MUTHUBANDA AND ANOTHER
v.
GUNARATNE

COURT OF APPEAL.
EDUSSURIYA, J.,
JAYASINGHE, J.
C.A. NO. 176/91 (F).
DC BANDARAWELA NO. 440/L.
OCTOBER 27, 1998.

Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 – SS. 4 (1), 5 – Gift – Revocability – Can there be a revocation when the rights have already passed – Prior Registration – Evidence Ordinance s. 68 – Proof of execution of a deed.

The plaintiff-respondent sought a declaration of title to the land in question. His position was that the original owner one HB gifted the corpus by deed No. 59287 of 10. 6. 1971 to one A, one of his predecessors in title and subsequently he became the owner. The defendant-appellant contended that HB was a Kandyan whose property rights are governed by the Kandyan Law Declaration and Amendment Ordinance and the said HB had not renounced the right of revocation and that the said deed of gift was revoked by deed No. 31294 of 21. 10. 1976, thereafter the said HB had by deed of Transfer No. 31295 of 24. 10. 1996 transferred same to the 2nd defendant-appellant.

The District Court entered judgment for the plaintiff-respondent. On appeal it was contended that the Kandyan Law is silent on the question whether there can be a revocation of a deed when the rights on the deed have already passed to a third party.

Held:

1. The Kandyan Law reserves to the donor the right to revoke a gift during his life- time and without the consent of the donee or any other person and therefore it is not open for the donee acting unilaterally to deny the donor a right that is reserved under s. 4 (1), and s. 5 (1) and provides for the renunciation of the right to revoke, which right should be expressly renounced by the donor, either in the same deed or by any subsequent instrument.

2. S. 4 (1) and s. 5 (1) read together clearly spell out the donors right to revoke, and the donee by a subsequent retransfer to a 3rd party could not defeat the donors right to revoke a gift during his lifetime and without the consent of the donee or any other person.

3. The execution of the deed of revocation was not challenged and not put in issue at the trial. S. 68 of the Evidence Ordinance prohibits the use as evidence of any document required by law to be attested until one attesting witness at least has been called for the purpose of proving its execution.

4. Once a gift becomes void after revocation in terms of s. 4 (1) registration of other deeds or registration in the proper folio will not revive a deed that is void.

APPEAL from the judgment of the District Court of Bandarawela.

Cases referred to:

1. *Arnolis v. Muthumenika* – 2 NLR 199.
2. *Solicitor-General v. Awa Umma* – 71 NLR 512.
3. *Banda v. Hethuhamy* – 15 NLR 193.
4. *Appuhamy v. Holloway* – 44 NLR 276.

H. M. P. Herath with *W. D. G. Wickremasinghe* for 1st defendant-appellant.

K. M. P. Rajaratne for 2nd defendant-appellant.

N. S. A. Gunatileka, PC with *N. Mahendra* for plaintiff-respondent.

Cur. adv. vult.

October 27, 1998.

JAYASINGHE, J.

The plaintiff instituted this action in the District Court of Bandarawela against the defendants for a declaration of title to the paddy land called Wewa Arawa, for ejectment of the defendants and all those holding

under them and for peaceful possession of the land and for damages in a sum of Rs. 500 per year from 1982 until restoration of possession.

According to the plaintiff the original owner of the property was one R. M. Heen Banda who by a deed of transfer No. 59287 transferred the said property to one R. M. Appuhamy on 10. 06. 1971. The said R. M. Appuhamy by deed No. 458 of 29. 7. 1973 made a conditional transfer to one Simon Appu. Thereafter, the said Appuhamy and Simon Appu transferred the property to one Chularatne Peiris – a minor, who by deed No. 7325 of 10. 10. 1982 transferred the property to the plaintiff and that the plaintiff and his predecessors in title were in possession for a period of over ten years and have prescribed thereto. They alleged that the defendants had forcibly occupied the land and are now in possession.

