

RAN BANDA AND ANOTHER
v
PIYADASA AND OTHERS

COURT OF APPEAL
 SOMAWANSA, J. AND
 EKANAYAKE, J.
 C.A. 320/95 (F)
 D.C. KULIYAPITIYA 9545/P
 MAY 10, 2004
 JUNE 17, 2004

Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, sections 4, 5(1), and 5(1)(d) – Renouncing of right to revoke deed – Are there any operative words?

Held:

- i) In the deed in question the right to revoke has been renounced by the donor -

සෑම අන්දමින්ම ස්ථර වූ 1938 අංක 39 දරණ ආඥා පනතේ අංක 5(1) කොටසේ 'වී' අක්ෂරයේ පදනන් කවරාකාරයකින් මොනම කරුණක් නිසාවත් අවලංගු කළ නොහැකි තැග්ගක් වශයෙන් එකී තැඟි ලැබුම් කාරයින්ට මෙයින් තැඟි කොට අයිතිකර හිමිකම් පවරා බාර දුනිමි.

- ii) The operative words embodied specifically refer to section 5(1)(d) of the Ordinance, No. 39 of 1938, in renouncing his right to revoke. No other

meaning could be attributed to the aforesaid operative words. Reference to section 5(1)(d) makes it clear what the intention of the donor is.

- iii) It is also seen that the Notary who attested the deed acknowledge the fact that before the parties signed the deed that he read over and explained the contents of the deed to them.

APPEAL from the judgment of the District Court of Kuliyaipitiya.

Case referred to:

1. *P. B. Ratnayake v M.S.B.J. Bandara* — (1990) 1 Sri LR 156

M.C. Jayaratne with T.C. Weerasinghe for 3rd and 6th defendant-appellants
Asoka Gunasekera for plaintiff-respondent.

Cur.adv.vult

July 30, 2004

SOMAWANSA, J.

At the hearing of this appeal, counsel for the 3rd and 6th defendants-appellants stated to court that in this appeal he would only pursue the learned District Judge's finding with regard to the validity of deed No. 5855 dated 11.09.1981 attested by H. Siri Prematilleka marked P1 which is a deed of gift executed by E.M. Punchi Banda who was the original owner of the land sought to be partitioned in the instant action. It is to be seen that the entire case of the plaintiff-respondent rests on the validity of this deed marked P1. If the court holds that the said deed marked P1 is a valid deed then the plaintiff-respondent succeeds; if not the contesting 3rd and 6th defendants-appellants would succeed.

It is common ground that E.M. Punchi Banda the donor in deed marked P1 was the original owner of the land sought to be partitioned and that he was subject to Kandyan Law. Accordingly provisions of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 would be applicable to the deed of gift marked P1.

It is to be seen that whilst section 4 of the said Ordinance, No.

39 of 1938 confers on any donor an unrestricted right of revocation of any gift, exceptions to such a right are spelt out in section 5 of the said Ordinance. The relevant sections applicable to the issue at hand reads as follows:

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5.(1) Notwithstanding the provisions of section 4(1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance.

5(1)(d) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words “ප්‍රකාශිත කිරීමේ අයිතිවාසිකම අත්හැරීම” or words of substantially the same meaning or, if the language of the instrument be not Sinhala, the equivalent of those words in the language of the instrument;

In the present appeal the issue to be determined by court is whether in deed marked P1 the donor E.M. Punchi Banda has renounced his right to revoke the deed in conformity with the provisions contained in section 5(1)(d) of the said Ordinance, No. 39 of 1938.

The right to revoke has been announced by the donor in deed marked P1 as follows;

“සෑම අත්දැකීමක්ම ස්ථිර වූ 1938 අංක 39 දරණ ආඥා පනතේ අංක 5 (1) කොටසේ ‘ඒ’ අක්‍ෂරයේ සඳහන් ප්‍රකාර කවරාකාරයකින් මොනම කරුණක් නිසාවත් අවලංගු කළ නොහැකි තැග්ගක් වශයෙන් එකී තැග් ගැබ්බුම් කාරයින්ට මෙයින් තැග් කොට අයිතිකර හිමිකර පවරා බාර දුනි.”

It is contended by the counsel for the 3rd and 6th defendants-appellants that the said deed marked P1 is in fact a revocable deed in the light of the dictum enunciated in the decision in *P.B. Ratnayake v M.S.B.J. Bandara*⁽¹⁾. He submits that in the light of the aforesaid decision the mere words such as-

“වර්ෂ 1938 අංක 39 දරණ ආඥා පනතේ අංක 05 (1) කොටසේ ඒ අක්‍ෂරයේ සඳහන් ප්‍රකාර කවරාකාරයකින් මොනම කරුණක් නිසාවත් අවලංගු කළ නොහැකි තැග්ගක් වශයෙන්”

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found in the deed marked P1 are insufficient to renounce the right

to revoke the said deed marked P1 and also there is no proof whatsoever to establish that the donor had been explained the contents of the said section 5(1)(d) by the attesting Notary.

