1925.

Present : De Sampayo and Schneider JJ.

DHARMALINGAM *v.* KUMARIHAMY *et al.*

406—D. C. Kurunegala, 9,114.

Kandyan law—Deed of gift—Right to deal as to will and pleasure—Promise not to raise a dispute—Revocability.

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.

THE plaintiff sued the defendants in ejectment from the land called Gamagehena claiming title thereto as purchaser at a sale in execution in April, 1922, against the heirs of Dingiri Kumarihamy, who, according to the plaintiff, was the original owner by virtue of a Crown grant in her favour.

The defendants by their answer denied that Kumarihamy became entitled to the land by virtue of the Crown grant, and further pleaded that first defendant was the owner of the land. That by deed No. 34,524 of April, 1913 (marked P 3) first defendant gifted this land to Kumarihamy, but that it was subsequently revoked in 1919 by deed, and thereafter in 1921 transferred to the second defendant.

The learned District Judge held that the plaintiff had good title as purchaser in execution against the heirs of Kumarihamy, as the deed of gift of 1913 was irrevocable. From this judgment the defendants appealed.

Samarawickreme, for defendants, appellants.

The words in the deed of gift binding the donor "not to raise or utter any dispute whatsoever against this gift and donation" does not disentitle the donor to revoke the gift. Revocation of a gift is not the same as disputing a gift. Revocation implies an affirmation of the validity of the gift itself.

The general rule is that deeds of gift under the Kandyan law are revocable. To cite only two Full Bench decisions: *Bologna v. Punchi Mahatmaya* [1] and *Tikiri Kumarihamy v. de Silva.*[2]

An exception has of recent years been created in favour of an absence of the power of revocation where the deed of gift is for services already rendered, *vide Kiri Menika v. Kaw Rala.*[3]

In cases such as the present one where the consideration is "love and affection" there is always a right of revocation.

[1] *Ram. (1863-68) 195.* [2] *(1909) 12 N. L. R. 74.*

[3] *(1858) 3 Lor. 76.*

The case for the defendant is stronger still, for in the deed in question there is no renunciation of the right of revocation. Even if there was a clause of renunciation, and the consideration is merely love and affection, still the right of revocation is not taken away from the donor under the Kandyan law.

So that whether the authorities be considered, or the matter be dealt with independently of authority in the present case, the only possible conclusion is that the deed of gift was revocable, and hence second defendant has the better title.

With regard to the Crown grant all that need be said is that it was granted to Kumarihamy after her death, and hence no title passed to the heirs thereby, *vide Bastian v. Andris* [1] and *Appuhamy v. Nona.*[2]

Drieberg, K.C. (with him *H. V. Perera*), for plaintiff, respondent.

It is too late now for one to ask whether the case in *Tikiri Kumarihamy v. Silva* (*supra*) is not conclusive on the point.

[SCHNEIDER J.—What about the passage from Browne J's judgment cited in *9 N. L. R. at p. 213* where gifts are divided into conditional and unconditional. Here the gift is unconditional.]

That decision is not exhaustive.

When can there be a waiver of the right to revoke ? In all cases except where there is a condition still to be performed. In such there is hardly a revocation. The true explanation is that the gift fails for want of consideration. In the present case there is no condition still to be performed, and this circumstance, coupled with the words by which the donor bound himself not to dispute the gift, disentitles him now to revoke.

On the claim by virtue of the Crown grant, although it must be conceded that no title passed thereon to the heirs, the grantee being dead at the date of its execution, there is, however, one point arising therefrom.

The grant itself is in 1915, and therefore, presumably, the Crown had title at that date. The transfer to the second defendant is in 1921. The land being chena land in the Kandyan provinces, the title is in the Crown, and the Crown might still be willing to transfer the interests to us as successors in title to Kumarihamy.

With regard to the point sought to be made on the validity of the Crown grant to pass title to the plaintiff, it must be said that the point was taken in the Court below.

Samarawickreme (in reply).—Under Kandyan law what a person can give by way of gift he can get back.

[1] *(1911) 14 N. L. R. 437.*

[2] *(1912) 15 N. L. R. 311.*

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The Full Bench decisions that the general rule is that gifts are revocable is binding.

Even a transfer could have been set at naught by a refund of the money paid. This rule was set aside by proclamation dated July 14, 1821.

Mere renunciation does not prevent a person from exercising the right. A testator though he renounces the right of revoking a will can nevertheless do so.

The power of revocation is an inherent right, and must be deemed to exist.

June 23, 1925. SCHNEIDER J.—

The plaintiff sued the defendants in ejectment from an allotment of land called Gamagehena with its appurtenant pillewa. He set out in his plaint that Dingiri Kumarihamy was the owner of the land by virtue of a Crown grant, and after her death, under a writ issued against her heirs, that it was sold and purchased by him in April, 1922. He did not say that he had obtained a transfer of it, but it appears that he did, in fact, obtain such a transfer from the Fiscal.

