Present: De Sampayo J. and Garvin A.J. 1921.

PONNAMPERUME *v.* GOONESEKERA *et al.*

78.—D. C. Galle, 16,996 F.

Donation—Power of revocation reserved—Donor may revoke without sanction of Court—Is there a time limit?—Remuneratory donation—Donation propter nuptias.

A donor may expressly reserve a power of revocation and exercise it himself without obtaining a decree of Court.

A donation *propter nuptias* is not revocable for ingratitude during the subsistence of the marriage. But it may be revoked by a donor who has reserved the power of revocation.

A *donatio propter nuptias* is not a mere gift made on the occasion of a marriage, but a contract made as an inducement to marry. Where a donor reserves to himself the power to cancel the deed "at any time hereafter," there is no time limit within which the power must be exercised.

THE facts appear from the following judgment of the District Judge (L. W. C. Schrader, Esq.):—

This is an action for the partition of a land which belonged to one Kurupanawe Gamage Juwanis. Juwanis sold the same by deed No. 258 of March 7, 1919, to the plaintiff and first defendant for valuable consideration, and the deed P 2 is registered.

Plaintiff and first defendant, therefore, divided the land in equal moieties, assigning planting interests to the second, third, and fourth defendants.

2. It appears, however, that Juwanis by deed No. 3,539 of March 5. 1908 (copy of 5 D 2), gifted half of the land and buildings to his niece. Karonchihamy, with a *fidei commissum* in favour of her children Sipila, Grace, and Noel, and any others unborn, and, subsequently, cancelled or purported to cancel it by deed No. 8,272 of November 30, 1914 (P 17). The original donation deed is annexed, and, admittedly, is not registered.

3. The added party, Nichulas, the husband of the fiduciary donee and father of the child Noel, intervenes, and claims the two boutique rooms 2 and 3 put up by him, the planter's interest of a plantation of 58 trees put in by him, and prays that his wife be declared entitled to a half part of the land, and the plaintiff's action be confined to the other part. His wife has accepted the revocation and does not join.

4. The issue is whether the gift is revocable, and whether the plaintiff's deed gains priority by registration.

5. On the first point it has already been held between the parties that this deed of gift was not a *donatio mortis causa*, though it is so expressed in the document. And it does not comply with the requisites of a *donatio mortis causa* (*Pereira's Institutes 602*). The reservation for cancellation is incidental to the class of deeds *mortis causa*, and any kind of donation is irrevocable, subject to the exceptions enumerated

1921.

Ponnamperume v. Goonesekera

at page 610. None of these apply. Moreover, the deed is charged with a reversion to the donee's children, and once accepted by the *fidei commissaries* it becomes irrevocable. These were all minors at the time. Acceptance by the fiduciary donee, their mother, is acceptance on their behalf. "In the case of such a donation, acceptance by the fiduciary donee is a sufficient acceptance on behalf of the unborn descendants." (*17 N. L. R. 279.*)

"In such cases as the present where the reversioners are the legitimate descendants of the donees, acceptance by the fiduciary donee is a sufficient acceptance on behalf of the descendants, and preclude the donor from revoking it." (*18 N. L. R. 222.*)

6. The plaintiff's contention, however, is that all these considerations apply to cases where no power of revocation is reserved. Here there is the express power of revocation. This is a lawful power (*11 N. L. R. 151*), and is valid. Mr. Jayawardene's contention was that the clause is merely incidental to a *donatio mortis causa*, and this one is not *mortis causa*, though recited as such. Therefore, if it is not *mortis causa*, it is a deed *inter vivos*, with an express power of revocation reserved. I think, therefore, that the deed was revocable.

7. Next, to take the question of registration. The registration of the second title entitles it to prevail over the unregistered donation, section 17 of 14 of 91, unless fraud in obtaining such prior registration can be established.

8. The defendant urges that there is fraud and collusion in this matter. First, Don Juwanis sued the intervenient in A. C. R. 7,641 to enforce the power of revocation of the two boutiques built by the latter in April, 1913, and the case was dismissed, May, 1915, the Court holding that the defendant was by right of his wife's half interest entitled to remain.

Circumstances have now changed, and the revocation has been executed on November 30, 1914, and acquiesced in by the donee without the sanction of her husband. There seems to me, however, to be no doubt about the right of revocation, and therefore there seems to be no fraud in employing it. The conveyances to the parties in the case were eminently *onerosa titula*, and remove presumption of fraud.

9. In regard to improvements, the parties, I gather, do not really object to paying compensation, and in any case they must. The defendant is not a *malâ fide* improver. I enter judgment therefore for partition of the lands, apportioning half to plaintiff and half to first defendant. Improvements as in the surveyor's return, only that the house 1 to plaintiff and first defendant, 2 and 3 to fifth defendant, 4 to second defendant to be removed. The compensation for the second to fourth defendant's plantation to be in terms of the planting voucher 2 D 1.

