SIRISENA
v
EYELYN DE SILVA

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. NO. 679/90 (F)
D.C. KANDY 13591/L
MARCH 1 AND
MAY 29, 2002

Kandyan Law Declaration and Amendment Ordinance, sections 4((1) and 5 – Revocation of deed – Donee dead at that time – Property devolved on minors – Interests of minor - Are they protected? – Is sanction of court necessary? - Contingent interest.

Held:

(i) Under the Kandyan Law *the heirs* be they minors or majors get no better interest than the original donee and they all get only a contingent interest. Therefore once the deed of gift is revoked the said contingent interest terminates and the donor acquires title. Sanction of court is not necessary.

(ii) The Kandyan Law reserves to the donor the right to revoke a gift during his lifetime and without the consent of the donee or any other person.

APPEAL from the judgment of the District Court of Kandy

Cases referred to:

1. *Malliya* v *Ariyawathie* - 65 NLR 145
2. *Silindu* v *Akura* - 10 NLR 193
3. *Appuhamy* v *Holloway* - 44 NLR 276
4. *Mutu Banda and another* v *Gunaratne* - (1999 3) Sri LR 1
5. *Heneya* v *Rana* - 1 SCC 47

J.C. Boange for defendant - appellant.

A.A. de Silva, P.C., with *Piyal Munasinghe* for plaintiff-respondent.

Cur. adv. vult.

28 June 2002

SOMAWANSA, J.

The facts in this case are: the 2nd defendant who was subjected to Kandyan Law gifted the property in suit to one P.B. Dissanayake by deed No. 16874 dated 3.12.1951 marked P1/D2 and the said P.B. Dissanayake by deed No. 21170 dated 20.05.1955 transferred 1/2 share of the land to Leelawathie of which there is no dispute. The said P.B. Dissanayake died on 01.01.1966 leaving as his heirs his widow and two children who are the 1st to 3rd plaintiffs-respondents. However 16 days after the death of P.B. Dissanayake by deed of revocation No 2251 dated 16.01.1966 marked D3, the 2nd defendant-appellant revoked the deed of gift marked P1/D2 in respect of the undisposed 1/2 share of the said P.B. Dissanayake and by deed of gift No. 33 dated 16.02.1974 marked D4 gifted the said 1/2 share in the land to the 1st defendant-appellant.

The plaintiffs-respondents challenged the said revocation on the basis that on the death of P.B. Dissanayake all his rights in the land passed on to his heirs, the two children and the widow and the two children being minors, permission of Court had to be obtained to deal with their property, which the 2nd defendant-appellant failed to do. The claim of the 1st defendant-appellant is based on the ground that under Kandyan Law a deed of gift could be revoked by the donor and therefore he claimed the said 1/2 share upon the deed of gift No. 33 marked D4.

At the commencement of the trial, 5 admissions were recorded and 4 issues were raised on behalf of the plaintiffs-respondents while 6 issues were raised on behalf of the defendant-appellant. Subsequently another additional issue was raised on behalf of the plaintiffs-respondents. At the conclusion of the trial the learned Additional District Judge by his judgment dated 18.07.1990 held in favour of the plaintiffs-respondents and deeds marked D3 and D4 were declared to be invalid deeds. It is from the said judgment that the defendants-appellants have lodged this appeal.

At the hearing of this appeal the only matter that was argued was whether the 2nd defendant-appellant who is subject to Kandyan Law could revoke a deed of gift that he executed without

the sanction of Court if rights of minors are affected by such revocation.

It was contended by the counsel for the defendants-appellants that the heirs could only get a contingent interest and once the deed of gift is revoked the said contingent interest is terminated and the donor re-acquired title. I am inclined to think that there is force in this argument. It is common ground that the 2nd defendant-appellant was governed by the Kandyan Law therefore the Kandyan Law Declaration and Amendment Ordinance become relevant and applicable.

Section 4(1) of the said Ordinance, No. 39 of 1938 provides:

"Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation:

Provided that the right, title or interest of any person in any immovable property shall not, if such right, title, or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted."

Section 5 stipulates the deeds of gift which cannot be revoked and in the present context it is unnecessary to dwell in such matters except to advert to section 5 (1) (d) which states -

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.

(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 "ප්‍රත්‍යාදිෂ්ට කිරීමේ අයිතිවාසිකම්

අත්හරිමි" 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:"

However on an examination of the deed of gift No. 16874 marked P1/D2 it appears that the donor the 2nd defendant-appellant had not renounced the right of revocation of the gift granted by the said deed. This fact is admitted by the plaintiffs-respondents and therefore even the provisions contained in section 5 (1)(d) of the Kandyan Law Declaration and Amendment Ordinance will have no application to the said deed. Therefore there can be no doubt that the donor during his lifetime and without the consent of the donee or any other person could cancel or revoke in whole or in part of any gift and such revocation would be valid. The question at issue in the instant case is whether it could be done so without the sanction of Court if the rights of minors are effected by such revocation as it happened in this case.

It is common ground that the revocation of the deed of gift marked P1/D2 was done after the death of the donee, that at the time the said deed of gift was revoked the two children of the deceased donee were minors and that on the death of the donee whatever rights the donee had passed on to the two minor children and the window. It is contended that there is no provision made in the Kandyan Law. For a situation of this nature therefore it was vehemently argued by the counsel for the plaintiffs-respondents that Court as the upper guardian is called upon to step into the vacuum so as to protect the interest of the minor children. Hence in the instant case it was incumbent on the part of the 2nd defendant-appellant to have obtained permission of Court to deal with the rights inherited by the minor children on the death of their father the donee.

