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[IN REVIEW.]

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

TIKIRI KUMARIHAMY *v.* DE SILVA *et al.*

D. C., Kegalla, 1,879.

Kandyan law—Donation for past services—Renunciation of right to revoke—Irrevocability.

A Kandyan deed of gift made in consideration of past services rendered by the donee to the donor and containing a clause renouncing the right of revocation is irrevocable.

HEARING in review of the judgment reported in (*1906*) *9 N. L. R. 202.*

Bawa (with him *Batuwantudawe*), for the plaintiff, appellant.

Walter Pereira, K.C., S.-G. (with him *Samarawickreme*), for the defendants, respondents.

Cur. adv. vult.

March 2, 1909. HUTCHINSON C.J.—

This is a hearing in review. The first question debated was one of Kandyan law, as to the revocability of a deed conveying lands to the grantee in consideration of past payments and services. The defendants claim under that deed. The plaintiff claims under a subsequent deed, by which the grantor purported to revoke the earlier one. If the earlier deed was irrevocable, the plaintiff can only succeed by proving title by prescription ; and the second question is whether he had proved such a title. The decisions under review were adverse to the plaintiff on both points.

The deed, which has been held to be irrevocable, is dated May 25, 1864, and is fully set out in the judgments under review. The grantor in consideration of services rendered to her for the last four years by her daughter Madduma, and of expenditure in cash of about £100 incurred by Madduma for physicians and medicines for her, transferred certain lands to Madduma, and covenanted that henceforth the grantor and her heirs, &c., would raise no dispute against " this donation," and that, if any such dispute should arise

during her lifetime, she would deliver the lands from this day forth to Madduma, who should hold and possess them for ever without dispute.

The appellant's counsel contends that the rule to be extracted from the conflicting decisions and dicta is that by Kandyan law every deed of gift of lands (with some exceptions which do not apply in this case) is revocable by the donor, even if it contains a clause by which the donor purports to renounce his right to revoke; and that a deed executed for a past consideration is a deed of gift. And it seems to be the law that a grant of land in consideration only of the grantee undertaking to render services to the grantor in the future is to be construed as a conditional grant and is revocable, subject to the right of the grantee to recover compensation for expenses which he may have incurred in reliance on the grant. The respondent contends that a grant made in consideration of past services is irrevocable, at any rate if the deed contains a clause debarring the grantor from revoking it.

In my opinion the respondent's contention is right, and this case is concluded by the decision of the Full Court in D. C., Kurunegala, 13,801, reported in *3 Lorenz 72* and quoted in the judgments under review.

I should have liked to inquire into the reason for these rules in Kandyan law, and as to whether or why a man should not be allowed to bind himself not to revoke his deed of gift, and whether or why the ordinary covenant for title, whereby the grantor covenants that he will not dispute the grantee's title, is not equivalent to a covenant not to revoke the gift, and whether or why any such covenant is necessary in order to make a grant in return for past services irrevocable. But as it is not necessary to decide these matters in order to decide this question, I will leave them alone.

The appellant referred us to *Dingiri Menika v. Dingiri Menika*,[1] in which a grant of land to a woman, in consideration of the fact that the grantor's son was to be married to her, was held to be revocable, on the ground that a grant of that kind is a gift and not a transfer for value. The reasoning of the Court was this. All "donations" are revocable; a grant in consideration of marriage is a "donation"; therefore it is revocable, there being no authority in Kandyan law to the contrary. The argument assumes that such a grant is a "donation," that is, a gift. That question, however, does not arise here, and the decision did not purport to over-rule and could not over-rule the Kurunegala case, from which the present case cannot be distinguished.

On the question of prescription, after considering the arguments addressed to us on behalf of the appellants, I remain of the same opinion which I gave in the judgment under review. I think the decrees of the Supreme Court should be affirmed with costs.

