1968 *Present :* **H. N. G. Fernando, C.J., and Wijayatilake, J.**

K. M. R. H. KEKULANDARA, Appellant, *and*
T. B. MOLAGODA, Respondent

S. C. 301/66 (F)—D. C. Kegalle, 15263/L

Kandyan law—Deed of gift executed prior to year 1939—Revocability—Effect of words such as "the donee shall possess for ever"—Kandyan Law Declaration and Amendment Ordinance (Cap. 59), ss. 4 (1), 5.

In a clause in a Kandyan deed of gift, which was executed prior to the commencement of the Kandyan Law Declaration and Amendment Ordinance, the donors recited that they "do hereby transfer set over and assure by way of gift unto the said Donee his heirs executors administrators and assigns the said several premises . . . . and all the estate right title interest claim and demand whatsoever of us the said Donors into upon or out of the said premises hereby gifted and assigned and each of them and every part thereof which are of the value of Rupees One Thousand (Rs. 1,000) unto the said donee his aforewritten *for ever*".

Held, that the gift was revocable as against the donee (even if the proviso to section 4 (1) of the Kandyan Law Declaration and Amendment Ordinance was intended to protect a donee). Words such as "the donee shall possess for ever" could not, by themselves and without more, constitute an effective renunciation of the right of revocation.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, Q.C., with *C. R. Gunaratne* and *T. B. Dissanayake*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *Ananda Paranavitane*, for the defendant-respondent.

Cur. adv. vult.

September 27, 1968. H. N. G. FERNANDO, C.J.—

The plaintiff sued the defendant for a declaration of title to two lands conveyed to the plaintiff by one Senaratne Banda on Deed No. 829 of 27th April, 1961. Senaratne Banda himself had acquired the two lands from one Bandara Menike by a deed of 20th November 1956, P3.

The defendant, who is a son of one M. B. Mollegoda, claimed that Bandara Menike had by a deed of Gift of 7th August 1935, P1, donated these lands to his deceased father. Bandara Menike by deed P2 of 20th November 1956 purported to revoke the donation which she had made to the difendant's deceased father by P1. It was agreed between

the parties at the commencement of the trial that if the donation P1 was irrevocable the plaintiff will have no title, and on the other hand that, if P1 is held to have been revocable, the plaintiff will have title to the lands by virtue of the deeds P2 and P3. The learned District Judge has held against the plaintiff that P1 was not revocable. This appeal is against that finding.

The only provision in P1 upon which the trial Judge relied is the clause in which the Donors recite that they "do hereby transfer set over and assure by way of Gift unto the said Donee his heirs executors administrators and assigns the said several premises . . . and all the estate right title interest claim and demand whatsoever of us the said Donors into upon or out of the said premises hereby gifted and assigned and each of them and every part thereof which are of the value of Rupees One Thousand (Rs. 1000/-) unto the said donee his aforewritten *for ever*". The construction which the learned Judge placed on this clause is made clear in the following passage from his judgment :—

> "In my view these words show that the Donors surrendered every right or demand that they had over the premises gifted to the Donee for ever. To my mind these words clearly show that the Donors surrendered all their rights including their right of revocation."

The admissions of the parties at the commencement of the trial establish that both Bandara Menike and her son the Donee on P1 were persons subject to the Kandyan Law. The law relating to the revocation of a deed of donation by such a person is the subject of statutory provision in the Kandyan Law Declaration and Amendment Ordinance, Cap. 59. Section 4 of that Ordinance provides as follows :—

> "4. (1) Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation :
>
> Provided that the right, title, or interest of any person in any immovable property shall not, if such right, title, or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted."

Section 5 of the Ordinance provides that it shall not be lawful for a donor to cancel or revoke gifts of a specified description made *after the commencement of the Ordinance*, and sub-section (2) of Section 5 makes it clear that these limitations on revocability do not affect gifts made

before the commencement of the Ordinance. Accordingly Section 4 (1) is the relevant provision applicable in the case of the gift P1, which was made before 1st January 1939.

The substantive provision in Section 4 (1) declares the right of a donor, without any fetter or limitation, to revoke a gift made before 1st January 1939, but the proviso to this sub-section does impose a limitation, namely that a revocation must not prejudice any right title or interest of *certain persons* to a greater extent than it might have been prejudiced under the law applicable before 1st January 1939. Counsel for the plaintiff in the present appeal has argued that the protection intended by the proviso is only for persons other than a donee himself. It turns out however that the plaintiff must in any event succeed in this appeal, even if the proviso was intended to protect a donee. I shall therefore assume for the purpose of this case that the revocation of a gift made before 1st January 1939 will be effective against every person, including a donee, whose right title or interest accrued before 1st January 1939, only to the same extent as it would have been effective under the law prevailing before 1939.

