Present : Dalton J. and Jayewardene A.J.

1926.

UKKU BANDA *v.* PAULIS SINGHO *et al.*

282—D. C. Kegalla, 6,818.

Kandyan law—A gift absolute and irrevocable—Revocability.

Where a Kandyan deed of gift was expressed in the following terms : " I, Ukku Banda, in consideration of the love and affection which I have and bear unto Lokuhamy, do hereby give, grant, assign, transfer, set over, and assure unto the said Lokuhamy, her heirs, executors, administrators, and assigns as a gift absolute and irrevocable . . . . to have and to hold the said shares of the said premises hereby conveyed or intended so to be unto the said Lokuhamy, her heirs, executors, administrators, and assigns absolutely for ever,"—

Held, that the deed was irrevocable.

PLAINTIFF brought the present action for a declaration of title to a land which he had in 1905 by deed P 1 gifted to his wife, Lokuhamy. Lokuhamy died in 1922, leaving a daughter, Punchinona, who by deed D 2 sold the land to the first defendant. In 1923, plaintiff, by deed P 2, revoked his deed of gift. In 1924, by deed D 3, the first defendant conveyed the land to the second defendant. Both the defendants were *bona fide* purchasers. The learned District Judge held that the deed of gift was revocable and gave judgment for the plaintiff. The defendants appealed.

H. V. Perera (with him *C. V. Ranawake*), for defendants, appellants.—Kandyan gifts are as a rule revocable, but there is nothing illegal in a party contracting himself out of the rights which the law gives him, provided it does not violate any statute or it is not against public policy or morality. The tendency has been to restrict the power of revocation and bring the Kandyan customary law into line with the common law of the land (*Tikiri Kumarihamy v. de Silva*[1]).

There is no definite authority on the point; it has been laid down in *Molligodde v. Sinnetamby*[2] that if renunciation of the power to revoke is permissible under the Kandyan law the renunciation should be in express and unmistakable language. The deed itself should be examined to ascertain the true intention of parties (see *Kirihenaya v. Jotiya*[3]). The relevant words in the present case are that the gift should be " absolute and irrevocable " and that the donee should have the property " absolutely and for ever." These terms are unambiguous, and there is no need

[1] *(1906) 9 N. L. R. 202.*

[2] *(1878) 7 S. C. C. 118.*

[3] *(1922) 24 N. L. R. 149.*

1926.

Ukku Banda v. Paulis Singho

for a special clause of renunciation. The Court should not be called upon to give to these words an intention beyond what they clearly and unmistakably signify.

Navaratnam, for plaintiff, respondent.—The general rule of law is that all deeds of gift, be these conditional or unconditional, are revocable. Gifts to priests and temples alone are deemed to be exceptions to this rule. A third class of exception has been recognized in a series of decisions, in which it has been held that the presence of consideration for a gift renders it inequitable to permit a revocation. Thus it follows that the revocability of a voluntary gift, as in the present instance, is well within the rule of law. It is, however, contended that a donor has an inherent right to renounce the right of revocation. This doctrine, though foreign to Kandyan law, has been recognized only in cases where the renunciation was in *express and unmistakable terms.* The deed under consideration does not come within this category. The following authorities, among others, were relied upon : *Perera's Armour, pp. 90–95, Molligoda v. Keppetipola,*[1] *Tikiri Kumarihamy v. de Silva,*[2] *Banda v. Hetuhamy,*[3] *Ran Menika v. Banda Lekam.*[4]

March 24, 1926. DALTON J.—

Plaintiff sued for a declaration of title to land which he had in 1905 given by deed P 1 to his wife, Lokuhamy. Lokuhamy died in 1922, leaving a daughter, Punchinona. By deed D 2 in 1922, which was duly registered, Punchinona sold and conveyed the land to the first defendant. In 1923, plaintiff, by deed P 2, which was registered, revoked his gift of 1905. In 1924, by deed D 3, the first defendant sold and conveyed the land to the second defendant. It is admitted that both defendants are strangers and *bona fide* purchsers.