The defendants filed answer denying the plaintiff's claim, and averred that the original owner of the property was one Ratnayake Mudiyanselage Heen Banda by deed No. 830 of 8. 6. 1915 and that the said Heen Banda was a Kandyan whose property rights are governed by the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, that the said Heen Banda had not renounced the right of revocation of the gift referred to in the plaint – deed of gift No. 59287 and that the said deed of gift was revoked by deed No. 31294 of 24. 10. 1976 and that even after the revocation of the deed of gift the physical possession of the property was with the said Heen Banda. That the said Heen Banda by deed of transfer No. 31295 of 24. 10. 1976 transferred the said property to the 2nd defendant and the 2nd defendant became the owner thereof. That the defendants are husband and wife and that the plaintiff forcibly entered the property in November, 1982, and that the defendants resisted the intrusion. The defendants prayed for dismissal of the action.

The learned District Judge entered judgment for the plaintiff after trial. This appeal is from the judgment of the learned District Judge.

This appeal was argued before L. H. G. Weerasekera, J. and myself on 6. 11. 1997 and judgment was reserved. However, before the pronouncement of the judgment Weerasekera, J. was elevated to the Supreme Court and the matter was fixed for argument before Edussuriya, J. and myself on 14th September, 1998. On that day counsel submitted to Court that exhaustive written submissions have been tendered and that the matter may be disposed of on the written submissions already before Court in lieu of oral arguments.

The plaintiff's case is that one R. M. Heen Banda was the original owner of the land called Wewa Arawa and that he gifted it to one R. M. Appuhamy and that thereafter the aforesaid Appuhamy executed a conditional deed of transfer in favour of one K. W. T. Simon Appu and the aforesaid R. M. Appuhamy and K. W. T. Simon Appu transferred to one Chularatne Peiris and that the said Chularatne Peiris thereafter transferred it to the plaintiff. The plaintiff claimed title accordingly.

The defendants on the other hand stated that the deed of gift No. 59287 is a revocable deed of gift and that it was in fact revoked by the deed marked P14 and the original owner R. M. Heen Banda executed a deed of transfer D16 on the same day in favour of the 2nd defendant.

The main contention of the defendants was that there had been a valid revocation of the deed No. 59287 and therefore the plaintiff acquired no title. The learned District Judge in his judgment pointed out that there are three main matters for determination before Court:

Whether deed No. 59287 whereby the original owner gifted the land to one R. M. Appuhamy was revoked by deed No. 31294 marked P14 and D17;

Whether there was a valid transfer to the 2nd defendant by the subsequent deed No. 31295 marked D16;

Whether there was priority of registration in favour of the plaintiff and his predecessors in title by virtue of due registration of their deeds. The other matter for determination was the question of prescription.

The plaintiff took up the position in their written submissions whether the deed of revocation and the subsequent deed of gift to the 2nd defendant was duly proved.

As regards the 1st question whether the deed No. 59287 was revoked by deed No. 31294, Mr. Gunathileke submitted that deed No. 59287 had been executed on 10. 6. 1971 and that two years later the donee R. M. Appuhamy had executed a deed of transfer by deed No. 458 of 29. 7. 1973 in favour of Simon Appuhamy and submitted that this was a conditional transfer but the condition notwithstanding it was a transfer by which all rights of ownership in R. M. Appuhamy were divested and vested in his vendee subject only to the condition that he was required to retransfer the property; that the revocation by deed No. 31294 was executed on 26. 10. 1976 by a deed executed over 3 years after R. M. Appuhamy had transferred his rights in the land; that after R. M. Appuhamy had divested himself of his rights there could have been no question of revoking the deed No. 59287 as the donee thereon had divested himself of any title and transferred his rights thereof to a 3rd party. He submitted that once a transferee on a deed of gift had alienated that property the right to claim revocation thereof cannot arise under the Roman Dutch Law which is the common law and that this aspect is not covered by the Kandyan Law and also by the Kandyan Law Declaration and Amendment Ordinance.

Section 4 (1) of the Kandyan Law Declaration and Amendment Ordinance provides:

That subject to the provisions and exceptions therein after contained a donor may *within his life time and without the consent of the donee or 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 (1) stipulates the deeds of gift which cannot be revoked and, in the present context it is unnecessary to dwell on such matters except to advert to section 5 (1) (*d*); it states that:

"Any gift the right to cancel or revoke which shall have been expressly renounced by the donor, either an instrument effecting that gift or in any subsequent instrument by the declaration contained in the words 'ප්‍රකාශිත කිරීමේ අයිතිවාසිකම් අත්හරිමි' "or words substantially the same meaning or if the language of the instrument be not Sinhala, the equivalent of those words in the language of the instrument."