Added party to pay costs of contention, inclusive of first defendant's costs of partition *pro ratâ*.

The fifth defendant appealed.

Bawa, K.C. (with him *J. S. Jayawardene*), for fifth defendant, appellant.

A. St. V. Jayawardene, K.C. (with him *Weerasooria*), for plaintiff, respondent.

E. W. Jayawardene, for first defendant, respondent.

December 19, 1921. DE SAMPAYO J.—

This is an action for the partition of a land, which formerly belonged to one Juwanis de Silva, the plaintiff claiming half share of the land, and assigning the other half share to the first defendant. The second, third, and fourth defendants were joined as parties, as they were entitled to certain planting interests and to certain buildings. The contest in the case is between the plaintiff and first defendant on one side and the fifth defendant on the other. Both parties, however, claim under the same Juwanis de Silva. It appears that the fifth defendant in 1904 married Karonchihamy, a niece of Juwanis de Silva, and that by an informal writing Juwanis de Silva agreed to gift to Karonchihamy a half of the northern half part of the land, and to execute a deed in her favour as soon as possible. Four years afterwards, namely, on March 5, 1908, Juwanis de Silva executed a deed of gift in favour of Karonchihamy for half share subject to certain conditions, and Karonchihamy, on the face of the deed, accepted the gift, subject to those conditions. The terms of this deed are important, and are therefore here quoted in full :—

> "I (Juwanis de Silva), in consideration of the natural love and affection I have and bear unto my niece (Karonchihamy), and for divers other good causes and considerations me hereunto moving do hereby give and grant unto her, the said (Karonchihamy), her heirs, executors, administrators, and assigns as a *donatio mortis causa* all that the premises in the schedule hereunder written, &c. To have and to hold the said premises of the value of Rs. 2,000 unto her, the said (Karonchihamy), subject to the condition that she, the said (Karonchihamy), shall not sell, mortgage, gift, or otherwise alienate or encumber the said premises in any manner, but that the same after her death devolve equally on her children now living; namely, P. K. Sepila, P. K. Theodora, Grace, and W. Noel, and on any other children that may be born to her hereafter.
>
> "Provided further, that I, the said (Juwanis de Silva), do hereby reserve full power to cancel these presents at any time hereinafter. And I, the said (Karonchihamy), do hereby gratefully accept the gift hereby made in manner aforesaid subject to the conditions aforesaid."

The first two of the children, who are constituted *fidei commissaries*, are children of Karonchihamy by her first husband, and the third child is her child by the fifth defendant. By deed of revocation dated November 30, 1914, Juwanis de Silva, in pursuance of the power reserved to himself and with the consent of Karonchihamy, revoked the deed of gift, and thereafter by deed dated March 7, 1919, he sold the land to the plaintiff and first defendant. The fifth defendant, husband of Karonchihamy, contends that the revocation

1921.

DE SAMPAYO J.

Ponnamperuma v. Gooneseekera

is invalid, and that no title vested in the plaintiff and the first defendant so far as the share gifted to Karonchihamy is concerned. The situation is somewhat anomalous, because Karonchihamy herself, not only consented to the revocation of the deed of gift, but raises no dispute to the claim of the plaintiff and the first defendant and is not a party to this action. The fifth defendant's prayer, however, is that Karonchihamy may be declared entitled to a share by virtue of the deed and by prescriptive possession. It appears that the husband and wife are on bad terms, and are separated from each other. Mr. Bawa, for the fifth defendant, contends that as gifts by their nature are irrevocable, the power of revocation which Juanis de Silva purported to reserve to himself is inoperative. There is, no doubt, that under the Roman-Dutch law gifts *inter vivos* are generally irrevocable, except for such causes as ingratitude, and even then the revocation must be effected by decree of Court. It is therefore unnecessary to refer to the well-known authorities which Mr. Bawa cited on that point. What Juwanis de Silva and the notary meant by calling the gift a *donatio mortis causa* is not apparent. It is obvious, however, that the gift is not a *donatio mortis causa*, but a gift *inter vivos*. The question is whether a donor may not expressly reserve a power of revocation and exercise it himself. I do not see any principle disentitling a donor to do so. Since a gift is purely voluntary, and as it is in the power of the donor to give the property absolutely or a limited interest therein, I think that it is not contrary to law if he makes a transitory gift, such as a gift to be terminated by his own act. The donee Karonchihamy accepted the gift subject to the specified condition, and the fifth defendant himself sets up the deed as his wife's source of title. *In Government Agent, Western Province, v. Palaniappa Chetty*,[1] this Court held that, notwithstanding the irrevocable character of a gift under the Roman-Dutch law, an express power reserved to the donor is operative, and may be validly exercised by him. Mr. Bawa accepts this decision as he is bound to do, but he argues that it is not applicable, because the gift in this case is not a pure donation, but is of the description called remuneratory donation or a donation *propter nuptias*, which it is contended are wholly irrevocable. But the Court in the above case did not base its decision on any distinction with regard to the kind of gift, and I think the *ratio decidendi* is applicable to the present case.