In *P.B. Ratnayake v M.S.B.J. Bandara*(*supra*) which is a Supreme Court decision I would certainly prefer the view expressed in the dissenting judgment of G.P.S.de Silva, J. as he then was with reference section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938. However I am bound to follow the majority decision in that case. The facts in that case were as follows: 60

On 11.6.1960 one Tikiri Kumarihamy Ellepola by Deed No. 8247 gifted certain land to her sister Jayalatha Kumarihamy as a donation *inter vivos* absolute and irrevocable subject to the condition that the donee shall not mortgage or otherwise alienate the said premises but shall only possess and enjoy the fruits and produce thereof and on her death the land was to devolve on her children and in the event of her dying issueless on the donor and her children. The gift was accepted by the donee. Jayalatha Kumarihamy by Deed No. 5204 of 5.10.1972 gifted the said land to her husband Ratnayake the defendant-appellant. On 3.1.1973 Tikiri Kumarihamy by Deed No 39373 revoked the Deed of Gift No. 8247 and on 17.2.1975 by Deed No. 72 gifted the said land to her son Bandara the plaintiff-respondent who sued Ratnayake the defendant-appellant for declaration of title. 70

The operative words embodied in deed No. 8247 in that case were as follows:

“For and in consideration of the natural love and affection which I have and bear unto.....and for diverse other good causes and considerations we hereunto specially moving do hereby give, grant, convey, assure and make over as a donation *inter vivos* absolute and irrevocable unto the said donee.....” 80

It was held:

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 is an Ordinance to declare and amend the Kandyan Law. It seeks to amend the Kandyan Law and not to make a mere restatement of the law as it was prior to 1939 when the intention to renounce the right to revoke was inferred or deduced from the particular words used. The amending Ordinance has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation. The words "expressly renounced" in sec. 5(1)(d) of the Ordinance recognize a pre-existing right to revoke which every Kandyan donor had in Kandyan Law. What the Ordinance contemplates is an express and deliberate renunciation by the donor of his right to revoke. From the words "absolute irrevocable" it may be implied that the Donor intended to revoke but such an expression would not constitute an express renunciation of the right to revoke.

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There is a further requirement that the renunciation must be effected in a particular way, viz, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning.

The Ordinance by sec. 5(1)(d) has now vested in the donor a statutory right to revoke and he is required to exercise that right in a particular way.

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The words "absolute and irrevocable" are only an adjectival description of the gift by the essential requirement is a transitive verb of express renunciation. Words merely of further assurance are insufficient.

The use of the words "absolute and irrevocable" and "to hold the premises for ever" do not satisfy the requirement of sec. 5(1)(d) of the Ordinance. Deed No. 8247 was revocable.

Applying the principle laid down in *P.B. Ratnayake v M.S.B.J. Bandara (supra)* to the instant case, I would say the right to revoke has been renounced by the donor in deed marked P1 in that the operative words embodied therein specially refer to section 5(1)(d) of the Ordinance, No. 39 of 1938 in renouncing his right to revoke.

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No other meaning could be attributed to the aforesaid operative words embodied in deed marked P1. Reference to section 5(1)(d) of Ordinance, No. 39 of 1938 makes it clear what the intention of the donor is, viz to renounce his right to revoke in conformity with the provisions contained in section 5(1)(d) of Ordinance, No. 39 of 1938. Furthermore, it is to be seen that the Notary who attested the deed marked P1 acknowledge the fact that before the parties signed the deed that he read over and explained the contents of 130 the deed to them which is recorded as follows;

“යන සාක්ෂිකාරයන් ඉදිරිපිට ද එකී නම් සඳහන් වූ පුංචි බන්ධා යයි අත්සන් කළ ඒකනායක මුදියන්සේලාගේ පුංචි බන්ධා ද ඊ. ආම්. පියදස යයි අත්සන් කළ එමගේ පියදස ද ගුණනිලක යයි අත්සන් කළ එමගේ ගුණනිලක ද යන අයට එකී නොකාරිස් වන මා විසින් හරියාකාර කියවා තේරුම් කර දුන් පසු”

It is to be noted that though the learned District Judge does not make any reference to the Supreme Court decision in *P.B. Ratnayake v M.S.B.J. Bandara* (*supra*) nevertheless having considered the earlier decisions has come to a correct finding that the deed marked P1 is a valid deed and has proceeded to act upon the 130 deed.

For the above reasons, I see no basis to interfere with the decision of the learned District Judge. Accordingly the appeal of the 3rd and 6th defendants-appellants will stand dismissed with costs fixed at Rs. 5000/-.

CHANDRA EKANAYAKE, J. - I agree

Appeal dismissed.