1942 *Present* : **Howard C.J. and Hearne J.**

BELGASWATTE *v.* UKKUBANDA *et al.*

123—D. C. Kandy, 2.

Kandyan law—Transfer by father to daughter—Retransfer by daughter—Under influence—Proof—Evidence Ordinance, s. 92, proviso (1)—Subsequent donation by father—Revocability.

The first defendant, father of plaintiff, transferred the property in question to plaintiff, from whom he obtained a retransfer by undue influence. The first defendant thereupon gifted the property to plaintiff as an act of reparation for the undue influence exercised against her. From the deed itself the purpose of the deed appeared to be to secure future assistance.

The first defendant thereafter transferred the property for valuable consideration to the second and third defendants.

***Held,* that oral evidence to vary the terms of the deed of gift was admissible under proviso (1) of section 92 of the Evidence Ordinance.**

***Held, further,* that the gift must in the circumstances be regarded as irrevocable.**

APPEAL from a judgment of the District Judge of Kandy.

N. Nadarajah, for 2nd and 3rd defendants, appellants.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for plaintiff, respondent.

Cur. adv. vult.

February 6, 1942. HOWARD C.J.—

This is an appeal by the 2nd and 3rd defendants from a judgment of the District Judge of Kandy declaring the plaintiff entitled to the land in question. The 1st defendant, who is the father of the plaintiff, on October 2, 1928, by deed P. 1, transferred the said land to the plaintiff for valuable consideration. By deed P 3 dated March 15, 1929, the plaintiff retransferred the same land to the 1st defendant. By deed P 4 dated September 6, 1929, the 1st defendant by deed of gift donated the same land to the plaintiff. By deed P 5 dated July 6, 1937, the 1st defendant revoked the deed of gift P. 5. By deed P 6 dated September 13, 1937, the 1st defendant for valuable consideration transferred the same land to the 2nd and 3rd defendants, the appellants.

The plaintiff was born on April 3, 1912, and hence did not attain majority until April 3, 1933. The deeds P 1, P 3 and P 4 were, therefore, executed during her minority. It was alleged by the plaintiff that the 1st defendant used undue influence on her to induce her to execute P 3. She, moreover, repudiated P 3 and stated that in order to confirm her title to the land the 1st defendant executed P 4. Thereafter she states that she possessed the land until the appellants forcibly took possession.

It is conceded by the plaintiff that the appellants are *bona fide* purchasers for value from the 1st defendant. Their title turns on the question as to whether the first defendant had the power to revoke P 4 and subsequently transfer the land to the appellants by P 6. The appellants contend that P 3, if executed by the plaintiff in favour of the 1st defendant

as the result of undue influence, was not absolutely void but only voidable. That action for *restitutio in integrum* to declare P 3 void should have been instituted by the plaintiff within three years of her attaining her majority, that is to say, before April 3, 1936 (vide *Silva v. Mohamadu* [1] and *Velupillai v. Elanis* [2]). The proceedings to declare P 3 void were not instituted until November 5, 1937, and hence her cause of action must fail. The learned Judge in finding in favour of the plaintiff accepted the argument of her Counsel that there was no need to get P 3 set aside as the 1st defendant by his own act in executing P 4 remedied the evil and made the deed P 3 of no effect. In his Judgment the District Judge states that he agrees, that after P 4 was executed, there was really no cause of action, except technically, perhaps, as the relief to be sought had been given by P 4. The plaintiff had possession and there was in effect restitution and until the deed of revocation, P 5, in July, 1937, there was no cause of action. I am of opinion that the learned District Judge on this point came to a correct conclusion. It is true that P 4 was a deed of gift made under Kandyan law and hence had not the same effect in law as the conveyance P 1 made by the 1st defendant in favour of the plaintiff for valuable consideration. On the other hand P 4 vested the property in the land in the plaintiff and until her title was challenged no cause of action would arise.

