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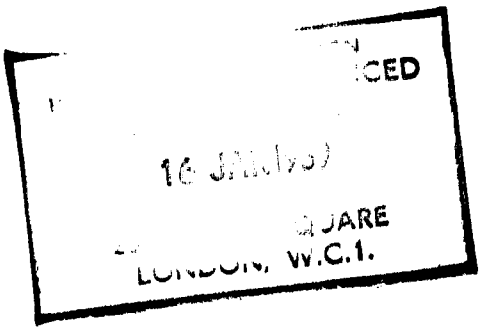

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

B E T W E E N

TIKIRI BANDA DULLEWE (Defendant-Appellant)

APPELLANT

- and -

1. PADMA RUKMANI DULLEWE
2. LOKU BANDA GIRAGAMA (Plaintiffs-Respondents)

RESPONDENTS

C A S E FOR THE APPELLANT

1. This is an appeal from the judgment and decree dated the 3rd of December 1965 of the Supreme Court of Ceylon (T.S. Fernando and Sirimanne, JJ.) dismissing with costs the appeal of the Appellant from the judgment and decree of the District Court of Kandy. The District Court of Kandy held that Deed of Gift No. 183 dated the 26th of May 1941 (P1) (whereby the donor conveyed to the donee, inter alia, the lands described in the schedule to the plaint) was irrevocable in that the description of the gift as "irrevocable" in the said deed itself constituted an express renunciation of the donor's right of revocation as required by the Kandyan Law Declaration and Amendment Ordinance (Cap. 59), and that accordingly the 1st Respondent above named, as the fideicommissary heir, was entitled to the said lands described in the schedule to the Plaint. The learned District Judge held that Deed No. 9048 of the 26th of October 1943 (P2), whereby the donor purported to revoke the said Deed of Gift in respect of the said lands, and Deed No. 9049 of the 26th of October 1943 (P3), whereby the donor purported to convey the said lands to the Appellant, were of no effect and did not operate to convey title to the Appellant.

p.48 l.15 - p.49 l.37
p.50
p.33 l.24 - p.34 l.38
p.35 l. 1
p.43 l.11
p.77 l.22 - p.88 l.43
p.89 l.1 - p.98 l.39

2. The 1st Respondent, appearing by her next-

friend the 2nd Respondent, instituted this action against the Appellant by her plaint dated the
p.11 l.1 - 18th of May 1959, praying for a declaration that
p.24 l.26 the 1st Respondent be declared entitled to the lands described in the schedule to the Plaint and for damages. The 1st Respondent claimed title through one Loku Banda Dullewe Rate Adigar, admittedly the original owner of the lands in
p.57 l.1 - suit, upon a Deed of Gift No. 183 (P1) dated the
p.77 l.21 26th of May 1941, whereby, inter alia, the lands in suit were gifted to one Richard Dullewe, the father of the 1st Respondent, subject to a fideicommissum in favour of his children. The said Richard Dullewe died in May 1943 leaving the 1st Respondent as his only child.

The said Deed provided, inter alia, as follows:-

"WHEREAS the Donor is seized and possessed and lawfully entitled to the several lands and premises in the Schedule hereto more fully described.

AND WHEREAS the said Donor is desirous of gifting the said lands unto his son ..... Richard Dullewe ..... subject to the condition hereinafter contained.

NOW KNOW YE AND THESE PRESENTS WITNESS that the said Donor in consideration of the love and affection which he has unto the said ..... Richard Dullewe (hereinafter sometimes called the said Donee) ..... doth hereby grant, convey, assign, transfer, set over and assure unto the said Donee as a gift irrevocable but subject to the condition hereinafter contained.

All those premises in the Schedule hereto of the value of Rupees Ten Thousand (Rs.10000/-) only, ...

"TO HAVE AND TO HOLD the said lands and premises hereby conveyed unto the said Donee subject to the condition that the said Donee shall not sell, gift, mortgage or otherwise alienate or encumber the said premises (but may lease the said premises for a period not over five years) and after his death the same

shall devolve absolutely on his legal issue and in the event of his dying without legal issue the premises shall devolve absolutely on ..... TIKIRI BANDA DULLEWE ....."

