STEPHEN
v.
HETTIARACHCHI AND ANOTHER

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 135/90
DC NEGOMBO NO. 3277/L
OCTOBER 04 AND 31 AND
NOVEMBER 20, 2000

Deed of Sift – Right of revocation reserved in deed of gift executed in anticipation of marriage – Is it against public policy and contra bones mores?

Held:

(1) Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to reserve to himself the right of revocation in which event the donor can by executing a subsequent deed of revocation and without assigning or proving any reason in a court of law revoke the earlier deed of gft.

(2) It is legitimate for a donor to reserve a right of revocation in a *donatio propter nuptias.*

APPEAL from judgment of the District Court of Negombo.

Cases referred to :

1. *Jayasekera v. Wanigaratne* – 12 NLR 364 at 365.
2. *Nakanthan v. Sirinamal* – 31 CLW 78.
3. *Government Agent, Western Province v. Palaniappa Chetty* – 11 NLR 151.
4. *Ponnamperuma v. Gunasekera* – 23 NLR 235.
5. *Dona Podinona Ranaweera v. Rohini Senanayake* – (1992) 2 Sri LR 180.

S. F. A. Cooray with *Muditha Premachandra* for plaintiff-appellant.

Mahanama de Silva for defendant-respondent.

Cur. adv. vult.

February 16, 2001

WEERASURIYA, J.

The plaintiff-appellant by his plaint dated 08. 05. 1984, instituted action against the defendant-respondents seeking a declaration of title to the land described in the 2nd schedule to the plaint, ejectment of the defendant-respondents therefrom and damages.

The partnership in its said returns claimed a divisible loss of Rs. 9,325,001. This was based on the difference between the locally earned income, which is liable to income tax and the total expenditure incurred in earning the gross receipts. Out of this sum of Rs. 9,325,001, a sum of Rs. 2,797,500 was allocated as the appellant's share of loss.

The defendant-respondents in their joint answer, whilst denying averments in the plaint prayed for dismissal of the action and that deeds bearing Nos. 1241 and 1243 dated 26. 07. 1983 and 28. 07. 1983 respectively, be declared void.

At the commencement of the trial, 8 issues were accepted as arising from pleadings for adjudication at the trial, but it was agreed that issues Nos. 3, 4 and 5 should be tried initially as preliminary issues of law. They read as follows:

(3) Since deed No. 925 dated 12. 01. 1073 attested by J. A. E. Amaratunga, NP is a dowry deed, is the condition reserving the right of revocation opposed to public policy and morality?

(4) If so is such condition null and void?

(5) If the above two issues are answered in favour of the defendants are the deeds P1 and P2 invalid?

The following admissions were found to be relevant in the determination of the said issues:

(1) That the original owner of this land was Botarage Mary Rosalin Fernando.

(2) That by deed bearing No. 925 dated 12. 10. 1973 attested by J. E. A. Amaratunga, NP the aforesaid Rosalin Fernando gifted the said land to the defendant-respondents.

(3) That the said deed of gift was effected subject to a right revocation by the donor.

It is vital to note that deed bearing No. 925 dated 12. 01. 1973 had been executed on the condition that the title would pass on after the marriage of defendant-respondents and that the donor reserved for herself the life interest over the property so gifted.

Learned District Judge at the conclusion of the submissions of Counsel by his judgment dated 24. 07. 1990, held that deeds marked P1 and P2 were invalid and dismissed the action with costs. It is from the aforesaid judgment that this appeal has been lodged.

At the hearing of this appeal, learned Counsel for the plaintiff-appellant submitted that right of revocation reserved in deed of gift marked D1 is against public policy and *contra bones mores.*

He cited the following cases in support of his contention:

1. *Jayasekera v. Wanigaratne*[1] at 365.
2. *Nakanthan v. Sinnamal.*[2]

In *Jayasekera v. Wanigaratne* (*supra*) it was observed that in this country as in most others the dowry is almost always the consideration or part of the consideration for the man taking the woman as his wife.

In the case of *Nakanthan v. Sinnamal* (*supra*) it was held that under Roman Dutch Law a deed of gift can be revoked on the ground of ingratitude even though the donor may have expressly agreed not to revoke and that such an agreement was *contra bones mores.*

Learned Counsel appearing for the defendant-respondents cited the following cases in support of the contention that it is legitimate for a donor to reserve right of revocation of a deed of gift:

1. *Government Agent, Western Province v. Palaniappa Chetty.*[3]
2. *Ponnamperume v. Goonasekera.*[4]
3. *Dona Podinona Ranaweera v. Rohini Senanayake.*[5]

The sole question arising for decision in this appeal is whether it is legally permissible for the donor to reserve the right of revocation in a deed of gift executed in anticipation of marriage.

In *Ponnamperume v. Goonasekera* (*supra*) it was held that a donor may expressly reserve a power of revocation and exercise it himself without obtaining a decree of Court. A *donatio propter nuptias* is not a mere gift made on the occasion of marriage, but a contract made as an inducement to marry and that where a donor reserves to himself the power to cancel the deed "at any time thereafter" there is no time limit within which the power must be exercised.

De Sampayo, J. at page 238 observed as follows:

"The question is whether donor may not expressly reserve a power of revocation and exercise it himself. I do not see any principle disentitling a donor to do so. Since a gift is purely voluntary, and as it is in the power of the donor to give the property absolutely or a limited interest therein, I think that it is not contrary to law, if he makes a transitory gift, such as a gift to be terminated by his own act."

At page 239 De Sampayo, J. observed further, that –

"In my opinion the gift cannot be considered as a *donatio propter nuptias* in the true sense of the expression. Even if it were such a donation, there is no authority for holding that an express power of revocation reserved in the very deed of donation cannot be validly exercised. The "dowry" as given and accepted, passed a precarious title, . . . "

In *Government Agent, Western Province v. Palaniappa Chetty* (*supra*) it was held that it is lawful for the donor in a deed of gift to reserve to himself the power to revoke the gift and a revocation made in the exercise of such power is valid. 90

Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to reserve to himself the right of revocation in which event the donor can by executing a subsequent deed of revocation and without assinging or proving any reason in a Court of Law revoke the earlier deed of gift.

In *Dona Podinona v. Roslin* (*supra*) it was held that where a deed of gift was written with a donee's marriage in view it cannot be regarded as a *donatio propter nuptias* where the life interest was reserved in the donor.

In the circumstances, it would be manifest that the it is legitimate 100 for a donor to reserve a right of revocation in a *donatio propter nuptias.*

For the above reasons, I am of the view that the learned District Judge was in error when he came to a finding that deeds P1 and P2 are invalid and dismissed the action.

I set aside the order of the learned District Judge dated 24. 07. 1990 and direct that issues Nos. 3, 4 and 5 be answered in the negative. The case is remitted for further trial on the remaining issues that were settled by the parties.

This appeal is allowed with costs.

DISSANAYAKE, J. – I agree.

Appeal allowed.