The defendants denied in their answer that Kumarihamy became entitled to the land under the Crown grant pleaded by the plaintiff. They stated that the first defendant was the owner of the land, and gifted it to Kumarihamy by the deed No. 34,524 of April, 1913 (P3), but that she subsequently revoked that gift by another deed of October, 1919, and in 1921 sold and transferred the land to the second defendant. They also pleaded that the Crown grant " enured to the benefit of the defendants."

Among other issues the District Judge tried the following :—

" (1) Is the deed No. 34,524 of 1913 revocable ? "

" (2) Did the title to the land in question vest in Dingiri Amma Kumarihamy on Crown grant of December 31, 1915 ? "

" (3) Or did Dingiri Amma Kumarihamy obtain the said grant in trust for the first defendant ? "

The learned District Judge held that the deed of gift was irrevocable. He also held that the plaintiff had acquired a good title to the land as a purchaser when it was sold in execution against the heirs of Kumarihamy, although the Crown grant was ineffectual to pass title to Kumarihamy, as it was executed after her death. He was of opinion that as the land " was settled " upon Kumarihamy before her death, her title, which devolved on her heirs against whom it was sold, had passed to the plaintiff as the purchaser at the sale. He says in his judgment that he regards the whole dispute as depending upon the question of the revocability of the deed of gift·

It was this question which was debated at the argument of this appeal of the defendants. The following are the relevant portions of the deed :—

> Four allotments of land including the one in dispute " are hereby donated, gifted, and assigned over to my daughter, Dingiri Amma Kumarihamy (who is affectionately rendering me aid and assistance in an obedient manner), for and in consideration of the affection and love which I bear and cherish towards her."
>
> " Therefore the said donee and her heirs, executors, administrators, and assigns are hereby empowered to hold and possess this gift from this day, or deal with the same as to will and pleasure. That I, the said donor, for myself and on behalf of my heirs, executors, administrators, and assigns have hereby promised not to raise or utter any dispute whatsoever against this gift and donation."

It is now well settled that according to the Kandyan law gifts of land are revocable as a general rule *Bologna v. Punchi Mahatmaya* (*supra*), *Tikiri Kumarihamy v. de Silva* (*supra*), and several others.

In *Tikiri Kumarihamy v. de Silva* (*supra*), it was held by a Bench of three Judges of this Court that a grant of land by deed in consideration of past services and containing a clause debarring the grantor from revoking it is irrevocable according to the Kandyan law.

Mr. Samarawickreme's contention as regards the revocability of the deed of gift was two-fold. He argued first that the deed was a transfer of lands by way of a simple gift, the only consideration for which was " affection and love " as stated expressly in the deed itself, and that that being so, even if there was a clause by which the right of revocation was barred, the deed was nevertheless revocable. He next argued that there are no words in the deed which can be construed as debarring the donor's right of revocation. Mr. Drieberg for the plaintiff, respondent, did not seriously contest that the consideration for the deed was " affection and love." I do not see how he could have urged that there was any other consideration in the face of the fact that the deed itself expressly sets out that the consideration was the love of the donor for the donee. But he argued that the words " deal with the same as to will and pleasure," and the promise of the donor for herself and her heirs and assigns " not to raise or utter any dispute whatsoever against this gift and donation " operated to debar the revocation of the gift, although it was, if I may adopt the language of the Roman-Dutch law, *a Donatio simplex*. A long argument was addressed to us upon the question that there was nothing in the Kandyan law to prevent a

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person renouncing his right of revocation whatever be the consideration for the grant he is making upon the principle " *unicuique licet juri in favorem suum introducto renunciare.*" This is a question which has been argued in some previous cases. It is one which requires careful consideration, and as it is not necessary for the decision of this case to decide that question, I will say no more. I accept Mr. Samarawickreme's contention that there is nothing in the deed under consideration debarring the donor from revoking it. It would be helpful to refer to a few cases in which the construction of deeds similar to the one in question had been under consideration.

In *Kiri Menika v. Kaw Rala* (*supra*) a Full Bench of this Court held in 1858 that the words " to be possessed finally as paraveni property " and provided" that if the donor should happen to leave him, not being satisfied, he should for the above-named consideration (*i.e.*, assistance for three years and payment of a debt) finally hold the land," constituted a renunciation of the right of revocation.

In *Bologna v. Punchi Mahatmaya* (*supra*) again a Full Bench held in 1866 that the words—services " continued to be rendered by the donee "—were insufficient to debar revocation. They also expressed the opinion that before a particular deed is held to be an exception to the rule of revocability, it should be shown that " the circumstances which constitute non-revocability appear most clearly on the face of the deed itself."