The question to be decided is as to whether plaintiff was entitled to revoke his deed of gift of 1905.

The material parts of deed P 1 of 1905 are as follows :—

> " Know all men by these presents that I, Korallage Ukku Banda of Dehiowita . . . . now of Hulftsdorp Jail, Colombo, in consideration of the love and affection which I have and bear unto . . . . Lokuhamy, also of Dehiowita aforesaid, do hereby give, grant, assign, transfer, set over, and assure unto the said . . . . Lokuhamy, her heirs, executors, administrators, and assigns, as a gift absolute and irrevocable, a just undivided one-sixth part or share of the following lands, fields, and premises, being of the value of rupees one hundred and fifty . . . . (here the lands are set out) . . . . to have and to hold the said shares of the said premises hereby conveyed or

[1] *(1858) 3 Lor. 24.*
[2] *(1909) 12 N. L. R. 74.*
[3] *(1911) 15 N. L. R. 193.*
[4] *(1911) 15 N. L. R. 407.*

intended so to be unto the said . . . . Lokuhamy, her heirs, executors, administrators, and assigns absolutely for ever. And I, the said Korallage Ukku Banda, do hereby, for myself, my heirs, executors, and administrators, covenant, promise, and agree to, and with the said . . . . Lokuhamy, her heirs, executors, administrators, and assigns, that the said shares of the said premises are free from any encumbrance whatsoever, and that I and my aforewritten shall and will always warrant and defend the same unto her and her aforewritten against any person or persons whatsoever.

"And I, the said . . . . Lokuhamy, do hereby accept the above gift thankfully."

The usual notarial attestation follows.

No witnesses were called, the only evidence before the learned Judge being the documents put in; it being agreed that the parties are Kandyans, and governed by Kandyan law.

The question to be decided is whether deed P 1 is a revocable deed of gift. The learned Judge held it was revocable, and the defendants appeal from that decision.

The question of the revocability of Kandyan deeds of gift has, from the number of cases cited, been often raised in these Courts before, and at any rate from the later authorities the law seems to be clearly laid down. The difficulties arise in the application of the law to the circumstances of each case. The Kandyan law to be gathered from these authorities appears to be as follows. All deeds of gift of lands, excepting those made to priests and temples, are revocable during the lifetime of the donor. That general rule, however, is subject to certain qualifications. I cannot do better here than set out an extract from *Armour* cited in *Tikiri Kumarihamy v. de Silva*[1] and in *Banda v. Hetuhamy*[2] in the following terms:—

"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 donor's debts and also render assistance and support to the donor during the remainder of his life, and if the said deed contain 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 purchaser 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

[1] *9 N. L. R. 211.* [2] *15 N. L. R. 194.*

1926.

DALTON J.

Ukku Banda v. Paulis Singho

proprietor . . . . If the proprietor did by a regularly executed deed transfer any landed property to a public functionary in lieu of a fee that was justly due, or to any person whomsoever, in recompense for favour and assistance already received, and if that deed expressly debarred the donor and his heirs from reclaiming the said property, in such case the gift or transfer shall be irrevocable."

The deed P 2, it must be noted, is not a conditional one, but it contains in clear and express terms that it is irrevocable. The cause or reason actuating the gift is the love and affection of the husband for his wife, a contract of beneficence as it is sometimes called. There is apparently no prohibition of donations between husband and wife in Kandyan law. It has been argued in this case, as has been done in some of the authorities cited, that no authority could be produced to show that such deeds, even if the power of revocation is renounced, are irrevocable. Many of the cases, it is true, refer to the difficulty of extracting any definite principle governing the question, but it would appear that the principle on the power of revocation is founded to a great extent of the conditional nature of most of these deeds. (See opinion of Sir Charles Marshall referred to in *Tikiri Kumarihamy v. de Silva* (*supra*) and Middleton J. in *Banda v. Hetuhamy* (*supra*).) And in the latter case Lascelles C.J. points out that the principle laid down by *Armour* in the extract I have cited involves an examination of the deed in order to ascertain the true intention of the parties. He continues :—

"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 observation of the stipulations subject to which the donation was made."