There remains for consideration the further question as to whether the 1st defendant was entitled to revoke P 4. Kandyan law entitles a donor to revoke a deed of gift (vide *Gunadasa v. Appuhamy* [3]). In that case the phraseology employed in the vesting clause was very similar to that employed in P 4. The purpose of the gift would seem from the deed itself to be to secure to the donor that he would be well cared for during what remained of his life. Such deeds are always revocable under the Kandyan law unless they are expressly declared to be irrevocable or where the power of revocation is expressly renounced. P 4 is not declared to be irrevocable and there is no expression of the renunciation of the power to revoke. Mr. Perera has, however, contended that the evidence of the plaintiff, which is uncontradicted, indicates that P 4 was made not out of love and consideration for the plaintiff, but as reparation for the fact that the 1st defendant had by the exercise of undue influence induced her to transfer the property to him by P 3. The 1st defendant's intention was, therefore, to place the plaintiff in the position she occupied with regard to the property prior to the execution of P 3. P 4 must in these circumstances be regarded as irrevocable. Mr. Perera maintains that this evidence of the plaintiff, varying as it does the terms of P 4, is admissible under proviso (1) of section 92 of the Evidence Ordinance. He argues that it establishes that the consideration is something different to what is stated in P 4 and the proof of such consideration entitles the plaintiff to a decree or order relating to P 4. In this connection we were referred to *Kiri Banda v. Saly Marikar* [4]. In that case the plaintiff sought to show that part of the sum of Rs. 4,000, the consideration for the transfer of certain land, had not been paid although in the deed he had acknowledged that it had been paid. It was held that such evidence

[1] *19 N. L. R. 426.*
[2] *7 C. L. R. 162.*
[3] *36 N. L. R. 122.*
[4] *4 C. W. R. 206.*

was admissible. The following extract from the judgment of the Privy Council in *Shah Mukhun Lall and others v. Baboo Sree Kishen Singh and others* (*XII Moore Ind. App. 157*) was cited with approval :—

"When one party . . . . is permitted to remove the blind which hides the real transaction the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudce his adversary.

The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice."

Mr. Nadarajah has invited our attention to the cases of *Velan Alvan v. Ponny* [1] and *Lunacha Umma v. Hameed* [2]. In the latter case a Moorish lady sued her husband to recover Rs. 7,000, being proceeds of the sale of a property belonging to her, and the defendant pleaded that the sum in question was by an agreement between his wife and himself to be taken by him in consideration of a transfer to her and her child of other property belonging to him and this transfer purported to be an absolute and irrevocable gift in consideration of the love and affection he bore towards them and for divers other good causes and considerations. It was held that the expression "for divers other good causes and considerations" was an ordinary notarial flourish and that it was not open to a party to show by *viva voce* evidence that what purports to be on the face of it an out and out deed of gift was in fact a transfer for other and valuable consideration. No reasons were given for this decision, but perusal of the report of this case indicates that the repection of this oral evidence turned on the answer made by the defendant to the plaintiff's claim. The decision must, therefore, be regarded as being based on the pleadings, the issues and the evidence tendered by the defendant at the trial. In these circumstances it cannot be regarded as an authority in regard to the question that has to be answered in the present case. In *Velan Abram v. Ponny* (*supra*) Keuneman J. in his judgment held that oral evidence is not allowed where the effect of the deed comes up for consideration incidentally. He states that the action in that case made no attempt to "-invalidate" the document nor would the fact to be proved entitle any person to any decree or order "relating thereto". There was no claim relating to the document. I think the present case can be distinguished from *Velan Alvan v. Ponny* on the ground that a decree or order is sought in relation to P 4. There is a claim relating to P 4, the effect of which does not come up merely incidentally in connection with the proof of the plaintiff's title. I am, therefore, of opinion that the evidence of the plaintiff with regard to what was the real consideration for P 4 is admissible and establishes the irrevocability of this document.

In these circumstances the plaintiff is entitled to maintain this action and the appeal is dismissed with costs.

HEARNE J.—I agree.

Appeal dismissed.

[1] *41 N.L. R. 106.*

[2] *1 C. W. R. 30.*