Present: Lascelles C.J. and Middleton J.

1911.

BANDA *v.* HETUHAMY *et al.*

290—D. C. Kurunegala, 3,996.

Kandyan law—Clause in deed of gift renouncing right of revocation—Effect of.

A deed of gift containing a clause renouncing the right of revocation is revocable under the Kandyan law, if the donee fails to observe the stipulations subject to which the gift was made.

MIDDLETON J.—It is an admitted principle of the so-called Kandyan law that all deeds of gifts of lands, excepting those made to priests and temples, are recovable during the lifetime of the donor. I would therefore hold that the doctrine of *caveat emptor* must certainly apply to all contracts for sale of land in the Kandyan Provinces, and all purchasers for valuable consideration should be duly put upon inquiry as to their vendor's title to convey.

HE facts appear in the judgment.

Bawa, for appellants.

Sampayo, K.C., (with him *H. A. Jayewardene*), for the respondent.

The following authorities were cited at the argument: *Tikiri Kumarihamy v. De Silva et;*[1] *Unambuwe v. Junghamy;*[2] *Modder's Kandyan Law 135; Austin's Reports 15, 903; Pereira's Armour 95; Molligoda v. Kepitipola;*[3] *Marshall's Judgments 313, 320, and 321.*

Cur. adv. vult.

October 13, 1911. LASCELLES C.J.—

This case raises the much discussed question of the revocability of Kandyan deeds of gift, the gift in question not being one for past services. The plaintiff by deed of gift dated February 6, 1906, made over the bulk of his property to his grandson. The deed was expressed to be made "in consideration of the love and affection which I bear and cherish towards him and for his future welfare." The deed was also expressed to be subject to the condition that the donee should possess the property undisturbedly, "after paying and settling the principal Rs. 2,000 and interest thereon" which had been borrowed by the donor upon mortgage on some of the donor's property. The power of revocation is renounced in the following terms: "I, the donor, have hereby promised not to revoke the gift, and that I am not able to revoke the same."

[1] *(1906) 9 N. L. R. 202; 12 N. L. R. 74 (same case in review).*

[2] *(1892) 2 C. L. R. 103.*

[3] *(1858) 3 Lor. 24.*

1911.

LASCELLES C.J.

Banda v. Hetuhamy

In February, 1910, the donee sold to the defendants the lands comprised in the deed of gift, and in June of the same year the donor revoked the deed of gift on the grounds (1) that the donee had behaved with ingratitude and cruelty towards the donor in his old age, and (2) that he had not carried out the covenant to pay off the mortgage debt.

The District Judge, after finding that the donee had not been guilty of cruelty and ingratitude, and that the donee had only discharged about Rs. 500 of the mortgage debt, upheld the revocation of the donation, and entered judgment for the plaintiff for the land in dispute.

The authorities on the revocation of Kandyan deeds are set out at length and discussed in *Tikiri Kumarihamy v. De Silva et al.*,[1] where it was held that a Kandyan deed of gift in consideration of past services, and containing a clause renouncing the right of revocation, is irrevocable under the Kandyan law. But in the present case the deed is not for past services, and it was confidently asserted by counsel for the respondent that no authority could be produced for the proposition that such deeds, even though the power of revocation is renounced, are irrevocable.

It is difficult to extract any definite principle from the conflicting authorities and decisions on Kandyan law, but the most logical statement of the principle which governs such cases, *i.e.*, cases in which the gift is in consideration of future services, is to be found in the passage cited from Armour in *9 N. L. R. 211*:—

> But all conditional and unconditional gifts are not revocable; some gifts are irrevocable; for instance, if the proprietor executed a deed and thereby made over his lands to another person, stipulating that the donee shall pay off the donors' debts and also render assistance and support to the donor during the remainder of his life, and if the said deed contains also a clause debarring the donor from revoking that gift, and from resuming the land, and from making any other disposal thereof. If the donee did discharge the said debts, he will have acquired thereby the rights of a purchase to the lands in question; and consequently that deed will be irrevocable, but the donee, although he acquired the title of purchaser, will yet continue under the obligation of rendering assistance and support to the former proprietor . . . . . .

On this principle if the donee in the present case had carried out the conditions subject to which the gift was made, he would have been protected by the renunciation clause from having the donation capriciously revoked; in other words, the revocation clause holds good only when and so far as the donee observes the stipulations subject to which the gift was made.