Mr. Gunathileke submitted that the Kandyan Law Act, is silent on the question whether there can be a revocation of a deed when the rights on the deed have already passed to a third party. Mr. Gunathileke then submitted that the common law which is the Roman-Dutch Law can apply even to transactions involving persons governed by personal laws where such situations are not covered by their own personal law. Mr. Gunathileke submitted that under the Roman-Dutch Law a deed cannot be revoked even if there are grounds for such revocation if the subject-matter has been transferred to a 3rd party in good faith and without fraudulent intention prior to a revocation. Mr. Gunathileke sought to create a vaccum in the Kandyan law in that no provision has been made for situations whose property have passed to a 3rd party and thereafter sought to import the Roman- Dutch Law to fill

the said void. I am unable to accept that there is a vaccum in the Kandyan Law and that the Roman-Dutch Law ought to apply in the circumstances in view of the words found in section 4 (1) ". . . during his life time and without the consent of the donee or any other person . . . "

Section 4 (1) of the Kandyan Law Declaration and Amendment Ordinance clearly reserves to the donor a right to revoke a gift and section 5 (1) (*d*) provides for the renunciation for the right to revoke. These two sections taken together clearly spell out the donor's right to revoke and hence on a plain reading of the two sections it is my view that the doneee by a subsequent retransfer to a 3rd party could not defeat the donors right to revoke. The Kandyan Law reserves to the donor the right to revoke a gift *during his lifetime and without the consent of the donee or any other person* and therefore it is not open for the donee acting unilaterally to deny to the donor a right that is reserved under section 4 (1). Mr. Gunathilake also sought to attack the transfer to the 2nd defendant by deed No. 31295. He submitted that the notary on both deeds was Mr. Stanley H. Abeysekera, a very senior and respected Attorney-at-law, practicing in that Court. It is in evidence that Mr. Abeysekera did not know Heen Banda the donor personally. The deed of revocation No. 31294 was witnessed by Anura Ratnayake and a person called Punchibanda. The said Punchibanda had died and the death certificate pertaining to his death has been filed before this Court. It was the position of the plaintiff-respondent that Anura Ratnayake the 2nd defendant was while being the vendee of deed No. 31295 one of the witnesses to the deed of revocation No. 31294. Mr. Gunathilake submitted that she had every interest in procuring such a deed of revocation to be executed and that it is her evidence and only evidence which is brought forward to establish that the person who executed deed No. 31294 was Heen Banda himself and the deed No. 31295 on which the 2nd defendant claims title, her husband Muthubanda the 1st defendant signed as a witness and that the other witness Premadasa Jayasinghe was not called as a witness. That the 1st defendant who is the husband of

the 2nd defendant was the only witness called and that Mr. Abeysekera could not speak to the identity of the transferor and submitted that it is clear from the said circumstances that a fraud has been practiced. Mr. Gunathilake submitted that by the failure to place before Court, both witnesses must necessarily lead to the finding that the two deeds No. 31294 and No. 31295 have not been proved and that the only evidence before Court in support of these documents is that of the parties who benefited by them and caused them to be executed.