A very early case on the subject of the revocation of a Kandyan deed of Gift is that of *Kiri Menika v. Cau Rala* [1]. According to the report the deed in this case gave certain lands to the donee "to be possessed finally as paraveni property". But it appears that the report of this case is incorrect or incomplete, in that it did not fully set out the terms of the deed then under consideration. This matter is made clear in the judgment of Justice Wood Renton in the case of *Kumarihamy v. de Silva* [2]. The learned Judge there said that he had looked at the text of the record itself of the 1858 case, and he specified the relevant provisions of the deed, which were :—

(1) It transferred the lands to the donee "to hold finally in paraveni".

(2) It provided further that in future "I myself (the donor) or any one else who may descend from me or any person or persons who may receive administrations (*sic*) over my estates from this day shall do or say no dispute", and

(3) It had a clause that the donee may dispose of the property according to pleasure.

The brief judgment as reported in *Lorenz*, stated that "the donor having renounced on the face of the deed her right to revoke the Supreme Court considers the deed irrevocable". The judgment in this case was one of a Full Bench and is therefore binding on me. Having regard to the brief terms of the judgment, it is unsafe to think that the Court, in holding that the donor had renounced her right to revoke, relied particularly only *on any one* of the provisions of the deed which I have cited above. The only safe inference in my opinion is that the Court

[1] *(1858) 3 Lorenz Appeal Reports, p. 76.* [2] *(1906) 9 N. L. R. 202 at 214.*

relied on all the provisions taken together. The 1858 decision is thus not authority for the proposition that words such as " the donee shall possess for ever " constitute by themselves a renunciation of the right of revocation.

The case of *Kumarihamy v. de Silva* was heard in review by the Full Court, whose judgments are reported at 12 N. L. R., p. 74. Justice Wendt in his judgment in review adds nothing of interest to what he had stated in his judgment after the original hearing (9 N. L. R. 202, at 207). In that judgment he reproduced in its entirety the provisions of the deed which he ultimately held to be a provision against revocation. Those provisions (*vide* page 208) were substantially similar to the provisions of the deed in the earlier 1858 case, in that they recited that the donor or his heirs, etc., shall not raise any dispute whatsoever against this donation, and that the donee and her heirs shall according to pleasure hold and possess for ever.

Middleton J.'s judgment in the hearing in review does not deal with the form of words necessary to constitute an effective renunciation of the right to revoke a gift, and Hutchinson C.J. also appears to have reached without difficulty the conclusion that the language of the particular deed effected a renunciation. More consideration however was given to this matter by Wood Renton J., who only participated in the original hearing. Having cited the provisions of the particular deed, he stated as follows :—

> " Taken by themselves, the cases of *Kiri Menika v. Cau Rala* and *Heneya v. Rana* constitute clear and binding authority in favour of the irrevocability of the deed now in question. Here, as there, a pecuniary consideration is disclosed ; and in all three cases the terms of the debarring clause are substantially identical."

As to the question therefore of the language which can be properly held to be an effective renunciation of the right of revocation, the judgments in the case of *Kumarihamy v. de Silva* fairly establish in my opinion that, just as in the 1858 case of *Kiri Menika v. Cau Rala*, the Court relied on *all the provisions* of the deed for the conclusion that there had been an effective renunciation.

In *Dharmalingam v. Kumarihamy*[1], the head note of the report correctly reads as follows :—

> " Where a Kandyan deed of gift contained a clause, which gave the donee the right to deal with the property gifted as ' to will and pleasure ', coupled with a promise not to ' raise or utter any dispute whatever ', *held* that the gift was revocable."

But in this case Schneider J., in referring to the 1858 case of *Kiri Menika v. Cau Rala*, appears to have relied on the report in *Lorenz* as to the provisions of the deed in the 1858 case, and to have thought therefore that in the 1858 case the Full Bench had held that the words " to be

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

possessed finally as paraveni property " constituted a renunciation of the right of revocation. But I have already pointed out that in fact (as stated later by Wood Renton J.) the deed in the 1858 case contained three provisions, and not merely the single provision " that the donee shall possess for ever ".

