

**SOMALATHA AND OTHERS**  
**v.**  
**WICKREMASINGHE AND OTHERS**

COURT OF APPEAL  
WIGNESWARAN, J. AND  
TILAKAWARDANE, J.  
CA NO. 31/95 (F)  
DC KEGALLE NO. 1713/L  
JUNE 27, 2000  
AUGUST 03, 2000

*Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 – S. 4 (1), (2), 5 (1), 5 (1) (d), 6, and 6 (1) – Revocability of a Deed of Gift – Strict compliance with S. 5 (1) (d) – Imperative.*

One R gifted irrevocably the premises in dispute to one S subject to life interest in favour of his wife. He later revoked the said gift.

The question that arose for determination was whether the said deed of gift was revocable or not.

The District Court held that the revocation was valid.

**Held:**

- (1) Kandyan Law gives the right to a donor without the consent of the donee or any other person, such as the life interest holder, to cancel or revoke any gift by an instrument in writing in conformity with the law.
- (2) However, gifts to a temple, gifts in consideration of marriage, gifts effecting a charitable trust and gifts where right to revoke is renounced s. 8 (1) (d) are the exceptions.
- (3) Although the donor explained in the deed of gift that he was giving a gift which was irrevocable and absolute under all circumstances, he did not say that he was renouncing his right to revoke such an "irrevocable and absolute" gift. The section expected such renunciation in words similar to what is mentioned in s. 5 (1) (d), if a gift was to be considered as an exception to the general rule of revocability of gifts under the Kandyan Law.

**APPEAL** from the judgment of the District Court of Kegalle.

*Nimal Jayasinghe* with *P. P. Gunasena* for 1 - 4th defendant-appellants.

*L. V. P. Wettasinghe* for plaintiff-respondent.

*Cur. adv. vult.*

December 04, 2000

**WIGNESWARAN, J.**

The plaintiff-respondent, 5th defendant-respondent (now deceased) and the husband of the 1st defendant-appellant (deceased) were brothers subject to Kandyan Law. The 2nd to 4th defendant-appellant are the children of the 1st defendant-appellant.

The father of the above-named three brothers, Rankira, gifted irrevocably the premises in dispute on 07. 03. 1958 by deed No. 531 (P1) to Sundara *alias* Sirisena, the deceased husband of the 1st defendant-appellant subject to life interest in favour of the wife of Rankira. By deed No. 915 dated 18. 07. 1995 (P2) the said Rankira revoked the said gift.

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The question that has arisen for determination in this case is whether deed No. 531 was revocable or not. By judgment dated 28. 02. 1995 the Additional District Judge, Kegalle, held in favour of the plaintiff-respondent. The revocation was held by him to be valid.

The learned Counsel for the 1st to 4th defendant-appellant has argued that the said deed of gift was –

- (i) Irrevocable;
- (ii) In any event a unilateral revocation was invalid under Kandyan Law; and

- (iii) The defendants and their predecessor in title had acquired <sup>20</sup> prescriptive title to the premises in question by uninterrupted and undisturbed possession from 1958.

These arguments would presently be examined.

(i) and (ii) above – Deed of Gift No. 531 (P1) and the unilateral revocation by Revocation Deed No. 915 (P2).

The words in P1 relied upon by the 1st to 4th defendant-appellants for irrevocability are the following :

“එකී තැනි දීමනාකර මට කිසිවිටෙක කිසිම කාරණයක් උදෙසාවත් අවලංගු කළ නොහැකි ලෙසට ද මතු අප උපසන්කාර ලබන අවශ්‍යත්වය” – 2D2.

“මෙම තැනිදීම සෑම ආකාරයෙන්ම සවිකර දෙන හැටියට” – 2D3.

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Sections 4 (1) and (2) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 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 : . . ."*

*(2) No such cancellation or revocation of a gift effected <sup>40</sup> 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."*

Section 5 (1) of the same Ordinance reads as follows :

*"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 <sup>50</sup> gifts where any such gift is made after the commencement of this Ordinance :*

- (a) any gift by virtue of which the property which is the subject of that gift shall vest in the trustee or the controlling viharadhipati for the time being of a temple under the provisions of section 20 of the Buddhist Temporalities Ordinance or in any Bhikkhu with succession to his sacerdotal pupil or otherwise than as pudgalika for the benefit of himself and his heirs, executors, administrators or assigns;*
- (b) any gift in consideration of and expressed to be in consideration of a future marriage, which marriage has subsequently taken place;*
- (c) any gift creating or effecting a charitable trust as defined by section 99 of the Trusts Ordinance;*
- (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 ඉතහලිඵ*

සිරිමේ අයිතිවාසිකම් අත්හැරීමේ or words of substantially the same 70  
meaning or, if the language of the instrument be not  
Sinhala, 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."

