1967 *Present :* **Tambiah, J., and Sirimane, J.**

W. R. W. M. TIKIRI BANDARA and another, Appellants,
and P. GUNAWARDENA, Respondent

S. C. 602/65— D. C. Ratnapura, 5264/L

Kandyan law—Deed of gift executed prior to 1939—Clause stating that it shall not be revoked—No other conditions imposed—Irrevocability of such deed.

If a Kandyan deed of gift is not governed by the provisions of the Kandyan Law Declaration and Amendment Act and it states expressly that it is irrevocable, and the clause relating to irrevocability is not dependent on any other condition, then such a deed cannot be revoked.

APPEAL from a judgment of the District Court, Ratnapura.

W. D. Gunasekera, with *W. S. Weerasooria*, for the defendants-appellants.

R. L. N. de Zoysa, for the plaintiff–respondent.

Cur. adv. vult.

June 9, 1967. TAMBIAH, J.—

The plaintiff-respondent brought this action against the two defendants-appellants for a declaration of title to one-third share of the land called Medakumbara described in the schedule to his plaint.

It is common ground that the original owner of this land was one Dinorishamy, who by deed of gift No. 6606 of 3.2.1915, marked P1, gifted 1/3rd share of this land to his niece, one Yasohamy. Yasohamy by deed No. 13743 of 1955, marked P2, transferred her interest to her husband, the plaintiff.

The defendant's case is that Dinorishamy, the original owner, by deed No. 540 of 15.3.57, marked 1D2, cancelled and revoked the Deed of gift, P1, and by deed No. 541 of 15.3.57, marked 1D3, transferred his 1/3rd share to the two defendants.

The question for decision is whether deed P1 which is governed by Kandyan law could be revoked. This deed is not governed by the provisions of the Kandyan Law Declaration and Amendment Act (Cap. 59), which sets out the categories of deeds which are irrevocable. This Act only applies to deeds executed after 1939. Counsel for the appellant contended that the deed P1 could be revoked but the respondent's Counsel urged that in view of the express undertaking in the deed of

gift P1 by the donor that he will not *at any time* or *for any reason* revoke the deed, it could not be revoked. The relevant terms of the deed of gift P1 are as follows :

"That as I the said Dinorishamy for and in consideration of the natural love and affection I have and had towards Ratupunchi Waduge Yasohamy of said Rilhena, a daughter of my brother, and in consideration of the help and assistance tendered to me by her, and with the expectation of obtaining similar help and assistance from her in the future, too, and for her future welfare, am desirous of granting and conveying unto the aforesaid Yasohamy as a Gift or Donation absolute and irrevocable, which shall not be revoked at any time in any manner whatsoever the premises held and possessed by me in manner hereunto mentioned and to hold and possess or do whatever please with the same subject only to my life interest."

Dinorishamy died in 1958. The defendants made a feeble attempt to show that, far from rendering any help or assistance to the donor, Yasohamy, who lived far away, did not even attend his funeral. The learned District Judge has however not believed the defendants' evidence on this point and has held that the effect of the words "which cannot be revoked for any reason or in any manner whatsoever", is even stronger than the relevant words in the deed of gift which was construed in *Kumarasamy v. Banda* [1]. For these reasons the learned District Judge held that the deed was irrevocable and therefore the defendants had no title.

The revocability of a deed of gift governed by the Kandyan law has a long and checkered career. Kandyan deeds of gift are usually in favour of relatives and are in general revocable. As Hayley remarks, "Sinhalese conveyance of land has the curious characteristic of revocability." (Vide Sinhalese Laws and Customs by F. A. Hayley, p. 300.) The general characteristic of revocability is however subject to important exceptions. Armour lists the following grants as not being revocable :—

"(*a*) Dedications to priests and temples, or for any religious purpose.

(*b*) Grants made in consideration of payment of debts and future assistance and support, and containing a clause renouncing the right to revoke.

(*c*) Grants in consideration of past assistance, with a renouncing clause.

(*d*) Grants to a public official in lieu of a fee, with a renouncing clause.

(*e*) Settlements on the first wife and children before contracting a second marriage.

(vide Perera's Armour, p. 95)

[1] *(1959) 62 N. L. R. 68.*

Despite this clear statement by an institutional writer, the revocability of gifts made in consideration of payment of debts or future assistance and support had been the subject matter of many conflicting judgments. This conflict arose as a result of the views of other institutional writers who have not supported Armour on this matter.

In this context D'Oyly states as follows :—

" Transfers, donations and bequest of land are revocable at pleasure during the life of the proprietor who alienates it. It is held that any landed proprietor who has definitely sold his land may resume it at any time during his life, paying the amount which he received and the value of any improvement, but his heir is excluded from this liberty."