[1] *(1906) 9 N. L. R. 131.*

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This case divides itself into two branches—one concerned with title by deed to the land in dispute, and the other with title by prescriptive possession. The first District Court judgment decided that title by deed was in the plaintiff, by reason of the donation of 1864 having been revoked, but the Supreme Court reversed that decision, with the result that the title was placed in the present respondents; and plaintiff, in order to succeed, had to establish prescriptive possession of the land. The second District Court judgment held that she had established it, and declared accordingly. In review, both branches of the case have been fully argued. As regards the first, I remain of the opinion I expressed upon the original appeal, viz., that the deed of gift was irrevocable, and I have nothing to add to the reasons given by my brother Wood Renton and myself for that conclusion. No fresh material was adduced upon this point of law at the review hearing. I confine myself to the second branch of the case—the question of prescriptive possession by plaintiff.

The land claimed by plaintiff is that made up of lots 1, 2, 3, 4, and 5 on Mr. Ferdinands' survey plan filed of record, some 20 acres in extent. The evidence led by plaintiff as to possession had reference to this land. There is reason, however, to believe that what was conveyed to her by her mother was some distance away, adjoining (or at all events adjacent and appurtenant to) lot 7, which is Galapitawatta. The parcel in question is described in the conveyance No. 9,617 as "the land called Galgodahena appertaining to this (*i.e.*, to Galapitawatta) of one amunam paddy sowing extent (about 2 acres)." According to the amended plaint, plaintiff claims lots 1 to 5 as forming part of Galagodahena—20 acres included in 2. If, then, the land conveyed was in the immediate neighbourhood of lot 7, that is a reason for doubting that plaintiff under her conveyance entered into possession of the distinct and separate and much larger area covered by lots 1 to 5. Plaintiff herself never saw the land except once, about thirty years ago, before the discovery of plumbago, which so enhanced its value. By an informal writing PP 1 dated March 12, 1897, attested by first added defendant, her nephew, she gave over to Kirihamy and another "about 3 amunams of paddy sowing extent (say 6 acres) out of Galgodaheneyaya" for chena cultivation. The termination "heneyaya," which means a tract of chenas, is new. Plaintiff's deed gives "hena" a single chena. Kirihamy discovered plumbago, and plaintiff says she gave verbal permission to first added defendant and a Moorman to dig for plumbago, and that for about six years they rendered to her one-tenth share of the yield, after which she "leased" to the Moorman, and later the defendant took possession under his lease from respondents. She said first added defendant had lived for two

years in her house. His father, Ekneligoda Punchi Banda, had left his wife Madduma Kumarihamy, and his child first added defendant, and come and lived with plaintiff as her husband. In cross-examination she admitted she could not give the extent of the lands she claimed, but added that the extent was about 50 or 60 amunams, and that she "went by the boundaries." She also stated that her Moorman lessee was son of the lessee under first added defendant. It is stated by the witness Punchirala that first added defendant (described sometimes as "second defendant") managed all the lands of the "Walauwa," *i.e.*, of the "family." "Whenever he comes to the lands, we reckon him as owner." First added defendant on his part deposed that his mother (whom we must presume to have entered into possession upon the gift to her) possessed the land in question until her death eighteen years before the trial, and that thereafter he himself possessed it. He produced his lease (DD 4, October 22, 1898) to M. L. Thamby, and identified lot 4 as the situation of the plumbago pits he opened, three-fourths of a mile from Galapitawatta. He produced also his license to open a mine (DD 5, October 10, 1898) and the proceedings in two Police Court cases to corroborate his evidence.

The evidence adduced by plaintiff to show continuous and exclusive possession adversely to first added defendant is not strong and is not conclusive; and it must be remembered that, whereas plaintiff had to prove such possession uninterruptedly over a period of ten years, proof by respondents of possession of the land for however short a space, if adverse to and independent of plaintiff, would destroy the effect of plaintiff's antecedent possession, and necessitate a fresh period of ten years. The title, as already pointed out, being in first added defendant, the evidence does not satisfy me that plaintiff had such prescriptive possession, and that the view taken of it by this Court was wrong. I would therefore affirm our judgment with costs.

MIDDLETON J.—

The two questions in review in this case are whether the Supreme Court was right in holding (1) that a Kandyan deed of gift No. 6,918, dated May 25, 1864, was irrevocable; (2) that the plaintiff has not established her claim to the lands in dispute by prescriptive possession.