Perhaps also because of this incorrect impression in his mind concerning the 1858 case, Schneider J. in *Dharmalingam v. Kumarihamy* [1] said that " in *Tikiri Kumarihamy's case* the pregnant words were that the donee shall 'hold and possess for ever'." But Schneider J. himself thought fit, when setting out the relevant portions of the deed which he was actually considering, to quote also the provision that the donor and his heirs, etc., have hereby promised not to raise or enter any dispute whatsoever against the gift. In these circumstances I am unable to agree that the judgment of Schneider J. is acceptable authority for the proposition that the formula " the donee shall possess for ever " constitutes, by itself and without more, an effective renunciation of the right of revocation.

The case of *Ukku Banda v. Paulis Singho* [2] is not of much assistance upon the question I am now considering, because there the terms of the deed were that the land was given " as a gift absolute and irrevocable ", language which placed beyond doubt the intention to renounce the right of revocation.

A judgment of 1878 which is reported in 7 S. C. C., p. 118, held that a gift, which included an undertaking by the donor not to raise any dispute and a provision that the donee and the heirs etc., shall possess doing whatsoever they please, was revocable, the Court not being disposed to infer a renunciation from what was viewed as only words of further assurance. Counsel for the defendant in the present case has relied on this judgment for the argument that in the 1858 case the effective words of renunciation were " the donee shall possess for ever ", and that (as Schneider J. stated) these words would be the pregnant words of renunciation. It seems to me however that in considering whether a donor has expressed an intention that he will not revoke his donation, the Court must search for some language equivalent in meaning to " I will not revoke this deed ", and that words such as " I will not raise any dispute against this donation " are more nearly equivalent to the exact formula than any such language as " I give it to the donee for ever ". A donor who states that he will not raise any dispute against his donation might fairly be said to be making a promise that he will not interfere with the title of his donee, and in my opinion he would commit a breach of that promise if he does interfere with the title by revoking the donation.

I would therefore respectfully agree with Garvin J. when he said in the case of *Gunadasa v. Appuhamy* [3] that the words " for ever " make no difference to the meaning of a clause in a gift and that such words merely manifest an intention to vest the donee with full dominion. The

[1] *(1925) 27 N. L. R. 8 at p. 13.* [2] *(1926) 27 N. L. R. 449.*
[3] *(1934) 36 N. L. R. 122.*

decision of Garvin J. that giving property to the donee "for ever" is not an expression of renunciation of the power to revoke, does not in my opinion conflict with any of the earlier decisions which were cited to us.

Counsel for the defendant also invited us to take the view that, in considering whether a donor has sufficiently expressed a renunciation of the right to revoke, a distinction should be made between conditional and unconditional gifts. He argued that in many of the cases the question of renunciation has been decided with reference to deeds which were conditional on the affording of succour and assistance by the donee, and that even if the words "gift to the donee for ever" may be held to be insufficient in such deeds, the same language should nevertheless be considered sufficient in the case of unconditional gifts made purely out of love and affection. I find nothing in the past judgments of this Court to justify any such distinction. A donor must be presumed to be aware of his legal right to revoke a donation, irrespective of whether the donation is made with or without expectation of succour and assistance from the donee. In a case where there is such an expectation, it seems proper to attribute to a fair-minded donor an intention that he will not revoke the donation unless his expectation proves to have been optimistic. But where a gift is made purely out of love and affection, that is, entirely for the benefit of the donee, it is more reasonable to attribute to the donor the intention that his legal right of revocation will be unfettered. In this sense, a donation made purely out of love and affection contains far less of the element of contractual obligation than does the conditional donation. If then a renunciation of the right of revocation is to be more readily inferred in one case rather than in the other the Courts should in my opinion reach that inference more readily in the case of the conditional gift, where the element of contractual obligation is more evidently present than in a case where a gift is unconditional. A distinction between cases of the two different classes, even if justifiable, would thus be unfavourable to the defendant in this case.

I hold for these reasons that the deed P2 was a valid revocation of the donation P1.

As I have earlier indicated, the District Judge was invited to decide this case purely upon admissions made by Counsel on behalf of the parties. In consequence, the need to prove the title of the plaintiff was overlooked. The decree under appeal is set aside *pro forma* and the record is returned to the District Court, when the plaintiff will be given an opportunity to prove his title on the assumption that the donation P1 of 1935 was validly revoked by P2 of 1956. If the title is proved to the satisfaction of the District Judge, he will enter decree in favour of the plaintiff in terms of settlement recorded in Court on 29.4.1966; if not, he will again dismiss the plaintiff's action with costs. The plaintiff will be entitled to the costs of this appeal.

WIJAYATILAKE, J.—I agree.

Decree set aside pro forma.