In 1878 in *Molligoda v. Sinnetamby* [1] Clarence and Dias JJ. held that the following words were insufficient to constitute a renunciation : " Hereafter neither myself nor any of my descendants, heirs, executors, administrators, or assigns can raise any dispute by word or deed, and that should any such dispute arise, either I or myself, or my heirs, executors, administrators, and assigns shall free the same, and from this day forth the said Tikiri Banda or his assigns are hereby empowered to possess." They thought that the words appeared to be such words of further assurance as might reasonably be expected to occur in an ordinary conveyance, and were not intended by the donor to renounce her Kandyan power of revocation. They expressed the opinion that such a renunciation must certainly be express and unmistakeable.

In *Tikiri Kumarihamy v. de Silva* [2] a Bench of three Judges construed a deed granting lands in consideration of assistance rendered by the donee to her mother, the donor. They held that the following words constituted a renunciation of the right of revocation : " I or my heirs shall not from this day forth by act or word raise any dispute whatsoever against this donation, that in the event of any such dispute arising during my lifetime, such dispute shall be settled by me and deliver the lands unto the donee free from

[1] *7 S. C. C. 118 (at foot of 119).* [2] *(1906) 9 N. L. R. 202 ; (1909) 12 N. L. R. 74.*

dispute ; that from this day forth my daughter, Kumarihamy, who has received the aforesaid gampanguwa from me and her descending or inheriting children, grandchildren, and heirs, &c., shall, according to pleasure without dispute as their own property, hold and possess *for ever*." If I may say so with all humility, Wood Renton J. struck the right note when he said : " In my opinion to import into the decision of cases of this description, the English doctrine of consideration or ideas borrowed from English conveyancing rules as to covenants for title, instead of looking to the real nature of the transaction and to the intention of the parties, is merely to create opportunities for the evasion of obligations, which have been seriously undertaken, on the faith of which extensive dealings with property may have ensued, and which ought in the interests of public and private honesty to be strictly enforced."

Mr. Drieberg contended that we were bound by the decision reported in *12 N. L. R. 74* to construe the words in the deed under consideration in this case as containing words debarring revocation, as the words here are identical with the words of the deed construed in the case reported. I venture to say I am unable to accept that argument. The two deeds are different in their nature, though both come under the same category of a " gift. " In the former case the consideration was assistance rendered for four years and moneys spent on medicine and physicians, while here it is sincere love and affection. The consideration helps to interpret the covenants. In *Tikiri Kumarihamy v. de Silva* (*supra*) the pregnant words were that the donee shall " hold and possess *for ever*." Words which do not appear here. A promise " not to raise or enter any dispute whatsoever against the gift " is not the same thing as not to revoke or cancel the deed. The words of the deed construed in *Molligoda v. Sinnetamby* (*supra*) are closely similar to—if not identical with—the words of the deed under consideration. I would construe the words as not sufficient to exhibit an intention to renounce the right of revocation. I hold that the donor had not renounced her right to revoke the deed of gift, and that her subsequent revocation was valid. The second defendant is, therefore, entitled to be declared the owner of the land in dispute and to have the plaintiff's action dismissed, but only in so far as the plaintiff's claim to the land is referable to the title derived by Dingiri Amma Kumarihamy under the deed of gift of April, 1913, from the first defendant.

There remains the question of the title purported to be conveyed to Dingiri Amma Kumarihamy by the Crown grant of 1915 (P 7). I venture to differ from the holding of the learned District Judge that Kumarihamy's heirs became entitled to the land as it was " settled " upon her before her death. The Crown grant is ineffectual to pass title to Kumarihamy as it is a grant to a dead person. This is clear from *Chellamma v. Namasiwayam*,[1] *Bastian v.*

[1] *(1907) 3 Bal. 209.*

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Andris (*supra*), and *Appuhamy v. Nona* (*supra*). If Kumarihamy had no title from the Crown, she could transmit nothing to her heirs. What the District Judge calls "settled" cannot be regarded as giving Kumarihamy any other right than to claim a grant from the Crown. otherwise why should there be a grant at all. It has been held that a formal grant by the Crown is necessary to pass title to immovable property from the Crown. See *Chellamma v. Namasiwayam* cited above. Accordingly, the plaintiff's claim fails in so far as it is based upon the Crown grant in question. For this reason, too, his action must be dismissed. Mr. Drieberg apprehended that dismissal of this action would debar the plaintiff from asserting a claim to the land upon a title rightly derived from the Crown. I do not think that this case could be pleaded *res judicata* against such a claim. This case only decides that if the first defendant was once the owner, the second defendant is now the owner, and if the Crown was the owner the plaintiff's predecessor had not obtained title from the Crown. It would appear from the document (P 10), the Crown would be in a position to prove a *primâ facie* incontestable claim to the land, as it is said to have been a chena at the date of its survey by the Crown and to be situated in the Kandyan provinces.

In the circumstances the simplest course is to allow this appeal with costs, and to dismiss the plaintiff's action with costs. I make order accordingly.

DE SAMPAYO J.—I agree.

Appeal allowed.