3. The Appellant by his Answer dated the 7th of July 1959, admitted (a) that the said Loku Banda Dullewe Rate Adigar was the original owner of the said lands, (b) the bare execution of the said Deed No. 183, and (c) the death of the said Richard Dullewe. p.24 l.27 - p.26 l.11

The Appellant averred that the said Loku Banda Dullewe Rate Adigar by Deed No. 9048 of the 26th of October 1943 revoked the said Deed No. 183, and by Deed No. 9049 of the 26th of October 1943 gifted the said lands to the Appellant.

4. At the trial the following issues were accepted, and at the conclusion of the trial were answered as follows, by the learned District Judge:- p.32 ll.10-15 p.34 ll.20-26.

(1) Was deed No. 183 of 26. 5.41 a revocable deed?

Ans. No.

(2) If not, is the plaintiff entitled to claim all the lands on the said deed of gift?

Ans. Yes.

(3) Is the purported revocation 9048 of 1943 bad and ineffectual in law?

Ans. Yes.

(4) Damages?

Ans. Damages agreed upon between the parties at Rs.6000/- up to 30th August, 1963, and further damages at Rs.1000/- a year till the plaintiff is restored to possession.

5. The learned District Judge held, following a decision of the Supreme Court in Punchi Banda v. Nagasena, 64 N.L.R. 548, that the use of the single word "irrevocable" in a Kandyan deed of

gift is sufficient to constitute an express renunciation of the right to revoke the gift, and that accordingly the said Deed No. 183 was irrevocable. He gave judgment for the 1st Respondent declaring her entitled to the lands described in the schedule to the plaint (the description of land No. 43 being amended to read "an undivided ¼th share" instead of one-half share), and for ejectment of the Appellant therefrom together with damages fixed at Rs.6000/- up to 30th August, 1963, and thereafter at Rs.1000/- per year until the 1st Respondent is restored to possession of the premises, and costs.

6. The Appellant appealed to the Supreme Court against the said judgment and decree of the
p.46 l.15 - p.48 l.14 District Court, by his petition of appeal dated the 9th of August 1963. The Supreme Court dismissed the appeal, following the previous decisions of the Supreme Court in the case of Punchi Banda v. Nagasena, 64 N.L.R. 548, (which was cited and followed by the learned District Judge) and in the unreported case of Kuruppu v. Dingiri Menika (S.C. 161/62 (F) - D.C. Kandy 6442 - S.C. Minutes of 5.12.1963). The Supreme
p.48 l.32-36 Court held that "by the use of the single word 'irrevocable' in a Kandyan deed of gift the donor may, under section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59), expressly renounce his right to revoke the gift".

7. The relevant provisions of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59) are 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.

(2) No such cancellation or revocation of a gift effected after the commencement of this Ordinance shall be of force or avail in law unless it shall be effected by an instrument in writing declaring that such gift is cancelled or revoked and signed and executed by the donor or by some person lawfully authorized by him in accordance with the provisions of the Prevention of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

5. (1) Notwithstanding the provisions of section 4 (1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance:-

(a) .....

(b) .....

(c) .....

(d) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument:

Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such instrument bears stamps to the value of five rupees and is executed in accordance with the provisions of the Prevention

of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

(2) Nothing in this section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance.

8. It is respectfully submitted that the learned District Judge and the learned Judges of the Supreme Court were wrong in their interpretation of Sections 4 and 5(1)(d) aforesaid.

Sections 4 and 5(1)(d) were intended to, and do, give effect to the recommendations of the Kandyan Law Commission in paragraphs 48 and 58 of its Report (Sessional Paper XXIV of 1935):

"48. ..... We accordingly recommend that the general rule of Kandyan Law that a gift is revocable should be retained.

58. On a consideration of all the authorities bearing on the point we have come to the conclusion that to minimize the evils of litigation and to give a certain amount of security and stability to titles derived by deeds of gift, a clause renouncing the right to revoke made in explicit terms and according to a form prescribed should in itself be sufficient to render a deed, otherwise revocable, absolute and irrevocable, and we accordingly make this recommendation. As regards the actual wording of the form of renunciation, we do not think it necessary to make any suggestion, as this is a matter which may be left to the Legal Draftsman if and when an Ordinance is drafted to give effect to the recommendations we have made in this report."

