Privy Council Appeal No. 24 of 1967

Tikiri Banda Dullewe – – – – – – – – *Appellant*

v.

Padma Rukmani Dullewe and another – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER 1968

Present at the Hearing:

LORD HODSON
LORD GUEST
LORD UPJOHN
LORD DONOVAN
SIR THADDEUS MCCARTHY

(*Majority Judgment delivered by* LORD HODSON)

This is an appeal from a judgment of the Supreme Court of Ceylon dismissing the appeal of the appellant from the District Court of Kandy.

The case concerns a Deed of Gift (No. 183) dated 26th May 1941, whereby the Donor Tikiri Banda Dullewe made a gift of certain lands to his son Richard.

The material words following the recitals are:

> "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) and for diverse other good causes and considerations him hereunto specially moving 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. 10,000/-) 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."

It is to be noticed the gift of the lands effected by this deed was expressed to be irrevocable although subject to a condition as expressed. The gift was perfected by acceptance and was properly described as a "Kandyan" gift. No question arises as to its validity.

The Donor however by Deed No. 9048 dated 26th October 1943 did purport to revoke the deed of gift in respect of the lands and on the same date purported to convey them to the appellant.

The action was instituted by the first respondent appearing by her next friend the second respondent on 18th May 1959 praying for a declaration of title to the lands. Her claim rested upon the deed of gift of 26th May 1941. The first respondent is the only child of Richard (the Donee) who died in May 1943 and having come of age is the effective respondent to the appeal.

The appellant's claim rests on the deed of purported revocation executed by the Donor on 26th October 1943 and the conveyance to him by the Donor on the same date.

The Supreme Court, confirming the District Court, followed a previous decision of its own in *Punchi Banda v. Nagasena* 64 N.L.R. 548. The effect of the latter decision was that the use of the word "irrevocable" in a deed of gift was sufficient to constitute an express renunciation of the right to revoke the gift.

The determination of the question under appeal depends mainly upon the true construction of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59 of 1939) which so far as material reads 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 authorised 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*) any gift by virtue of which the property . . . shall vest in the trustee . . . of a temple . . .
>
> (*b*) any gift in consideration of . . . marriage . . .
>
> (*c*) any gift creating or effecting a charitable trust . . .
>
> (*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."

In order to construe the language of 5 (1) which relates to gifts made after the commencement of the Ordinance it is necessary to appreciate what the legal position of gifts was in Kandy before the passing of the Ordinance.

Their Lordships have been referred to the authoritative Treatise on the Laws and Customs of the Sinhalese including the portion still surviving under the name Kandyan Law by the late Dr. Hayley.

From this it appears, and the contrary was not argued, that Sinhalese conveyances of land had the curious characteristic of revocability. This characteristic of revocability is not peculiar to the Sinhalese law: for example in the laws of Babylonia the right to reclaim property alienated was well established.

Although exceptions to the general rule have been recognised in decisions of the courts the opinion of Dr. Hayley was that it would seem that Sinhalese law proper, unaffected by European ideas or judicial decisions knew nothing of renunciation but permitted revocation in every case with the exceptions perhaps of dedications to religious establishments.

The Convention of 1815, by which the Kingdom of Kandy was joined to the rest of Ceylon, did not contemplate any departure from the strict enforcement of the Kandyan customs and usages otherwise than under legislative sanction.

A proclamation of 14th July 1821 recognised the existence of the right to repurchase in some of the Kandyan provinces and declared that all sales of land should be final and conclusive, and neither the seller nor his heirs should have any right to repurchase unless an express stipulation to that effect were contained in the deed.

By abolishing the right of revocation in the case of sale alone the right in other cases was impliedly preserved.

Prior to 1815 a clause of renunciation appears to have been rare or non-existent. An examination of the actual grants contained in the Central Province Gazeteer between 1620 and 1830 shows no example of a clause of renunciation as such. The existence of any rule of law at that time based upon such a clause is therefore highly improbable.

The limitation of the exception to a gift in favour of religious establishments to which Dr. Hayley referred was not universally accepted. According to Armour, one of the institutional writers, other deeds came within the exception and were irrevocable.

It was in dealing with exceptions that uncertainty was created by various decisions of the courts and in 1927 the Kandyan Law Commission was appointed to deal with the matter in view of the doubts which had arisen.

This Commission in 1935 issued the report which their Lordships have looked at in order to see what the position was leading up to the passing of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59 of 1939).