It would appear that this is an attempt to incorporate principles of the the common law to fill the said void in the Kandyan Law. In support of this contention the counsel for the plaintiffs-respondents cited *Malliya v. Ariyawathie* (1) and *Silindu v. Akura.*(2) In all these cases Court took the view that the rights of minors needed to be protected by their guardian and if there is no guardian by their upper guardian the District Court. It appears that following the decisions cited above, the learned District Judge has taken the view

that in the instant case too the deed of revocation has been effected without the sanction of Court and consequently the subsequent gift granted by the 2nd defendant-appellant to the 1st defendant-appellant is invalid and therefore the 1st defendant-appellant was not entitled to the 1/2 share he was claiming on D4. However in both these cases it was not the Kandyan Law that was considered but the common law. Thus it appears that the learned Additional District Judge had proceeded on an erroneous basis to incorporate principles of Roman Dutch Law into Kandyan Law.

In *Appuhamy* v *Holloway*[3] a Kandyan deed of gift was revoked by the donor on the ground that the donee had failed to give him necessary assistance. Thereupon the donor gifted the property to A. Subsequent to the deed of revocation the property was transferred to B by the heirs of the original donee and B registered his transfer prior to the deed of gift to A held, that B's transfer did not prevail over the gift to A by reason of prior registration.

In the case of *Muthubanda and Another* v *Gunaratne*[4] the facts were the plaintiff-respondent sought a declaration of title to the land in question. His position was that the original owner one HB gifted the corpus by deed No. 59287 of 10.6.1971 to one A one of his predecessors in title and subsequently he became the owner. The defendant-appellant contended that HB was a Kandyan whose property rights are governed by the Kandyan Law Declaration and Amendment Ordinance and the said HB had not renounced the right of revocation and that the said deed of gift was revoked by deed No. 31294 of 21.10.1976. thereafter the said HB had by deed of transfer No. 31295 of 24.10.1996 transferred same to the 2nd defendant-appellant.

The District Court entered judgment for the plaintiff-respondent. On appeal it was contended that the Kandyan Law is silent on the question whether there can be a revocation of a deed when the rights on the deed have already passed to a third party.

Held - (1) The Kandyan Law reserves to the donor the right to revoke a gift during his lifetime and without the consent of the donee or any other person and therefore it is not open for the donee acting unilaterally to deny the donor a right that is reserved under s. 4(1), and s. 5 (1) and provides for the renunciation of the

right to revoke, which right should be expressly renounced by the donor, either in the same deed or by any subsequent instrument.

(2) S. 4 (1) and s. 5 (1) read together clearly spell out the donors right to revoke, and the donee by a subsequent retransfer to a 3rd party could not defeat the donors right to revoke a gift during his lifetime and without the consent of the donee or any other person.

In the light of the two decisions that I have cited and the provisions contained in section 4 (1) of the Kandyan Law Declaration Amendment Ordinance, I am inclined to take the view that under the Kandyan Law the heirs be they minors or majors get no better interest than the original donee and they all get only a contingent interest. Therefore once the deed of gift is revoked the said contingent interest terminates and the donor re-acquires title. As section 4(1) of the Kandyan Law Declaration Amendment Ordinance specifically states that the consent of the donee or any other person is not required covers the contingent rights of the heirs of the deceased and they forfeit their rights on revocation of the deed of gift by the donor.

The counsel for the plaintiffs-respondents have also drawn our attention to some factual aspect in this case which he says is relevant. He contends that the 2nd defendant-appellant gifted the property to his adopted son P.B. Dissanayake taking into consideration not merely the love and affection towards him but more importantly expected assistance and care for himself. It is conceded that the gift was made on 3.12.1951 and the said gift was revoked on 16.01.1966, sixteen days after the death of the donee. Thus it could be said that for 15 years the donee would have supported the donor. This line of thinking is strengthened by the fact that in the deed of revocation marked D3 the donor does not state that the revocation was done due to ingratitude or for not giving any assistance by the donee. However this is only conjecture and on an examination of the evidence, I am unable to find sufficient evidence to accept this contention. Be that as it may if the donor expected assistance and care for himself during his lifetime from the donee then on the death of the donee during the lifetime of the donor the donor is entitled to revoke the deed of gift as the object of the gift is defeated by the death of the donee. One must not also forget the

fact that the donor only revoked 1/2 of what he gifted to the donee. In the circumstances the Supreme Court decision in *Heneya* v *Rana*[5] cited by the plaintiffs-respondents where it was decided that a gift of land purporting to be made in consideration of assistance rendered and money advanced by the donee to the donor was not revocable under the Kandyan Law will have no application to the instant case.

Likewise the view taken by Modder page 162 of his *Treatise on Kandyan Law* 2nd Edition that when a donation is made in consideration of or as an inducement for a marriage to be contracted or services to be rendered then it would be inequitable to allow a revocation of the donation or again a similar opinion expressed by Dr. Hayley, K.C. in his *Treatise on the Laws and Customs of the Sinhalese or Kandyan Law* pages 310 and 311 or the view expressed by J. Armour who edited නීති නිසඵවව on pages 1, 56,92 and 93 will have no application to the revocation effected in the instant case as the object of the gift is defeated by the death of the donee during the lifetime of the donor.

In view of the foregoing reasons, I am of the view that the 2nd defendant-appellant was entitled under the Kandyan Law to revoke the deed marked P1/D2 and upon the revocation of the said deed the plaintiffs-respondents lost all rights to the property in suit. Consequently the learned Additional District Judge has come to an erroneous finding that under the Kandyan Law a deed of gift effecting the rights of minors could be revoked only with the sanction of Court. Accordingly I set aside the judgment of the learned Additional District Judge and dismiss the action of the plaintiffs-respondents. The appeal is allowed with costs.

DISSANAYAKE, J. – I agree.

Appeal allowed.