

1946

*Present : Jayetileke and Rose JJ.*

SINNAMMAH, Appellant, and NALLANATHAR, Respondent.

*221—D. C. Jaffna, 1,850.**Donation—Gift by wife in favour of husband—Action for revocation—Gross ingratitude—Roman-Dutch law.*

Under the Roman-Dutch law a donation *inter vivos* may be revoked if the donee assaults the donor, although the latter may have agreed not to revoke it.

<sup>1</sup> 35 N. L. R. p. 323.

**T**HIS was an action brought by the plaintiff to revoke a deed of gift made in favour of her husband on the ground of gross ingratitude. The learned District Judge held that the defendant had assaulted the plaintiff and gave judgment for her.

*N. Nadarajah, K.C.* (with him *H. W. Jayewardene* and *S. Sivasubramaniam*), for the defendant, appellant.—The plaintiff seeks to have a deed of donation executed by her in 1932 in favour of her husband, the defendant, revoked on the ground of ingratitude and cruelty. In August, 1942, the plaintiff left her husband and later instituted maintenance action. Her allegation, in that case, of cruelty was, however, rejected by Court. The dismissal of the maintenance case would operate as *res judicata* in the present case—*Jainambo v. Izzadeen*<sup>1</sup>; *Bankiri Kiri v. Hattena*<sup>2</sup>; *Gunahami v. Arnolis Hamy*<sup>3</sup>. The finding as regards ingratitude is based on the finding of cruelty.

The donation is expressly and on the face of the deed stated to be irrevocable. Such a deed cannot be revoked on any ground—*Ukku Banda v. Paulis Singho*<sup>4</sup>; *Sahul Hamid v. Mohideen Nachiya*<sup>5</sup>; *Razeeka v. Settuck*<sup>6</sup>; *Gunerathamy v. Manuel Appuhamy*<sup>7</sup>; *Voet 39.5.31*. The Roman-Dutch law prohibits gifts between husband and wife—*Wessels' Law of Contract, Vol. I., pp. 255, 408*. It is only by the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), s. 9 that the gift in question was made possible. The rule, therefore, of Roman-Dutch law that a gift can be revoked on the ground of ingratitude is not applicable in this case. Even if it is applicable ingratitude, at large, is not a ground of revocation. The grounds of revocation of a gift are limited—*Sivarasipillai v. Anthonypillai*<sup>8</sup>.

*L. A. Rajapakse, K.C.* (with him *H. W. Tambiah*), for the plaintiff, respondent.—A gift can be revoked for ingratitude even though the donor expressly agreed that it should be irrevocable—*Maasdorp's Institutes of S. African Law (4th ed.) Vol. 3, p. 115*. All that section 9 of Cap. 48 does is to remove a bar imposed by the Roman-Dutch law on gifts between husband and wife. But there is no enactment which says that the common law does not apply to such gifts. Even in Roman-Dutch law the prohibition of gifts between husband and wife is not absolute—*Lee's Introduction to Roman Dutch Law (3rd ed.) 92-93; 296-297*; *Walter Pereira's Laws of Ceylon pp. 610, 611*. The grounds of revocation enumerated in *Sivarasipillai v. Anthonypillai (supra)* are not exhaustive. See *Van Leeuwen's Commentaries, Vol. 2, p. 235 (2nd ed.)*.

The dismissal of the maintenance action cannot operate as *res judicata*. The cause of action in the maintenance case was quite different from the cause of action in the present case.

<sup>1</sup> (1938) 10 C. L. W. 138.

<sup>2</sup> (1891) 1 C. L. Rep. 86.

<sup>3</sup> (1895) 3 N. L. R. 128.

<sup>4</sup> (1925) 27 N. L. R. 449.

<sup>5</sup> (1932) 34 N. L. R. 57 at 68.

<sup>6</sup> (1931) 33 N. L. R. 176.

<sup>7</sup> (1927) 28 N. L. R. 329.

<sup>8</sup> (1937) 40 N. L. R. 47.

*N. Nadarajah, K.C.*, in reply cited Voet 39 (Krause's translation, pp. 50, 105, 106) and Halsbury's Laws of England, Vol. 16, para. 1055 (Hailsham ed.).