Paragraph 44 which dealt with the revocability of deeds of gift reads: "Although the general rule was that all deeds of gift were revocable by the grantor in his lifetime, this rule seems to have had certain exceptions and it is in laying down what the exceptions were that great difficulty, not to say some confusion, has arisen owing to the very indefinite state into which the law drifted as a result of the construction of deeds of gift, the language of which lent itself to different interpretations."

It was in the light of the findings in this paragraph that the recommendations which led to the passing of the Ordinance were made.

It should be noted that this report is looked at not to ascertain the intention of the words used in the subsequent act but because, to quote and adopt the words of Lord Halsbury L. C. in *Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trade-Marks* [1898] A.C. 571, 575, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission".

An authoritative review of many of these early authorities is contained in the recent case, decided in 1967, of *W. R. W. M. Tikiri Bandara and another v. P. Gunawardena* Vol. LXX, Part 9, N.L.R., page 203. This judgment of the Supreme Court given on appeal from a judgment of the District Court, Ratnapura concerned a Kandyan deed of gift dated 1915 and accordingly not governed by the Kandyan Law Declaration and Amendment Act of 1939. The gift was in terms declared to be " absolute and irrevocable, which shall not be revoked at any time in any manner whatsoever ".

Tambiah J. with whom Sirimane J. agreed concluded his judgment by the words following:

> " . . . the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long established rule affecting title to property should not be interfered with by this Court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason."

If the deed in the instant case fell to be construed in accordance with the pre-1939 law it would no doubt properly be construed, notwithstanding the condition to which the description of the gift as irrevocable is subject, as equivalent to a renunciation of the right to revoke.

Similarly if there were a long line of decisions to the same effect in relation to deeds subject to the Kandyan Law Declaration and Amendment Ordinance of 1939, it would not be desirable to depart therefrom for obvious reasons since many titles to property may be affected.

Since the passing of the Ordinance of 1939, however, it cannot be said that there is a consistent current of authority in relation to such deeds.

In the instant case *Punchi Banda v. Nagasena* (*supra*) was followed by the Supreme Court and in another case decided by the Supreme Court, *Kuruppu v. Dingiri Menika* (S.C. 161/62 (F)—D.C. Kandy 6442—S.C. Minutes of 5.12.1963) the same interpretation was given. On the other hand in the District Court Kurunegala Case No. 10580 and in District Court Ratnapura Case No. 1317 the respective courts have held that the expression " as a gift absolute and irrevocable " does not constitute a sufficient compliance with the requirements of the section. Both of these cases were taken on appeal to the Supreme Court and the appeals were dismissed without reasons given, the former on 11th October 1956 and the latter on 16th September 1960.

The maxim " *contemporanea expositio est optima et fortissima in lege* " gives no assistance in this state of the authorities and it is necessary to examine the language of the Ordinance of 1939 with care for it is upon the language of the Ordinance that the answer to the question whether the purported revocation of the deed of gift of 26th May 1941 is bad and ineffectual in law depends. The Ordinance permits revocation of any gift when the right to cancel or revoke shall have been expressly renounced by the Donor. These words recognise a pre-existing right to revoke and require an express renunciation either in the instrument effecting the gift or in any subsequent instrument. There is a further requirement that the revocation must be effected in a particular way *videlicet* by a declaration containing the words " I renounce the right to revoke " or words of substantially the same meaning. The inverted commas draw attention to the words to be used. The exact words need not be used but if they are not used, words of substantially the same meaning are required. This alternative leaves no room for departure from the essential requiremen:

of a declaration containing a transitive verb as opposed to an adjectival description of the gift as irrevocable which is apt to describe what has been done already. Their Lordships cannot wholly agree with the analysis of Sansoni J. with which L.B. de Silva J. agreed appearing in *Punchi Banda's* case (*supra*) at page 550. He set out the requirements of the Ordinance as follows:

(1) A renunciation of the right to revoke

(2) which is express

(3) made by the Donor in a declaration

(4) containing the words " I renounce the right to revoke " or words of substantially the same meaning.

He added however these words " The fourth requirement seems to be merely illustrative of the other three."

This would appear to be to place too little significance upon the fourth requirement having regard to the long legal history of Kandyan deeds of gift and the doubts which had arisen as to their revocability prior to the appointment of the Kandyan Law Commission.