Where, on the other hand, the donee has failed to carry out the conditions on which the gift was made, he cannot invoke the protection of the renunciation clause, which was intended to take effect only if the stipulations in the deed were complied with. The

[1] *(1909) 12 N. L. R. 74.*

principle laid down by Armour involves an examination of the deed in order to ascertain the true intention of the parties. In the deed now under consideration, it is clear that the donor's intention was that the irrevocability of the gift should depend upon the due observance of the stipulations subject to which the donation was made. I am therefore of opinion that the deed in question was lawfully revoked.

With regard to compensation, it is admitted the donee is entitled to be indemnified for disbursements made by him for the benefit of the plaintiff's estate, but, as Mr. de Sampayo has pointed out, the amount of the compensation, if any, which is due cannot be ascertained without taking a complete account of the donee's dealings with the plaintiff's estate. No authority has been cited for the proposition that the defendant is liable to compensation. In the result the appeal is dismissed with costs.

MIDDLETON J.—

This was an appeal against an order declaring the plaintiff the lawful owner of certain land at Galgommuwa called Pitangane-assedduma, and decreeing that he be placed and quieted in possession of the same. The plaintiff by notarial deed of gift No. 10,322 dated February 6, 1906, granted the land amongst several others to his grandson Punchi Banda on the terms set out in the deed. Punchi Banda conveyed the land by notarial deed of sale No. 9,349 dated February 23, 1910, to the defendants.

The plaintiff by notarial deed No. 217 dated June 30, 1910, revoked the deed of gift to Punchi Banda, and by this action sought to recover possession, and the learned District Judge has upheld the right he claims, against which the defendants appeal. It is an admitted principle of the so-called Kandyan law that all deeds of gifts of lands, excepting those made to priests and temples, are revocable during the lifetime of the donor. (*Grammar of Kandyan Law, Armour 179; Sawer 90; Pereira's Armour 95.*) I would therefore hold that the doctrine of *caveat emptor* must certainly apply to all contracts for sale of land in the Kandyan Provinces, and all purchasers for valuable consideration should be duly put upon inquiry as to their vendor's title to convey.

The difficulty in deciding cases of Kandyan law is to find any fixed principle, but I think the principle of the power of revocation is founded to a great extent on the conditional nature of most of these deeds. (Sir John D'Oyley's exposition in *Marshall's Judgments 320, 321.*) Here it is contended that this deed of gift is irrevocable on the grounds (1) that the grantor declared its irrevocability in the deed itself, and (2) that it was made for a consideration.

On the first point, it has been held in certain cases quoted in a note at page 15, *Austin's Reports (1835)*, and followed by Norris J. in a judgment delivered on April 22, 1835, that a renunciation of the

1911.

MIDDLETON J.

Banda v. Hetuhamy

right of revocation in the deed of gift is of itself a sufficient ground for declaring the irrevocability of the gift. In that case the intention of the grantors was that the grantee should provide for the maintenance of one of the grantors, and the Court made order to this effect. In *Molligoda v. Kepitipola*[1] the converse was held by the Supreme Court, and in *Tikiri Kumarihamy v. De Silva et al.*[2] I reviewed all the cases on the point, except those mentioned in *Austin 15* of about the year 1835.

I think it was clearly not made for valuable consideration, but for love and affection, and on condition that the donee should pay off Rs. 2,000 borrowed by the donor from one Kiri Banda on a mortgage bond. It was not made for past services, nor is it specifically alleged in it that it was granted with a view to the donee rendering support and assistance to the donor in his declining years.

I agree with Sir John D'Oyley's view that in a case like this the condition must be shown to have been faithfully and strictly performed, in default of which the transfer ought not to be enforced and the donor given right of revocation.

I would again, therefore, act on the views I expressed in *Tikiri Kumarihamy v. De Silva et al.*,[2] and hold here that the deed intended that the donee should work the lands and pay off the mortgage in question, and if so, it should be irrevocable, if not, it was to be revocable. This is, I think, to be gathered, not only from the deed of renunciation, but from the terms of the deed of gift itself.

The District Judge holds that the property mortgaged does not from part of that gifted, and that the donee did not perform the condition by paying off the mortgage, and I agree with him.

On the question of compensation to the donee for his disbursements, it is admitted that such is due, and I presume an account will have to be taken. I am not prepared to say without authority that the defendant is entitled to compensation.

The appeal must be dismissed with costs.

Appeal dismissed.

[1] *(1858) 3 Lor. 24.*

[2] *(1909) 12 N. L. R. 74.*