(vide D'Oyly, p. 151)

Sawers says : —

" The assessors unanimously deny that a definite sale of land was revocable in the lifetime of the seller, at his pleasure. The chiefs say it was not without precedent for bargains of this kind to be broken and annulled, even years after the land had been sold, but it was not as a matter of course nor justified by law or custom."

(Sawers, p. 20)

These statements which were applicable to alienations and sales were equally applicable to donations. The resulting position was a spate of decisions of a conflicting nature.

The early customary law of the Kandyans, unaffected by European ideas or judicial decisions, knew of no contract renouncing the right of revocations. The Kandyan customary law is found in the decisions of the Judicial Commissioners, the Agents and the Board of Commissioners. These decisions are found in several volumes containing the decisions of the Board of Commissioners, preserved in the Ceylon Government Archives. The customary Kandyan law permitted revocation in every case with the exception perhaps of dedication to religious establishments (vide also *Salpalhamy v. Kirri Ettena* (1844) Morg. Digest 373 ; Hayley p. 305).

In order to ensure the validity of titles based on deeds of sale by Kandyans, Proclamation of 14th July 1821 declared that "all sales of land should be final and conclusive, and neither the seller nor his heir should have any right to re-purchase, unless an express stipulation to that effect was contained in the deed." In such a case the right must be exercised within three years of the date of the deed by the grantor, and the purchase money should be repaid together with compensation for improvements. Transfers other than sales were not affected by this Proclamation.

The earlier decisions of our courts on Kandyan deeds of gifts reflect the view that a duly executed deed of gift vests title immediatley on the donee (vide *Mudelitamby v. Aratchie* (1849) Morg. Digest 441, Hayley p. 306). In D. C. Kandy 9862 (1838) Aust. 43, a distinction was drawn between a gift of the whole of the donor's property and one part. It was held that the transfer of a part of it was not revocable, although no authority was cited for this conclusion.

In *Salpalhamy v. Kirri Ettena* (1844) Morg. Dig. 373 it was stated as a general proposition that all deeds of gift except grants to priests are revocable. A similar rule, however, with the recognition of exceptions set out by Armour, was laid down in *Molligoda v. Kepitipola* (1838) Aust. 214.

In *Bologna v. Punchi Mahatmeya*[1] the earlier cases were reviewed and a Full Bench held that it was impossible to reconcile all the decisions as to revocability or non-revocability of Kandyan deeds, but expressed the view that as a general rule such deeds are revocable, and before a particular deed is held to be an exception to this rule, it should be shown that the circumstances which constitute non-revocability appear clearly on the face of the deed itself. The general view that courts took at this time was that all simple deeds of gift were revocable, despite a clause purporting to renounce the right to revoke (vide Hayley p. 307 and the cases cited in the footnotes u and v).

Thereafter the courts began to apply the English doctrine of consideration to deeds of gift by way of marriage settlement. A settlement on the son of a first marriage was held to be irrevocable on the ground that there was consideration and such a gift came within the exceptions stated by Armour (vide *Dingiria Dureya v. Saleloo* B. & S. 114). In *Ukku v. Dintuwa*[2] the courts even went to the extent of holding that a gift to a daughter-in-law, executed after marriage and ostensibly out of free will and affection was irrevocable, because it was made in pursuance of a previous promise to the donee that the grantor would give the property to her if she married the donor's son. No authorities were cited in support of this proposition but the judgment appears to proceed on principles of equity. However, in *Dingiri Menika v. Dingiri Menika*[3] Lascelles A.C.J. and Middleton J., declined to apply the rule that English principles of equity could be resorted to in order to give equitable relief in construing Kandyan deeds of donation and held that a donation made by a person in favour of his daughter-in-law in contemplation of marriage with the donor's son is revocable under the Kandyan law. In *Doretugawe v. Ukka Banda*[4], it was held that a gift to the donor's daughter made three days before marriage as dowry was not revocable.

[1] *(1866) Ram. (1863-68) p. 195.*
[2] *(1878) 1 S. C. C. 89.*
[3] *(1906) 9 N. L. R. 131.*
[4] *(1909) 1 Cur. L. R. 259.*

The revocability of deeds granted for assistance and support also had been the subject matter of conflicting decisions. It was very common among the Kandyans who were labouring under the burden of performing rajakariya services to their feudal lords, to transfer their lands to the nearest relatives in return for assistance and support when they become feeble and infirm. The grantee in such cases obtained possession either immediately or after the death of the grantor, provided he honoured the undertaking by feeding and clothing the donor and gave him a funeral worthy of his rank. A majority of such gifts were usually executed before death, in consideration of services already rendered and also in respect of future services to be rendered.

