being aggrieved by the said Judgment, the Defendant filed an appeal in High Court of the Western Province Holden in Awissawella exercising its civil appellate jurisdiction ("the Appellate Court") by Petition of Appeal dated 25/07/2002.

[9] After hearing and considering the submissions of both parties, the Appellate Court, by its judgment dated 31/05/2002, set aside the judgment of the District Court and allowed the appeal.

[10] When this case was taken up for hearing on 07/03/2025, both parties agreed that the Questions of Law raised on 19/12/2009 were by the Plaintiff-Respondent-Appellant, and that the Court may proceed accordingly. The Questions of Law on which leave was granted are as follows:

I. Did the High Court err in holding that the Deed of Revocation marked 'V4' has been duly executed, and it thereby deprived the Petitioner of his title?

II. Is the Plaintiff-Respondent-Petitioner entitled to take up the position that he has title in view of the dicta of the learned District Judge that the said Deed of Gift has been cancelled, although no issue has been raised in regard to this matter at the trial?

[11] The basis of the Plaintiff's claim to title is the Deed of Gift No. 1040 dated 30/09/1980, executed by one Yakdessalage Nonna in favor of the Plaintiff. In contrast, the Defendant's position throughout the proceedings was that Nonna had no title to the said property and therefore had no right to transfer the same to the Plaintiff, and in any event, the Deed No. 1040 was fraudulently executed.

2. Findings of the District Court and Civil Appellate High Court.

[12] The learned District Judge in his judgement has analyzed the evidence relating to the Defendant's title in extensive detail and has determined that the Defendant does not possess legal title to the property in question. Following up, the learned Judge has considered the Deed of Revocation No. 39, dated 02/01/1998 (marked V4), and held that it was irrelevant to the proceedings. The Court noted that the deed of revocation was executed nearly nine years after the institution of the action and did not form part of the issues framed at the trial; as such, it had no bearing on the resolution of the case.

[13] However, by a conclusive statement, the District Judge accepted the validity of the Deed of Gift No. 1040, holding that the deed is genuine. Upon careful

examination of the judgment, it is apparent that this finding is not supported by an analysis of the available evidence, a reasoning based on the donor's legal capacity, or the absence of fraud in the execution of the deed.

[14] There was no evidence before the Court to prove that the requirements set out in Section 2 of the Prevention of Frauds Ordinance were considered in respect of Deed No. 1040. The Plaintiff has not called any person to testify to the signing, witnessing, or attestation of the deed, nor did he produce any evidence of the donor's understanding of the execution of the deed or consent.

[15] The Civil Appellate High Court, reversed the District Court Judgment. The Appellate Court judges focused primarily on the admissibility and the legal effect of the Deed of Revocation (V4). They observed that the Plaintiff had not objected to the deed at the conclusion of the trial and, on that basis, held that the Plaintiff had lost title to the land during the pendency of the action. However, the High Court did not address whether the original Deed of Gift No. 1040 had been validly executed.

[16] Several documents were placed before the court during the proceedings, among them, the two deeds, which are of particular relevance to the determination of the present matter are as follows:

I. Deed of Gift No. 1040 dated 30/09/1980, purportedly executed by Yakdessalage Nonna in favor of the Plaintiff; and
II. Deed of Revocation No. 39 dated 02/01/1998, also executed by Yakdessalage Nonna, purporting to revoke the earlier Deed of Gift.

[17] The Deed of Gift bearing No. 1040 was marked in evidence during the Plaintiff's case without being objected to by the Defendant, either at the time of marking

or at the close of the Plaintiff's case. The Defendant, having raised allegations of fraud to the deed of gift in his Answer, tendered an affidavit in that regard and did not raise any objection at the trial.

[18] The Deed of Revocation No. 39, tendered by the Defendant, was marked subject to proof at the time of production. However, the record reflects that no objection was raised at the close of the case when the documents were read in evidence.

[19] At the outset, I wish to draw attention to the Civil Procedure Code (Amendment) Act No. 17 of 2022, which has introduced a significant procedural reform to the law governing the admissibility of documents.

[20] The new Section 154A provides that where a deed purporting to be duly executed is tendered in evidence, it shall be admissible without requiring formal proof, unless its execution or genuineness is expressly challenged in the pleadings or the court otherwise requires proof. Its transitional provision provides that;

"3. Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –

a. (i) if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or

(ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence,

*the court **shall admit** such deed or document as evidence without requiring further proof;"* [emphasis added.]

[21] The above transitional provision applies to all cases and appeals pending as of the date the law came into force, which is 17th of February, 2022. Since this appeal was pending before this Court as of that date, the transitional provision applies to it without exception. Accordingly, I am compelled to apply the procedural rules introduced by the amendment, regardless of whether the trial or appellate proceedings were concluded prior to the Amendment coming into force.

[22] This provision sets out two procedural conditions, under which, a deed that is required by law to be attested is deemed to be admitted into evidence without requiring further proof:

(a) where no objection was raised at the time the document was tendered; and

(b) Secondly, where an objection was raised at production but not maintained at the close of the opposing party's case.