An indication that the distinction between an express clause of renunciation and an unambiguous adjective such as " irrevocable " was recognised as a real one in the courts is to be found in an authority much relied upon by the respondent namely *Ukku Banda v. Paulis Singho et al* 27 N.L.R. 449. In this case, decided some years before the Kandyan Law Commission reported, the Supreme Court held that a Kandyan deed of gift was irrevocable since it contained the words " absolute and irrevocable " attaching to the gift and a declaration that the Donee should have the property " absolutely and forever ".

It was argued successfully by counsel in support of the irrevocability of the deed that there was no need for a special clause of renunciation.

Now, however, the words of the Ordinance do require that which may fairly be described as a special clause of renunciation. The renunciation is to be expressed and not to be implied and a description of a gift as irrevocable does no more than imply the renouncing of an existing right to renounce. The requirement of an express renunciation stands in the way of the aeceptance of an interpretation of the words used in this case, to all intents and purposes the same words as those used in the *Ukku Banda* case (*supra*), so as to produce the result that the Donor has already effectively renounced his right to revoke.

Prior to the passing of the Ordinance, gifts being treated as contracts, the courts looked at the intention of the parties as expressed in deeds by which the gifts were effected. Judicial decisions appear to have been influenced in some cases by the English doctrine of consideration.

Now the position has changed.

In construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke but this is not the same as express revocation of an existing right. The requirements of the Ordinance have not, in the opinion of their Lordships, been complied with.

An alternative submission, not made in the courts below, was raised in the appellant's case and can be stated shortly. It was that the renunciation of the right of revocation was made by the Donor and accepted by the original Donee alone. The first respondent was accordingly not intended to be benefited by the revoked gift and the gift to her as fidei commissary stands.

This argument depends on a severance of the gift so as to separate the gift to the Donee as fiduciary from that to the fidei commissary.

This separation of gifts is not self-evident on the construction of the deed of 1941.

Their Lordships express no concluded opinion on this alternative submission since the appellant did not pursue the point in argument

having regard to the judgment of the Board in *United Marketing Co. v. Kara* [1963] 1 W.L.R. 523. Their Lordships there expressed their adherence to the guidance given by Lord Birkenhead L.C. in *North Staffordshire Railway Co. v. Edge* [1920] A.C. 254, 263.

Even where a bare question of law only is involved their Lordships are seldom ready to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below. In this case as in *Kara's* case (*supra*) the alternative submission cannot be said to be so clearly right that the contrary view is unarguable.

Upon the ground of appeal to which their Lordships have previously referred namely failure to comply with the Ordinance of 1939 they will humbly advise Her Majesty that the appeal be allowed, the Decrees of the Supreme Court of 3rd December 1965 and of the District Court of 9th September 1963 set aside and the respondents' action dismissed. The respondent must pay the appellant's costs of this appeal and of the proceedings in the courts below.

(*Dissenting Judgment by* LORD DONOVAN)

This appeal raises a short point of construction first of section 5 (1) (*d*) of the Kandyan Law Declaration and Amendment Ordinance of 1939, and secondly of the deed of gift of 26th May 1941.

Section 5 (1) (*d*) was enacted following a report of the Kandyan Law Commission in 1935 which referred to uncertainty in the existing law as to how a donor's right to revoke a gift could be effectively renounced. Omitting immaterial words it reads:

> ". . . 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. . . ."

The alternative thus indicated clearly connotes some words which are not a repetition of the formula but the meaning of which is in no material sense different. Nor need they begin with the words "I declare" in order to be a "Declaration"—a term which includes a statement or an assertion.

The Deed itself is a gift of certain lands; and the Donor avers that he "doth hereby grant, convey, assign, transfer, set over, and assure unto the said Donee as a gift irrevocable" the said lands.

The question is whether the words "as a gift irrevocable" satisfy the condition for irrevocability prescribed by section 5 (1) (*d*) of the Ordinance. The Supreme Court of Ceylon, affirming the decision of the District Court of Kandy, has held that they do.