It has been held in a number of cases and ultimately by a collective court in Case No. 28626 (1857) Aust. 207, that deeds of gift, for services previously rendered as well as services to be rendered in future, were revocable.

Despite this authoritative decision the English doctrine of consideration was again resorted to in order to interfere with the plain rule of revocability. In *Heneya v. Rana* [1] Phear C.J. and Dias J. held that a grant in consideration of past services could not be revoked. No authorities were however cited in support of this view. But even according to English principles of consideration, a deed for past consideration was regarded a voluntary conveyance. However, in *Ram Menika v. Banda Lekam* [2] Pereira J. followed the earlier rule in *Bologna v. Punchi Mahatmeya* (supra) and held that any free gift was revocable but stated in an *obiter dictum* that a gift in return for future assistance or other future consideration was really analogous to a sale, and not a free gift and therefore was not revocable, because it would be inequitable to revoke it if services were rendered in return for the gift.

In *Mudiyanse v. Banda,*[3] the narrow limits within which a deed of gift could be revoked are set out. In that case a deed of gift given in consideration of future assistance and a previous payment of a sum equivalent to about 1/10th of the value of property but containing no clause renouncing the right of revocation was held to be revocable. Pereira J. modified his earlier dicta in *Ram Menika v. Banda Lekam* (supra) and held that in his opinion, only where a deed of gift is executed in consideration of something which was to be done in future by a donee and that thing is actually done by him, having been induced to do so by the execution of the deed, the deed should be, on grounds of equity, deemed to be irrevocable (vide *Mudiyanse v. Banda*).[4]

It is unnecessary to decide this case on the footing that as it has not been shown that services have not been rendered by Yasohamy as found by the learned District Judge the deed becomes irrevocable since the judgment could be supported on another ground. There has been considerable difference of opinion as to whether a deed becomes irrevocable

[1] *(1878) 1 S. C. C. 47.*
[2] *(1912) 15 N. L. R. 407.*
[3] *(1912) 16 N. L. R. 53.*
[4] *(1912) 16 N. L. R. 53 at 55.*

by the donor renouncing his right to revoke. Hayley is of the view that the effect of a clause renouncing the right to revoke a simple deed of gift is of no avail in law (vide Hayley p. 311). In expressing his view Hayley was influenced by the Kandyan customary law. But it has been held that a clause renouncing the right to revoke, coupled with the payment of debts, past services rendered and services to be rendered in the future, is irrevocable (vide *Kiri Menicka v. Caurala* [1]). This case was followed by a Divisional Bench in *Tikiri Kumarihamy v. De Silva* [2]. But in *Banda v. Hetuhamy* [3] it was held that a deed of gift containing a clause renouncing the right of revocation is revocable under the Kandyan law, if the donee failed to perform his obligations.

In *Kirihenaya v. Jotiya* [4] it was held that a Kandyan deed of gift, which expressly renounces the right of revocation and which is not dependent on any contingency is irrevocable, since a deed of gift is a contract and there is no rule of law which makes it illegal for one of the parties to a contract to expressly renounce a right which the law would otherwise give. On the same principle in *Ukku Banda v. Paulis Singho* [5] a deed of gift, which was given in consideration of love and affection as a gift absolute and irrevocable, was held to be irrevocable. In *Kumarasamy v. Banda* [6] the recital in the deed was as follows :—

> " I have hereby given and grant by way of gift which cannot be revoked for any reason or in any manner whatsoever unto my granddaughter Gallange Appullangedera Horatalie residing at Yatawara aforesaid in consideration of the love and affection I have towards her and with the object of obtaining succour and assistance from her during the lifetime of me the said Kiri Muttuwa Veda."

This case followed the decision by the Full Bench in *Bologna v. Punchi Mahatmeya* (supra). The view taken in this case was that the donor having declared that the deed is irrevocable in most clear language, was not entitled to go back on it (vide dictum of Basnayake C. J. at page 70).

The customary laws of the Kandyans, on which Hayley was relying, have been developed and modified by case law which adapted the archaic system to suit modern conditions. They are of little significance on this point although on obscure points on which case law could throw little light, they could become an important source of Kandyan law.

As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows : If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing

[1] *(1858) 3 Lor. 76.*
[2] *(1909) 12 N. L. R. 74.*
[3] *(1911) 15 N. L. R. 193.*
[4] *(1922) 24 N. L. R. 149.*
[5] *(1926) 27 N. L. R. 449.*
[6] *(1959) 62 N. L. R. 68.*

irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long established rule affecting title to property should not be interfered with by this court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason. For these reasons the judgment of the learned District Judge is affirmed and the appeal is dismissed with costs.

SIRIMANE, J.—I agree.

Appeal dismissed.