The deed of gift in question was given by Loku Kumarihamy, the mother of the plaintiff Tikiri Kumarihamy, to another daughter Madduma Kumarihamy, and after reciting that Madduma Kumarihamy had for four years rendered her succour and assistance, and had incurred an expenditure in cash of about £100 by way of fees and presents to physicians who had attended the donor in her illness, stated that the donation was made for assistance rendered, and

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declared that henceforth neither she nor her descendants nor inheriting children, grandchildren, heirs, administrators, or assigns whosoever should from that date forth by act or word raise any dispute against the donation.

From the terms of the deed it appears to me clear that the donor considered herself under a pecuniary obligation to the donee, and had in full contemplation her own and her heirs' right to dispute the irrevocability of the donation, and intended by the words she used to indicate that neither she nor they should raise the question.

I agree with my brother Wood Renton that the Courts in construing these deeds should look to the real nature of the transaction and the intention of the parties in each case, an opinion which I think may be read between the lines of the compilers of the law on the subject.

In Pereira's *Armour, p. 90*, the author, quoting *Sawer*, enunciates the general doctrine of the revocability of gifts excepting those made to priests and temples, propounding that gifts to laymen of lands or of the bulk of the donor's fortune, goods, or effects when revoked involve the indemnification of the donee if he has been put to any expense in its acceptance, but that presents if given out of respect or for affection at the moment or in thankful acknowledgment of a benefit or service rendered to the donor are not revocable. The proviso as to indemnification applies only to gifts made to strangers, not gifts to children, except in the case of a child donee paying mortgage debts on the property gifted when on revocation he must be indemnified proportionally, unless he had indemnified himself from the profit of the user of the property. The author, clearly a layman, then declares the absolute right of revocation as regards bequests and testamentary dispositions.

At page 95 the author gives as an instance of an irrevocable gift the case of a proprietor executing a deed making over his lands to another person, but stipulating that the donee shall pay off the donor's debts and also render assistance and support to the donor during the remainder of the donor's life, and containing a clause debarring the donor from revoking the gift and from resuming the lands and making any other disposal thereof. If the donee discharges the debts, he acquires the right of a purchaser, the donee, however, being still under the obligation to render the assistance and support to the donor.

In *Molligoda v. Kepitipola* (D. C., Kandy, 29,890, March 23, 1858), reported at page 24 of *Lorenz, vol. III.*, and *Austin, p. 214*, it was held, affirming the decision of the District Judge, that a deed of gift though containing a clause renouncing the right of revocation was revocable. In that case the donor had transferred by deed of gift some lands to her binna married husband, and in the same deed renounced her right to revoke the gift as well as her right by Kandyan law to alter, cancel, or break the same. The

argument in that case turned principally on the construction of the renunciation clause, which the Supreme Court apparently thought insufficient.

In 105, D. C., Kegalla 888, Browne A.P.J. and Lawrie J. (July 5, 1898) held that a clause couched as follows :—" I do hereby debar my own right or that of any of my other heirs to raise any dispute whatsoever to or with regard to the gift hereby made," did not debar the donor from revoking a gift made for past services.

In D. C., Kurunegala 13,081, *Kiri Menika v. Ganrala and others* (July 29, 1858), reported at page 76 of *3 Lorenz*, the Full Court held that a Kandyan deed of gift in consideration of past and future services with a renunciation of the right of revocation clearly expressed was irrevocable.

In *Taldena v. Taldena*[1] the right of revocation was apparently assumed on the facts, the only question being as to its mode.

In *Dingiri Menika v. Dingiri Menika*[2] a deed of gift in consideration of marriage containing a stipulation by the donor on behalf of himself and his heirs not to raise any objection or dispute to the grant therein made was held to be revocable.

In D. C., Kandy, 28,626 (*Pereira's Collection, p. 74*), the Supreme Court felt itself bound to follow former decisions which established the doctrine that deeds as well for services previously rendered as for those to be rendered in future are by the Kandyan law revocable. The deed in this case contained no clause specially barring the donor from revocation but only the usual Kandyan form of renunciation of right.