Various arguments were adduced against this view. The word "irrevocable" it was said was simply a statement of intention and no more. In fact it is a statement of the kind of gift the Donor is presently making, and he is proclaiming that it is of the kind that is to be irrevocable. Next it was argued that the formula prescribed by section 5 (1) (*d*) contains a transitive verb ("renounce") and an object of that verb ("the right to revoke") and that other words cannot have substantially the same meaning unless they also possess these features. I find this argument of no weight when the Ordinance itself sanctions the use of other words provided they are of substantially the same

meaning. It was further contended that if the Ordinance had intended to make effective a simple statement in the deed of gift that it was irrevocable, it would surely have done so. The implication to be drawn is that the legislature intended some more different and more formal declaration. This argument is double-edged. One of the reasons for the Ordinance was the previously existing confusion as to what words would amount to irrevocability and which would not. So that if a donor did not use some expression containing the actual word "irrevocable", arguments would still be open that the words he *had* used meant the same thing: and a provision such as is suggested might have raised as many problems as it solved. I can well understand the legislature in these circumstances taking the alternative course of prescribing a set formula, and adduced that words of substantially the same meaning would do. Furthermore, since there were decisions prior to the Ordinance in which a simple declaration of irrevocability was held by the Supreme Court to be sufficient, the expectation is that had the legislature wished to provide otherwise it would have said so.

The Donor here has expressly indicated that the lands were to be "a gift irrevocable". The word "irrevocable" means "not capable of revocation"; and the capacity to revoke obviously depends upon the existence of a right to do so. One may therefore ask, "Who could revoke the gift in the ordinary way" or "In whom would such right ordinarily exist"? The answer of course is the Donor himself. When therefore he uses a word which indicates that the gift is not to be capable of revocation, he is saying that he shall not enjoy the right to revoke which he would otherwise possess. In other words he is renouncing that right. He is not using words which "substantially" mean the same thing as the prescribed formula, but exactly the same thing. True, the Ordinance requires that whatever words are used the right shall be "expressly" renounced. The words "as a gift irrevocable" *are* express.

It follows that in my opinion the judgment appealed from is correct. But even if I had some doubt upon the matter I should be averse from disturbing it, having regard to the legal history behind the controversy.

In *Kirihenaya v. Jotiya* (24 Ceylon New Law Reports p. 149) a Kandyan deed of gift dated in 1908 contained a declaration by the Donor that "I shall not revoke this deed of gift at any time. . . ." In 1920, however, she purported to do so. It was held by the Supreme Court of Ceylon in 1922 that by the words quoted she had renounced her right to revoke.

In *Ukku Banda v. Paulis Singho et al.* (27 Ceylon New Law Reports p. 449) a Kandyan deed of gift dated 1905 contained a declaration by the Donor that he granted shares of certain premises unto the Donee "as a gift absolute and irrevocable". In 1923 the Donor purported to revoke the deed. It was again held by the Supreme Court of Ceylon in 1926 that the words quoted were an express renunciation of the power to revoke.

Later in 1926 the two foregoing decisions were challenged in the Supreme Court in the case of *Bogahalande v. Kumarihamy* (8 Ceylon Law Recorder 91) but were affirmed by the Supreme Court.

In 1939 the Ordinance here in question was enacted without any express disavowal of these decisions.

Thereafter in 1963 in *Punchi Banda v. Nagasena* (64 Ceylon New Law Reports p. 549) it was held (again by the Supreme Court) that by the use of the single word "irrevocable" in a Kandyan deed of gift the Donor expressly renounced his right to revoke it. Continuity was thus given after the Ordinance to the above quoted decisions to a similar effect which were pronounced before the Ordinance was enacted.

In *Tikiri Bandara v. Gunawardena* (1967) New Law Reports 203 Tambiah J. concluded his judgment in these words:

> "The customary laws of the Kandyans, on which Hayley was relying, have been developed and modified by case law which

adapted the archaic system to suit modern conditions. They are of little significance on this point although on obscure points on which case law could throw little light, they could become an important source of Kandyan law.

As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long-established rule affecting title to property should not be interfered with by this court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason. For these reasons the judgment of the learned District Judge is affirmed and the appeal is dismissed with costs."

The reasonable expectation is that on the basis of the decisions above cited, some given before the Ordinance and some after it, there have been transfers of land which have been declared irrevocable in the manner held by the Supreme Court to be a renunciation of the right to revoke. This expectation is not diminished by any paucity of decisions since the Ordinance: on the contrary it is enhanced. In my view therefore the decision of the Supreme Court in the present case ought not in any event to be disturbed unless it were plainly wrong. I think however that it is plainly right.

I differ from your Lordships with regret: but would humbly advise Her Majesty that the appeal should be dismissed.

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Printed by Her Majesty's Stationery Office Press
1968