In either case, the court is required to treat the document as admitted and may not require the party to lead evidence of the attesting witnesses or further proof of execution.

[23] Prior to this amendment, courts were guided by authorities such as ***Amerasinghe Arachchige Don Dharmaratne vs. Dodangodage Premadasa***[1], where this Court held that formal proof was necessary where execution was in issue, and in ***Francis Samarawickrema vs. Hilda Jayasinghe***[2], the Court imposed a higher burden of proof on deeds challenged on the ground of fraud. In both cases, the courts treated the absence of formal proof as a failure to satisfy the burden of proof placed on the parties.

[24] As the law stood at the time of the trial and the High Court appeal, these principles remained fully in force. Therefore, both the District Court and the Civil Appellate High Court were duty-bound to examine whether the Deed of Gift had been duly executed in accordance with the requirements of the Evidence Ordinance and prevailing judicial authority at the time.

[25] However, I observe that neither court conducted such an examination. The District Court accepted the Deed of Gift without the attesting witnesses' testimony or reasoning the Plaintiff's failure to call the donor, who was alive and accessible to testify at the time. The High Court, for its part, focused primarily on procedural aspects but did not address the Plaintiff's title.

[26] On any substantive analysis prior to the 2022 Amendment, this deed of gift would have failed the test of proof under the Evidence Ordinance and prevailing case law. Although a more detailed examination of the evidence may have been appropriate, considering the issues raised and the nature of the dispute, now

[1] SC APPEAL No. 158/2013, SC minutes of 12th October 2016
[2] 1982 01 SLR 349

this Court is not at liberty to revisit those omissions under the earlier legal framework.

[27] In ***Thennakoon Mudiyanselage Kusalanthi vs. Liyanage Don Dharmasena and Others***[3], this Court has discussed the effect of the Amendment Act No. 17 of 2022, on established principles of law:

"It is observable that this amendment to the Civil Procedure Code, has directly impacted upon the principles of law which are contained in the earlier mentioned judgments. The amendment seems to have given statutory recognition to the cursus curiae of original courts pertaining to the production and proof of documents such as deeds required by law to be attested. When legislative provisions are inconsistent with legal principles contained in previous judicial precedent, courts are obliged to apply subsequent legislative provisions which may have impliedly repealed legal principles contained in such previous judicial precedent. That is a fundamental legal principle recognized in common law jurisdictions including Sri Lanka."

The recent judgments dealing with this amendment shared similar views. As held in ***K. Dona Nimalawathie and Others vs. P. H. Dayananda***[4],

"The Act No. 17 of 2022 has specifically stated that the above provision of law shall apply to the appeals pending on the date of coming into operation of that Act. Moreover, it has stated that it shall apply notwithstanding anything contained in the provisions of the Evidence Ordinance. Therefore, although there is a reference to Section 68 of the Evidence Ordinance in the first two

[3] SC Appeal No. 53/2014, decided on 07.11.2022
[4] SC Appeal No. 49/2020, decided on 22.05.2025

questions of law, Section 154A (3) (a) (ii) of the Civil Procedure Code as amended by the Act No. 17 of 2022 shall apply to this appeal."

[28] In the present matter, Deed of Gift No. 1040 was marked in evidence without objection at the time of tendering or at the closure of the Plaintiff's case. Similarly, Deed of Revocation No. 39, although marked "subject to proof" when tendering, was also not objected to at the close of the case. Therefore, by operation of Section 3 of the 2022 Amendment, these documents are now deemed to be admitted as evidence.

[29] Before turning to the specific questions of law, I find it necessary to briefly address what appears to be an inconsistency in the Defendant's position taken up in the pleadings and the documents placed in evidence.

[30] One position that the Defendant takes is that Nonna held no valid title to the property and therefore, was not legally entitled to execute the Deed of Gift No. 1040. However, the Defendant simultaneously relies on the Deed of Revocation No. 39 dated 02/01/1998, purportedly executed by Nonna herself. These two positions are mutually exclusive. A person who argues that a deed is *void ab initio* due to lack of title, cannot rely on a subsequent revocation by the same person to nullify the earlier transaction. It is a fundamental principle of law that a party cannot approbate and reprobate, or in other words, adopt contradictory positions in the same litigation.

[31] The trial court did not have the opportunity to clarify this position through independent evidence, as Nonna, who was a witness for the Defendant, had passed away by the time the Defendant's case began. However, it is clear from the evidence of the Defendant, that the execution of the Deed of Revocation was

undertaken *ex abundanti cautela*, or a precautionary measure in contemplation of a situation where title may have passed under the original deed.

[32] Nevertheless, under the current statutory framework discussed above, and given that the Deed of Revocation was admitted without objection at the close of the case, this Court must proceed on the basis that both deeds are formally admitted as evidence before the Court.

[33] Advancing on the foregoing discussion, I will now answer the questions of law as follows;

3. Did the High Court err in holding that the Deed of Revocation marked V4 has been duly executed, and it thereby deprived the Petitioner of his title?

[34] With regard to the analysis provided above, I answer this question in the negative.