Moreover, I doubt whether Juwanis de Silva made or intended to make any remuneratory gift. Properly speaking, remuneratory gifts may be said to be given for consideration, and not as a matter of pure benevolence, or, as *Voet 39, 5, 25* put it, such a gift is an exchange rather than a donation, and is irrevocable. Juwanis de Silva's gift was not one of that kind, but may at the highest be said to be a gift *propter nuptias*, with regard to which

[1] *(1909) 11 N. L. R. 151.*

Voet lays down in the above *lex* 25 and in *lex* 34 that it is not revocable for ingratitude during the subsistence of the marriage. There is nothing to show, however, that even in such a case an express power of revocation may not be exercised. *Voet 39, 5, 34*, to which Mr. Bawa referred us, indicates the meaning of *donatio propter nuptias*. It is not a mere gift made on the occasion of a marriage, but a contract made as an inducement to marry, and when the person who gets the donation fulfils his or her part of the contract by marriage, the donation, like any other contract, is not capable of being withdrawn at the instance of one party alone. Is the donation in this case a donation *propter nuptias* in this sense? It is to be noted that the promise and the actual gift was not to the fifth defendant, but to Karonchihamy, so that one element of this kind of donation is absent. Moreover, neither the informal writing nor the deed shows that the gift was given as an inducement for the marriage. They do not even call it a dowry. Lastly, it was revoked with the concurrence of the donee herself, and not at the instance of Juwanis de Silva alone. Both in form and in substance it is an ordinary gift, though the promise may have been given on the occasion of the marriage between the fifth defendant and Karonchihamy. I should say that the nature of the gift, if it is to be claimed as being of a special kind, should be disclosed in the instrument itself. But even if extrinsic oral evidence is admissible, I think the evidence falls far short of what is necessary. The only evidence on the point is that of the fifth defendant, and all that he says is: "I am married to a niece of plaintiff's vendor Juwanis in 1904. Juwanis agreed to give as dowry half of Bamboragewatta." In my opinion the gift cannot be considered as a donation *propter nuptias* in the true sense of the expression. Even if it were such a donation, there is no authority for holding that an express power of revocation reserved in the very deed of donation cannot be validly exercised. The "dowry," as given and accepted, passed a precarious title, and neither Karonchihamy nor the fifth defendant can claim more.

There are one or two minor points which remain to be considered. It appears that the fifth defendant built one or two rooms on the land at his expense, and in 1913 Juwanis de Silva brought the action No. 7,641 of the Court of Requests of Galle to compel the fifth defendant to accept compensation for the buildings and to give up possession of the buildings. The action was dismissed, and the dismissal is pleaded as *res judicata*, even as regards the title to the land. It appears that the deed of gift had not been revoked at the time of that action, and that the revocation was made pending the action. Nevertheless, it is contended for the fifth defendant that Juwanis de Silva might have had an issue stated at the trial, and that that not having been done, the plaintiff, as purchaser from Juwanis de Silva, is under section 207 of the Civil Procedure Code concluded

1921.

DE SAMPAYO J.

Ponnamperume v. Goonesekera

by the dismissal of the action. In my opinion the Court could only have decided the rights of the parties as at the date of the action, and I do not think that an issue as to the effect of the revocation of the gift would or could have been entertained by the Court. Moreover, if a claim to the land could have been set up in that action, the Court of Requests would have had no jurisdiction, inasmuch as admittedly the value of the land was much above the monetary limit of the jurisdiction of the Court of Requests, and, consequently, any decree in that action could not operate as *res judicata*.

It was also contended that there was too great a lapse of time between the date of the deed of gift and its revocation. But the power reserved was to cancel the deed "at any time hereafter," and there was therefore no time limit within which the power must be exercised.

It was further urged that the fifth defendant, or rather Karonchihamy through him, had acquired a title by prescription, which could not be affected by the revocation. Apart from the question whether by possession the power to revoke can be defeated, which I doubt, the evidence, which is conflicting, does not amount to proof of prescriptive possession, nor has the District Judge found that the fifth defendant has had possession of the share in question. It is clear, however, that he had possession of the two rooms which he built, and the decree allows them to him.

There is also the question whether the revocation has the effect of depriving Karonchihamy's children of the *fidei commissum* created in their favour by the deed of gift. That question, however, need not be considered now, as Karonchihamy is still alive, and the children may, when the event happens, have their remedy, if any.

In my opinion this appeal must be dismissed, with costs.

GARVIN A.J.—I agree.

Appeal dismissed.