This view of the law was approved of and followed in *Kirihenaya v. Jotiya* (*supra*), where the Court (Ennis and Schneider JJ.) definitely laid down that the governing factor was the true intention of the parties. To ascertain that the deed of gift itself must be examined and, where the deed expressly renounces the right of revocation and the gift is not dependent on any contingency, the gift is irrevocable. In a subsequent case (*Dharmalingam v. Kumarihamy*[1]) the Court (De Sampayo and Schneider JJ.) seem to have acted upon exactly the same principle, but were unable to find in the deed that the donor had expressly renounced the right of revocation.

As in that case, so here in the course of the argument addressed to us, we have been asked to take into account the question of consideration which has appeared to have influenced some of the decisions, and on that point I would repeat and lay stress upon the

[1] *(1925) 27 N. L. R. 8.*

opinion of Wood Renton J. in *Tikiri Kumarihamy v. de Silva* (*supra*), cited with strong approval by Schneider J. in the last case above mentioned. We must look to "the real nature of the transaction and to the intention of the parties," and not allow "opportunities for the evation of obligations which have been seriously undertaken, on the faith of which extensive dealings with property may have ensued and which ought in the interests of public and private honesty to be strictly enforced."

Mr. Navaratnam's lucid argument on behalf of the respondent, if I may be allowed to say so, said all that could be urged on behalf of the respondent, but he did not convince me as to the soundness of his case.

I am unable to agree with the learned trial Judge that the words in the deed renouncing the right of revocation are not an express and unmistakable renunciation of the power; I must admit I am not able to appreciate what he wishes to convey in his conclusion that the words "absolute and irrevocable" in the deed are "nothing more than words as are really found in deeds of gift." What happened in relation to the mortgage in 1921, and anything set out in the deed of revocation P 2 in 1923, many years after P 1 was executed, are in my opinion immaterial to the point to be decided. There was a tentative suggestion that P 1 might be regarded as a *donatio mortis causa*, on the supposition that the donor was in prison at the time he executed the deed, on a charge of murder, but there is nothing to show whether he was convicted, or if he was convicted, for what offence he was convicted, or how long he was in prison.

Applying the law set out in the authorities to which I have referred to the facts of this case, I find the donor clearly and expressly renounced the right of revocation, and hence his subsequent revocation was invalid. The appeal in my opinion should be allowed, and judgment be entered for the defendants, dismissing plaintiff's action, with costs.

The appellants are entitled to the costs of this appeal.

JAYEWARDENE A.J.—

We have had the advantage of an able and interesting argument in this case which once more raises the oft-debated question of the revocability of deeds of gift under the Kandyan law.

The facts, and the material portions of the deed of gift, are given in the judgment of my brother Dalton. The gift was made in consideration of "love and affection" and as a gift "absolute and irrevocable." Under the *habendum* clause the donee was to have and hold the properties donated "absolutely for ever." The donor agreed with the donee, who was present at the execution of the deed, and accepted the gift thankfully, to warrant and defend the title conferred "against any person or persons whomsoever."

1926.

JAYEWARDENE A.J.

Ukku Banda v. Paulis Singho

The question we are called upon to decide is whether such a deed of gift is revocable. The learned District Judge held it was revocable in the absence of an express and unmistakable renunciation of the power of revocation embodied in the deed itself. The words " absolute and irrevocable " were, in his opinion, insufficient, as they were usually found in deeds of gift, and he also thought the donor never intended to deprive himself of the right of revocation. In support of his view, he points out that when the heirs of the donee mortgaged one of the lands gifted, the donor became a party to the bond and signed it as a co-mortgagor. This decision has been assailed both on authority and on principle.