*Cur. adv. vult.*

February 7, 1946. JAYETILEKE J.—

This is an action for the revocation of a deed of gift bearing No. 12396, dated November 16, 1932 (P 3), executed by the plaintiff in favour of her husband, the defendant, on the ground of gross ingratitude. The parties were married in the year 1923. The plaintiff alleged that in the year 1942 the defendant opened a tea boutique and employed a woman called Eliyapillai to assist him. The defendant became intimate with that woman and took her from the boutique to his house. The plaintiff objected to Eliyapillai being brought to her house whereupon the defendant entered upon a course of conduct which amounted to cruelty. On one occasion he assaulted her and fractured her arm. The plaintiff was miserable thereafter, and she separated in July, 1942. The defendant denied the allegations made by the plaintiff, and disputed the plaintiff's right to revoke the deed. After a very careful review of the facts the trial Judge arrived at the following conclusions:—

- (1) That the defendant had assaulted the plaintiff.
- (2) That the defendant had kept Eliyapillai as his mistress.

Having come to these conclusions the trial Judge considered himself bound by the authority of a judgment of this Court in *Savarasipillai v. Anthonipillai*<sup>1</sup> to hold that the first finding was fatal to the defence. In so holding we are of opinion that he was clearly right. In the Roman-Dutch law there is the most ample authority that a donation can be revoked if the donee assaults the donor (Voet 39.5.22, Krause's Translation, page 50; Grotius 3.2.17, Herbert's Translation page, 286; Van Leeuwen 30.4.7, Kotze's Translation, page 235; 2 Burge, page 146.)

Mr. Nadarajah contended that plaintiff cannot maintain this action as on the face of it P 3 is irrevocable. The habendum clause is expressed in the following terms:—

“I, Sinnammah, wife of Nallanathar of Thinnalai South for and in consideration of the natural love and affection I have towards my husband Vallipurathar, of the same place, do hereby give, grant and convey by way of irrevocable donation the property described herein below in the schedule unto him subject to my life interest”.

He based his argument upon two cases, *Ukku Banda v. Paulis Singho*<sup>2</sup> and *Razeeka v. Mohamed Sathiek*<sup>3</sup>. In those cases it was held that where a deed of donation contains an express recital that it is irrevocable the

<sup>1</sup> 8 C. L. W. 121.

<sup>2</sup> 27 N. L. R. 449.

<sup>3</sup> 33 N. L. R. 176.

donor must be taken to have renounced the right to revoke it. There can be no question that the principle of those decisions still remains good but, in my view, they are not relevant to the present case. It must be remembered that under the Kandyan law and Mohamedan law the general rule is that the power of revocation is inherent in the donor of every gift. The gift may be revoked by the donor himself by the execution of another deed. By a renunciation clause or by making the gift irrevocable the donor merely gives up the right to resume the property at any time voluntarily. Under the Roman-Dutch law, however, a donation once made is valid and irrevocable but it may be cancelled by decree of court under exceptional circumstances. The Dutch writers mention among the grounds of revoking donations the case of the donee attempting the donor's life, striking him, attempting to ruin him, maliciously slandering or otherwise injuring the donor. The donation by the plaintiff to the defendant being irrevocable according to law, I do not think that there is any particular magic in the word "irrevocable" in P 3. There is, however, very clear authority which concludes the question. According to Voet<sup>1</sup> a donation *inter vivos* can be revoked even though the donor may have expressly agreed not to revoke it on the ground of ingratitude. Such an agreement is null and void as being *contra bonos mores*.

The section reads—

"Although a donation *inter vivos* cannot be revoked at pleasure not even by the rescript of the Sovereign, nor even if the donor alleges that he made the donation in fraud of another person, yet there are five instances of ingratitude, which, if the donee is guilty of them towards the donor, are considered just causes for revocation or change of mind, notwithstanding that at the time of the donation it may have been agreed by a pact confirmed even by oath, that the donation cannot be revoked on account of ingratitude, since such an agreement is null and void as being an incentive to misconduct and involving a condonation of future crime."

The opinion of Voet seems to be based on the following passage in the Digest (2.14.27. s 4) :

"An agreement not to institute an action for an injury to be committed by another is invalid".

I do not think it is necessary to deal with the second limb of Mr. Nadjajah's argument that the order made on the plaintiff's application for maintenance against the defendant in action No. 1,760 of the Magistrate's Court of Point Pedro is a bar to the present action. The proceedings show that the question at issue between the parties in that action was whether the defendant was living in adultery with Eliyapillai at the time

<sup>1</sup> 39.5.22 *Sampayo's Translation page 24.*

of the application. The trial Judge has, in my opinion, come to a correct conclusion both on the facts and on the law. I would, accordingly, dismiss the appeal with costs.

ROSE J.— I agree.

*Appeal dismissed.*

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