[35] Even though the answer to the first question may be sufficient to determine the rights of the parties to this appeal, I find it difficult to overlook the disquietude created between the admission of the Deed of Revocation as evidence and the procedural circumstances which made it a part of the record.

[36] It must also be observed that the action instituted by the Plaintiff is one in *rei vindicatio*. This Deed of Revocation was executed nearly nine years after the institution of the proceedings. This raises a question as to what then becomes of the rights of the parties as they stood at the commencement of the action? While the deed may be admitted in law, to what extent can it affect rights that were already in dispute at the time of filing the action.

[37] As discussed earlier, by operation of Section 3 of Act No. 17 of 2022, the deed must now be treated as valid and duly admitted. This development, in my view, creates a legal dilemma when deciding upon the validity of the instrument as against the rights of a party at the time of filing the action. Even if one were to reason out that the rights of parties in civil matters are generally determined as they stood at the time of filing, such a principle offers little clarity in a scenario where the evidence before the Court, which is considered to be relevant, admitted and unchallenged, extinguishes the very title upon which the Plaintiff's claim is based. It is for this reason that I now turn to consider the second question of law.

4. Is the Plaintiff-Respondent-Petitioner entitled to take up the position that he has title in view of the dicta of the learned District Judge that the said Deed of Gift has been cancelled, although no issue has been raised in regard to this matter at the trial?

[38] The general principle of civil procedure is that the rights of the parties must be determined as at the date of institution of the action. However, from time to time, courts have departed from this rule when the circumstances so require.

[39] Dr. G.L. Peiris in his book "The Law of Property in Sri Lanka"[5] describes *re vindicatio* as, *"...the major remedy conferred by the Roman Dutch law on an* ***owner*** *who has been deprived of possession of his property. The ius vindicandi, or the right to gain possession of one's property, is one of the significant attributes of ownership in Roman-Dutch law."*

[5] The Law of Property in Sri Lanka, volume 1, GL Peiris, Lake House investment limited, 1983 page 295

He further explained that, *"The requisites of the vindicatory action consist of proof (a) that the plaintiff is owner of the property; and (b) that the property is in the possession of the defendant."*

[40] In ***Pathirana vs. Jayasundera***[6] it was held that "*In a rei vindicatio action proper [sic] the owner of immovable property is entitled, on proof of its title, to a decree in his favour recovery of the property and for the ejectment of the person in -occupation.* ***The plaintiff's ownership of the thing is of the very essence of the action****."* [emphasis added.] Similarly, *in* ***Mansil vs. Devaya***[7]*,* it was held that *"In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership."*

[41] In ***Silva vs. Jayawardena*** (43 N.L.R. 551), Keuneman J., referring to Voet 6.1.4, stated:

*"Voet (6.1.4) says: 'But if he who brought this action was the dominus at the time of institution of suit****, but lite pendente has lost the dominium****, reason dictates that the defendant should be absolved. The action then fails not because it was wrongly commenced, but because the interest of the plaintiff in the subject of the suit has ceased to exist."* [emphasis added.]

Keuneman J. further explained:

"In respect of the three blocks which he has admittedly conveyed to a third party pendente lite, there is no right to possess in the plaintiff on which a declaration of title or order of ejectment could be made. No court can properly

[6] 58 NLR 169 at 172
[7] [1985] 2 Sri LR 46, 51

exercise its discretion to make a declaration in favour of a party who has divested himself of all interest in the subject-matter of the action."

[42] This position was reaffirmed in ***De Silva vs. Goonetileke***[8], where the Plaintiff brought a *rei vindicatio* action against a municipal council. During the proceedings, the property was vested in the municipal council under statute. Although the Council agreed to reconvey the property to whoever succeeded in the action, the Court held that the Plaintiff's title had ceased and that he could not maintain the action. Abrahams C.J. stated:

"*It is clear law that in an action rei vindicatio the plaintiff must have dominium. A party claiming a declaration of title must have title himself. He cannot maintain an action for a declaration of title to a property the title to which is vested in someone else. If he cannot, the action will not lie."*

[43] As observed above, previous decisions of this Court make it clear that 'ownership' forms the very foundation of a *rei vindicatio* action. Therefore, an unequivocal loss of title during the pendency of proceedings is sufficient to warrant a departure from the general rule that the rights of parties are to be determined as at the date of institution.

[44] Legal principles dictate that when a party who has lost title during the pendency of proceedings cannot maintain an action in *rei vindicatio*. Since ownership is the foundation of such an action, the loss of title, whenever it occurs, must result in the failure to pursue the claim. To hold otherwise would serve no practical purpose, as the Plaintiff no longer holds title and cannot be placed in possession

[8] 32 N.L.R. 217

of what he does not own. Accordingly, I answer the second question of law in the negative.

[45] For the foregoing reasons, the Judgment of the Civil Appellate High Court is affirmed, though for the reasons set out above. The Appeal is therefore dismissed.

Judge of the Supreme Court

Janak De Silva, J.

I agree

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree

Judge of the Supreme Court