Section 6 of the said Ordinance reads as follows :

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6. (1) *Upon the cancellation or revocation of any gift, the donor shall be liable to pay to the donee compensation in such sum as shall represent the cost of any improvements to the property effected by the donee, after deducting the rents and profits received by him, and the expenses incurred in the fulfilment of the conditions, if any, attached to the gift, provided that if the donee has made default in the fulfilment of any such conditions, no compensation shall be payable to him in respect of the* 90  
*improvements or otherwise.*

(2) *Such compensation shall be payable to any donee otherwise entitled thereto whether or not he would be an heir at law of the donor in the event of such donor dying intestate.*

(3) *In this section "donee" includes any person who has succeeded to the title of the donee under the gift.*

Kandyan Law gives the right to a Donor without the consent of the Donee or any other person, such as the life interest holder, to cancel or revoke any gift by an instrument in writing in conformity with the law. Therefore, the question of a unilateral revocation [argument (ii) above] without notice to the donee does not arise for consideration. <sup>100</sup>

But, there are certain exceptions to the general rule that gifts are revocable. Gifts to a temple [section 5 (1) (a)], gifts in consideration of marriage [section 5 (1) (b)], gifts effecting a charitable trust [section 5 (1) (c)] and gifts where right to revoke is renounced [section 5 (1) (d)] are the exceptions.

The basic question to be asked in gifts seeking exception to come under section 5 (1) (d) is not how strongly the gift had been expressed but whether there had been a deliberate and express renunciation by the donor of his right to revoke. In other words, the donor, conscious of his right to revoke under Kandyan Law, should have expressed in words similar to the words mentioned in section 5 (1) (d) that he was renouncing his right to revoke. In the instant case the words expressed (2D2 and 2D3 above) were descriptive of the nature of the gift. That is, the donor explained deed No. 531 that he was giving a gift which was irrevocable and absolute under all circumstances. He did not say that he was renouncing his right to revoke such an "irrevocable and absolute" gift. The section expected such renunciation in words similar to what is mentioned in section 5 (1) (d), if a gift was to be considered as an exception to the general rule of revocability of gifts under Kandyan Law. <sup>110</sup>

Passages 2D2 and 2D3 were rightly found by the learned Additional District Judge to have been words which did not express renunciation of the right to revoke.

(iii) Prescription

At pages 223 and 224 the cross-examination of the plaintiff-respondent appears as follows :

ප්‍ර : ඔප්පුව දිනා බලපු විට එ තොල්ලන්ට මෙම ඉඩමේ ඉන්න කිසිම අයිතියක් නැහැ.

උ : නැහැ.

ප්‍ර : තැන්පත් අවලංගු කළාට පසුව එතාට එ ගෙදර ඉන්න අයිතියක් නැහැ?

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උ : නැහැ.

ප්‍ර : එ අය ඉන්නේ බලහත්කාරයෙන් තමා කියන විදියට?

උ : බලහත්කාරයෙන් නොවෙයි. පීටර් සමරසිංහට අයිතියි. එතාගේ අවසරය උඩ. එ තොල්ලන්ට පල්ලේගම තිබෙනවා ගෙයක්. එතාට යනකම් පීටර් සමරසිංහගේ අවසරය පිට ඉන්නවා."

Sirisena, the husband of the 1st defendant and brother of the plaintiff, resided throughout with his father Rankira at the *Mulgedera*. After Sirisena married, with Rankira's leave and licence, he brought his wife and resided at the said *Mulgedera*. Even thereafter despite the revocation of the deed of gift, he had continued to live in the premises, not on his own right but with the leave and licence of his brother, the original 5th defendant. The original 5th defendant also resided in the *Mulgedera* until he died after this case was filed. Hence, the possession claimed by the 1st to 4th defendant-appellants was a possession based on leave and licence and not independent. In any event the deed of gift was *prima facie* not absolute as far as the husband of the 1st defendant was concerned. His mother had life interest according to P1. Any attempt to prove prescriptive title should have placed evidence of adverse possession against the mother and the brothers. Such evidence was not placed before Court.

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The 1st defendant referred to improvements or repairs to floor amounting to Rs. 5,000 or Rs. 6,000 and further expenditure upto one or two lakhs. Such evidence was not supported by any documentary or other corroborative evidence. But, it must not be forgotten that the defendants enjoyed free occupation of the premises in suit and the plantations thereon from the time of the Testamentary case of Rankira. Rankira had left the property by Last Will to the plaintiff and the original 5th defendant-respondent subject to life interest of his wife. If any event any compensation in terms of section 6 (1) of the Kandyan Law Declaration and Amendment Ordinance would have been 160 payable by Rankira at the time of revocation.

Nevertheless, we agree with the learned Additional District Judge that appropriate and acceptable evidence regarding improvements or repairs had not been placed before Court. The issues referred only to improvements amounting to Rs. 3,000 plus Rs. 2,000 and nothing more.

We, therefore, see no reason to interfere with the judgment dated 28. 02. 1995 and accordingly dismiss the appeal with taxed costs payable by the 1st to 4th defendant-appellants to the plaintiff-respondent.

**TILAKAWARDANE, J.** – I agree.

*Appeal dismissed.*