The general rule of Kandyan law is thus stated by Sawers :—

> " All deeds of gift, excepting those made to priests and temples, whether conditional or unconditional, are revocable by the donor in his lifetime, but should the acceptance of the gift involve the donee in any expense, he, the donee, must be indemnified, on the gift being revoked, to the full amount of what the acceptance of the gift may have cost him, either directly or by consequence, but this rule applies only to gifts made by laymen. Moreover, this rule is to be understood to apply only to gifts of land, or of the bulk of the donor's fortune of goods and effects; as presents if given out of respect or from affection at the moment (or in thankful acknowledgment of a benefit or service rendered to the donor) are not revocable. And in respect to the claims of indemnification by the donee, on the gift being revoked, this is only to be understood to apply to the gifts made to strangers or other persons, not heirs by law to the donor ; for gifts to children, if revoked, give such a donee no claim to compensation."

There were, however, exceptions to this rule, and a deed of gift became irrevocable if the donor stipulated that the donee should pay off his debts and also render assistance and support to the donor during the remainder of his life, and the donee pays off the debts, provided the deed contained a clause debarring the donor from revoking the gift and resuming possession of the property gifted. In such a case the donee acquires, the rights of a purchaser, but continues under the obligation to render assistance and support to the donor (*Perera's Armour, p. 95*).

The text books contain no reference to gifts granted for " love and affection " or " free will gifts," and the judgments of our Courts have to be looked into in deciding upon their nature and revocability. In an old case (1835) reported at page 15, *Austin's Reports*, a deed of gift in which no consideration, past or future services, or conditions were mentioned, came before the District

Court of Kandy, and the District Judge, who was asked for information as to whether, in his opinion, the deed of gift was from its terms "absolutely irrevocable" as a matter of fixed Kandyan law, reported "that the *general* rule of Kandyan law on the subject of deeds of gift having effect in the lifetime of the donor is that they are revocable by the donor in his lifetime. To this rule, however, there is a direct exception of all gifts of land to priests or temples. Some precedents may also be adduced from the late Judicial Commissioner's Court of decrees (subsequently affirmed by His Excellency the Governor) which directly set forth the principle that where a clause is inserted by consent of the donor, expressly debarring him from the privilege of resumption, the deed is irrevocable. (See *Makundara Mohottala v. Mahala Sobita Oonanse*, decided September 4, 1817, and affirmed in appeal December 15, 1819. Also *Mugahagey Bandulahamy v. Galagodda Dissawe*, decided February 14, 1822, and affirmed in appeal March 19, 1825.) It would seem, therefore, that the deed executed by the two sisters in favour of defendant is *irrevocable*, inasmuch as it contains the words *he shall possess the same without disturbance, and neither of us nor any descendant of ours can hereafter resume or give away the same.*" This Court affirmed the judgment of the Court below, but ordered the donee to provide for the maintenance of the donor, as the evidence showed that he had agreed to do so.

The next case dealing with a deed of gift of this character is the case of *Molligoda v. Keppetipola* (*supra*). There the gift was by a wife to her *binna*-married husband, and the donor had "renounced her right of revoking the gift as well as her Kandyan law right to 'alter, cancel, or break' the same." The District Judge in the course of his judgment said that the deed was revocable as it did not fall within any of the exceptions expressly mentioned by *Armour*. The report shows that an interesting argument took place at the hearing of the appeal, and emphasis was laid on the use of the words shall not "alter, cancel, or break," which it was pointed out were stronger than the words used in any deed of gift which had come before the Courts, and amounted to a renunciation of the right of revocation, and the principle that a party can renounce a right which the law creates in his favour was also relied upon. But this court merely affirmed the judgment without giving reasons for its decision.

In *Ukku v. Dintuwa*,[1] which has been often overlooked owing to the absence of any indication in the rubric or head note of the report that it is a case dealing with the Kandyan law of gifts, the gift was on the face of the deed made out of "free will and affection" and contained the following undertaking by the donor :—

> "Therefore, I, the said Dintuwa, or any of my heirs, descendants, or any person whomsoever, on my behalf, cannot hereafter make any dispute whatever, either by word or deed,

[1] *(1878) 1 S. C. C. 89.*

1926.