Mr. Herath submitted that the defendant was not able to obtain the death certificate of Punchibanda a witness to deed No. 31294 to be produced at the trial. However, on the application made to this Court it was permitted to file the death certificate. He submitted that the absence of the witness Punchibanda was satisfactorily explained and that the evidence of the 2nd defendant was sufficient to prove the deed No. 31294, under section 68 of the Evidence Ordinance. He faulted the learned District Judge's finding that both attesting witnesses were required to prove the execution of the deed under section 68 of the Evidence Ordinance. He also submitted that, at the trial the execution of the deed was not challenged and not put in issue at the trial. The deed No. 31295 was attested by two witnesses, Muthubanda the 2nd defendant's husband and one Premadasa Jayasinghe. He again faulted the learned District Judge's finding that the defendant failed to prove the two deeds No. 31294 and No. 31295 in that to wit the witnesses to each instrument was not called at the trial. Mr. Herath submitted that the authority relied on by the trial Judge in *Arnolis v. Muthumenika*[1] is inapplicable in that the 2 deeds in question were not challenged. The Mortgage bond referred to in that case was challenged on the basis of a forgery. The Supreme Court observed: "the plaintiff called the Notary and one of the attesting witnesses. It appears that the other attesting witness had left the district and had not been seen for some time. So, that his absence was not accounted for. The Acting District Judge of Ratnapura held that as a matter of law it was necessary to call both attesting witnesses. I am unable to agree with that statement of law. A deed

can be proved by the evidence of one witness though as a matter of precaution it may be advisable in many cases to call all the witnesses. Held, that the deed was sufficiently proved. It is relevant to point out that the deeds in question were not challenged at the trial and there was no issue raised on the basis of fraud.

Mr. Herath also referred to Sakar on Law of Evidence 10th edition, page 95. He submitted that the question of calling more than one witness arises according to the circumstances of the case. In *Solicitor-General v. Awa Umma*[2]. T. S. Fernando, J. observed that "the learned trial Judge has held that the prosecution has failed to satisfy section 68 of the Evidence Ordinance. The section prohibits the use as evidence of any document required by law to be attested until one attesting witness at least has been called for the purpose of proving its execution . . . " Therefore, I am inclined to accept the submission of Mr. Herath that the trial Judge erred when he held that the two instruments were not proved.

As regard the priority of the registration the plaintiff raised 2 issues 17 and 18. Mr. Gunathilake submitted that there is due registration of the deeds relied on by the plaintiff and such deeds must prevail by priority of registration. This submission was based on the fact that deed of gift No. 59287 was not revoked and had transmitted title to the plaintiff. The learned District Judge observed that the plaintiff's deeds are registered in the proper folio suggesting the inference that the defendants deeds are not. Mr. Herath submitted that the finding of the learned District Judge is erroneous. That no question of registration or prior registration does arise here and relied on section 4 (1) of the Ordinance. He submitted that immediately upon the gift being revoked by the donor the gift becomes void and of no effect and any transaction that flowed from deed of gift No. 59287 was void and no rights flow from the said deed. The question of prior registration does not arise. He referred to *Banda v. Hethuhamy*[3] which laid down that, "the doctrine of Caveat Emptor must certainly apply to our contracts for sale of land in the Kandyan Provinces and all purchases

for valuable consideration should be duly put upon inquiry as to their vendor's title to convey". Mr. Herath submitted that once a gift becomes void after revocation in terms of section 4 (1) registration of other deeds or registration in the proper folio will not revive a deed that is void and thereafter has no right, title or interest to convey to anybody. In *Appuhamy v. Holloway*[4] the Supreme Court observed that the question of title had to be considered independently of the law of registration. In Appuhamy's case *(supra)* when Mudalihamy executed the deed of revocation 2D2 in 1904 the very foundation of title of Punchirala based on P2 was destroyed and Punchirala had no right based on that deed that he could transfer to a vendee.

The learned District Judge was in error when he held in favour of the plaintiff on the question of registration.

It is unnecessary at this stage to go into the question of prescription by the 2nd defendant since I have come to a finding that there was a valid revocation of the deed of gift No. 59287 of 10. 6. 1971 by deed No. 31294 of 24. 10. 1976 and that the 2nd defendant acquires title by deed No. 31295. Question of prescriptive possession by the 2nd defendant, therefore, does not arise as regards prescriptive rights of the plaintiff. The trial Judge has come to a finding that the plaintiff has not been in possession. Even if the plaintiff was in possession the adverse possession would commence in 1976 when the deed of gift was revoked. Since action has been instituted in 1983 the question of prescription does not arise.

I, accordingly, set aside the judgment of the learned District Judge and enter judgment for the defendants as prayed for and with costs fixed at Rs. 2,100.

EDUSSURIYA, J. – I agree.

Appeal allowed.