Section 5(1)(d) refers to an express renunciation by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning, and hence requires (a) a declaration which is made, (b) with conscious reference to the right of revocation and the power to renounce the same.

The words "as a gift irrevocable" in the said Deed No. 183 do not constitute a declaration of the donor's intent to renounce his statutory right of revocation or an exercise of his statutory power to renounce the same, and were not used with conscious reference to his statutory rights and powers. The word "irrevocable" amounts, in the present context, to no more than a notarial flourish and does not manifest any awareness of the existence or the exercise of the power of renunciation.

It is respectfully submitted that the provisions of Section 4 which continued and gave statutory recognition to the pre-existing common law right of a donor to revoke a deed of gift further emphasise the need for an express declaration made with conscious reference to the donor's statutory rights and powers. The correct approach to the question of construction of a Kandyan deed of gift would be to begin with the prima facie presumption that it is revocable, and to refrain from holding that such presumption has been displaced unless there is a clear and unambiguous declaration by the donor that he renounces the right to revoke the gift.

It is respectfully submitted that the approach adopted by the learned District Judge and the learned Judges of the Supreme Court does not give sufficient weight to the express words of Section 5(1)(d) and completely ignores the effect of Section 4.

9. Even if the use of the word "irrevocable" in the said Deed No. 183 was a valid renunciation of the right of revocation insofar as the donee's fiduciary interest was concerned, it is respectfully submitted that there has been no renunciation of the right of revocation in respect of the 1st Respondent's fideicommissary interest.

A gift is in all respects a contract, and just as much as Section 5(1)(d) does not render unnecessary the acceptance of the gift itself, it does not render unnecessary the acceptance of any other contractual right incidental to the gift. Section 5(1)(d) merely indicates the manner in which particular contractual rights may be renounced by the donor and acquired by the donee.

The donee's acceptance of the said Deed of Gift rendered it irrevocable, if at all, only in respect of himself and those claiming through him (such as transferees, and testate and intestate heirs). While such acceptance might have constituted a sufficient acceptance of the fideicommissum by the children of the donee (under the law relating to family fideicommissa), conferring upon them fideicommissary rights to the lands in suit, nevertheless such acceptance does not constitute a sufficient acceptance (under the law of Contract) of the donor's renunciation, if any, of his right of revocation.

It is further submitted that the renunciation, if any, was made by the donor and accepted by the donee with reference to and in respect of the donee alone; the 1st Respondent was born only about two years later, and was not intended to be benefited thereby.

10. It is respectfully submitted that the learned District Judge exceeded his jurisdiction and erred in law in entering a decree for the ejectment of the Appellant from the lands in suit inasmuch as there was no prayer for ejectment in the plaint.

It is respectfully submitted that this appeal should be allowed and the Respondents' action dismissed with costs throughout, for the following among other

R E A S O N S

1. BECAUSE there was no declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning as required by Section 5(1)(d), in the Deed of Gift No. 183;

2. BECAUSE the Deed of Gift No. 183 was revocable, and was in fact revoked by the donor by Deed No. 9048;

3. BECAUSE the donor by Deed of Gift No. 9049 validly conveyed the lands in suit to the Appellant;

4. BECAUSE the Deed of Gift No.183 was revocable,

and was in fact revoked by the donor by Deed No. 9048, at least in respect of the 1st Respondent's fideicommissary interest in the lands in suit;

5. BECAUSE the learned District Judge was wrong in entering a decree for the ejectment of the Appellant from the lands in suit;

6. BECAUSE the judgments of the learned District Judge and of the Supreme Court were wrong and ought to be reversed, and the decisions of the Supreme Court in Punchi Banda v. Nagasena and Kuruppu v. Menika which were followed are wrong and ought to be overruled.

E. F. N. GRATIAEN

MARK FERNANDO

24 OF 1937

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