JAYEWARDENE A.J.

Ukku Banda v. Paulis Singho

with respect to this gift. I have hereby empowered the said Kira Veda and Ukku, and their heirs, descendants, and administrators, to possess the said two lands, with everything on them, from this day hereinafter for ever in *paraveni* and to do anything they please with the same."

It appears to have been taken for granted that this deed of gift was, on the face of it, revocable, but the donee succeeded in proving that the true consideration for the gift was the marriage of the donee with the donor's son, and not as stated in the deed. In the course of the judgment, the Court (Phear C.J. and Dias J.) said that by relying on the untrue statement in the deed of gift that the gift was made solely out of free will and affection " and by taking it as a fact, the donor has been able to assume a power of revocation which he did not in law possess . . . . ." That case is not a direct authority in support of the view taken by the learned Judge in this case, but it may be relied on as a valuable authority by implication.

Then we come to the case of *Molligodde v. Sinnetamby* (*supra*), in which the deed of gift contained the following clause in its operative part :—

" . . . . . and I have not heretofore done or committed any act whatsoever against this sale, and that hereafter neither myself or any other of my descendants, heirs, executors, administrators, or assigns whomsoever can raise any dispute either by word or deed, and that should any such dispute arise, either I myself or my heirs, executors, administrators, or assigns shall free the same, and that from this day forth the said Ganpanguwa the said Tikiri Banda or his heirs, executors, administrators, or assigns are hereby empowered to possess, subject to the regulations of Government, and doing whatsoever they please."

The deed was in form a deed of sale, but this Court held that it was a voluntary deed. By a subsequent deed the grantor purported to revoke it. In a considered judgment, in which many of the previous decisions, including the case reported in *3 Lor. 24* (*supra*), were discussed, the Court (Clarence and Dias JJ.) held that the deed was revocable. On the question of the renunciation of the right to revoke nothing definite was laid down, it merely stated that *if it is possible* for a Kandyan donor to renounce the right, he should do so in express and unmistakable language. This case is therefore not an authority for the appellants' contention.

The next case in which a similar deed of gift came before this Court is *Kirihenaya v. Jotiya* (*supra*). During the forty-four years that elapsed between those two cases, several cases have been decided in which the question of revocability has been discussed. But these are

cases in which gifts had been made in consideration of money payments, or marriage, or for past services, or conditionally on the donee paying off the debts of the donor, or rendering services in the future. They have no direct bearing on the question arising here, but in the course of his judgment in *Tikiri Kumarihamy v. de Silva* (*supra*) Wendt J. observed "that the tendency has been in the direction of restricting the power of revocation, and thereby assimilating the Kandyan customary law to the common law of the land." In *Kirihenaya v. Jotiya* (*supra*) the deed of gift was granted to the donor's grandson in consideration of his "filial love and affection, and various other good qualities, and for the sake of his future welfare," and it contained the following clause renouncing the right to revoke :—

> "And I hereby declare that I shall not revoke the deed of gift at any time in any manner or change it in any way after date hereof. Therefore, the said Vidanehenayalage Abanshiyahenaya, or his heirs, &c., from date hereof, can possess and own the said undivided shares of lands so gifted, and I shall have no claim whatever to them ; and further, the said donee and his heirs, &c., can do anything they like with the said property."

The Court (Ennis and Schneider JJ.) held that the deed of gift was irrevocable. Ennis J., who delivered the judgment of the Court, after referring to the case reported in *Austin's Reports, p. 15*, (*supra*), and *Banda v. Hetuhamy* (*supra*), said :—

> "These two judgments in my opinion show the principle that should be followed in deciding questions of this sort which arise on Kandyan deeds of gifts. The deed itself must be examined in order to ascertain the true intention of the parties, and where the deed of gift expressly renounces the right of revocation, and the gift is not dependent on any contingency, the gift is irrevocable. The reason would seem to be that a deed of gift is a contract, and there is no rule of law which makes it illegal for one of the parties to the contract to expressly renounce a right which the law would otherwise give him or her."