In D. C., Kandy, 21,344 (*Pereira's Collection, p. 59*, and *Austin, p. 127*), the Supreme Court held that a deed of gift of a whole estate made to a wife in consideration of assistance already rendered for twenty-six years to the husband and also for the purpose of receiving assistance during his lifetime was revocable.

In D. C., Kandy, 1,564 (*Pereira's Collection, p. 60*), the Supreme Court held a deed of gift irrevocable where no consideration apparently was alleged, but because it contained the words by the donor " he shall possess the same without disturbance, and neither of us nor any descendants of ours can hereafter resume or give away the same."

In D. C., Kandy, 22,404 (*Austin, p. 140*), the Supreme Court held that where a person has assigned by deed land to another in consideration of assistance to be rendered, even if such assistance has been rendered, the deed is revocable, and that in the case of a series of donees of land the last donee has the preferent claim, but that if any donee has been subjected to any disbursement out of his funds it is for him to prove it, the assumption being that the lands given left him harmless during the time he rendered assistance.

[1] (*1903*) *3 Balasingham, 133.*

[2] (*1907*) *9 N. L. R. 131.*

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In *Bologna v. Punchi Mahatmeya*[1] the Full Court consisting of Creasy C.J. and Temple and Stuart J.J. on July 17, 1866, held that it was impossible to reconcile all the decisions as to the revocability of or non-revocability of Kandyan deeds, but the Supreme Court thinks the general rule is that such deeds are revocable, and also that before a particular deed is held to be exceptional to the rule, it should be shown that the circumstances which constitute non-revocability appear most clearly on the face of the deed itself, and it held that the words in the deed under consideration as to "services continued to be rendered by the donee" did not appear to the Court sufficiently clear and strong.

In *Henaya v. Rana*,[2] it was held by Phear C.J. and Dias J. that a gift made in consideration of a past payment or advance was irrevocable. No clause of renunciation of right to revoke seems to have been in the deed, but the Court held that the consideration was of a substantial character, though a past one.

From a review of the authorities it seems to me that *Kirimenika v. Ganrala and others*[3] decided by the Full Court and *Henaya v. Rana*[2] must be held to govern the present case, while I share the surprise expressed that Mr. Justice Browne was unable to see that the words used in D. C., Kegalla, 888, were not sufficiently strong to indicate the donor's intention to renunciate his right.

In my opinion the ruling laid down by the Full Court in *Bologna v. Punchi Mahatmeya*,[1] taken in conjunction with the ruling of the Full Court in *Kirimenika v. Ganrala and others*,[3] should guide the decisions of this Court in determining whether or not a Kandyan deed of gift is revocable or not. I would support the judgments in review on this question.

As regards prescriptive possession, the evidence is that Loku Kumarihamy gifted the land in question to Madduma, her daughter, in 1864, and revoked the gift in 1865, and then gifted a portion of land called Galagodahena appurtenant to the land called Galapitawatta of 1 amunam in paddy sowing extent to the plaintiff in 1867.

The land now in claim by the plaintiff appears to be lots 1, 2, 3, 4, and 5 depicted on Mr. Ferdinands' plan of survey. It does not appear that Loku Kumarihamy ever purported to convey these lots to the plaintiff, but even if she did, the effect of the judgment of this Court in upholding the deed of 1864 as irrevocable is to vest the legal title to them in Maddumahamy, from whom the added defendant, her son, derives his title. The burden then was on the plaintiff to prove a title by prescriptive possession.

The evidence, as is usual in these cases, is by no means satisfactory, and, as my brother Grenier says, the added defendant may deserve all that has been said of him by the District Judge, but it is difficult, on the face of the facts, that second added defendant lived

[1] *Ram. 63–68, p. 195*
[2] *(1878) 1 S. C. C., p. 47.*
[3] *(1858) 3 Lor. 76.*

with the plaintiff and managed the property, and was looked upon by the headman in 1904 (p. 20) as owner and managed the plumbago mine, to say that the plaintiff has proved a title by exclusive adverse possession as against the added defendant for upwards of ten years. In my opinion therefore the appeal fails on this question, and I would support the judgments in review in their entirety. The appeal must therefore be dismissed with costs.

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Judgment in appeal affirmed.