This is a very strong authority in favour of the appellant's contention. It is practically on all fours with the present case, the only difference being that the donor here has stated in one or two words "absolute and irrevocable," what the donor there took a whole clause to express. It was cited to the learned District Judge, who thought it was inapplicable for the reasons I have already referred to. When a contract is in writing—a deed of gift is a contract—the intention of the parties must be gathered from a consideration of the terms of the writing, and not from extrinsic circumstances. The terms of the deed of gift in this case are

1926.

JAYEWARDENE A.J.

Ukku Banda v. Paulis Singho

unambiguous, and there is nothing in the document to show that when the donor said he gave the property as a gift "absolute and irrevocable" he did not mean what he said, or said what he did not mean. The court cannot give effect to any intention which is not derived from the language used in the writing, especially when, as here, third parties have entered into the transaction on the faith of the terms of the document. The case of *Kirihenaya v. Jotiya* (*supra*) is, to my mind, indistinguishable from the present case.

In a later case, *Dharmalingam v. Kumarihamy* (*supra*), the same question was again raised. There the deed of gift was in favour of the donor's daughter in consideration of love and affection, and the donee, her heirs, &c., were empowered to hold and possess "this gift from this day, or deal with the same as to will and pleasure," and the donor, for herself, &c., agreed "not to raise or utter any dispute whatsoever against this gift and donation." The Court (De Sampayo and Schneider JJ.) held that the deed of gift was revocable. Schneider J., who delivered the judgment of the Court, held that the clause above quoted had not the effect of debarring the donor from revoking the deed, distinguishing the case from *Tikiri Kumarihamy v. de Silva* (*supra*) owing to the absence of the words "hold and possess for ever," which he thought were the pregnant words there. Dealing with the general question whether under the Kandyan law a donor has the right to renounce the right of revocation, whatever be the consideration for the gift, upon the principle *unicuique licet juri in favorem suum introducto renunciare*, the learned Judge observed that the question had been argued in previous cases and required careful consideration. As the case before him did not require the determination of the question he left it open. The case of *Kirihenaya v. Jotiya* (*supra*) was not cited at the argument, and no reference to it appears in the judgment. *Dharmalingam v. Kumarihamy* (*supra*) cannot govern the decision of this case, as the gift here was to be regarded as "absolute and irrevocable," and the donee was to have and to hold the property gifted "absolutely for ever."

Such is the state of the authorities. They are conflicting. I do not, however, see any reason why at the present day the ordinary laws of contracts should not be held applicable in the case of Kandyan deeds of gift, and why parties to such deeds should not be allowed to enter into any lawful pacts or terms which are not subversive of the essential requisites of such contracts. In view of the law as laid down in the decided cases, it cannot be said that an agreement renouncing the right to revoke is subversive of the essential character of a gift under the Kandyan law. Although under our common law—the Roman-Dutch law—deeds of gift are irrevocable, yet it has been held that it is lawful for a donor to reserve to himself the right of revocation : *The Government Agent, Western*

Province, v. Palaniappa Chetty,[1] where Hutchinson J. said that he saw nothing in such a power of revocation which is opposed "to any enactment, or to public policy or to morality," and *Ponnamperuma v. Gunasekera*.[2] So, in the same way under the Kandyan law, according to which deeds of gift are, as a rule, revocable, it should be lawful for the donor to agree that his gift should be irrevocable.

I would, therefore, accept the law as laid down in *Kirihenaya v. Jotiya* (*supra*), which upholds this principle, and say that in the deed of gift in question in this case the donor has renounced the right to revoke it, and that the renunciation is effective. By doing so I would be advancing the trend of judicial decisions on the subject, as noted by Wendt J., and assimilating the Kandyan customary law to the common law of the land and to a universally accepted principle of the law of contract.

I agree to the order suggested by my brother, whose judgment I have had the advantage of reading.

Appeal allowed.