SESSION 2

REVOCATION OF IRREVOCABLE DEEDS OF GIFTS AND ADVICE NOTARIES TO AVOID PITFALLS

Chandana Liyanapatabendy President's Counsel

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Donation or Gift – R. W. Lee, 5th Ed page 285

- In Roman – Dutch Law all contracts are consensual.
- Some contracts are of somewhat a special category because they concern certain relationships of mankind which are of such frequent occurrence
- In Roman – Dutch Law, donation / gift is regarded as a contract
- Donation or gift is one such contract of special category
- Deed of gift in respect of land / immovable property requires registration and should be notarially executed

Irrevocable, but subjected to some limitations R.W. Lee Continued....

- A gift being gratuitous, is subjected to certain limitations
- If the property given does not belong to the giver, gift is void
- Gift as a rule is irrevocable
- By inclusion of an express provision to do so, the deed of gift can be a revocable deed of gift
- In such instance, by writing a subsequent deed of gift previous gift can be renunciated
- However its not the common practice to write such revocable deed

Gift as a rule is irrevocable

- Therefore, if a donor fails to hand over the property promised by way of gift he may be sued for breach of contract

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- If the property had been handed over by the donor, he can not reclaim it

Both these statements are subjected to some qualifications or limitations
If a donor fails to hand over the property promised by way of gift he may be sued for breach of contract

- ❖ However the donor may defend the action on the ground of want of means (*beneficium competentiae*)
- ❖ Further, the claim of creditors by onerous title are preferred to the claims of the donee

If the property had been handed over by the donor, he cannot reclaim it

- ❖ However the gift may be revoked and the property reclaimed:
  - ➢ If the done fails to give effects to a direction as to its application (*donatio sub modo*)
  - ➢ On the ground of donee's gross ingratitude
  - ➢ If at the time of the gift the donor was childless, and afterwards became the father of a legitimate child by birth or legitimation

Donation or gift is...

- A voluntary transfer of property to another made gratuitously and without consideration. (Bradley v Bradley as cited in Blacks Law Dictionary 6th Ed)

Essential requisites of gift

- Capacity of the donor
- Intention of donor to make gift
- Completed delivery to or for donee
- Acceptance of the gift by donee

Deed of Gift

- Ordinarily, a deed for a nominal sum or for love and affection

Revocation of gifts – Krishnaswamy vs Thillaiyampalm (SC)(1957) 59 NLR 265

The question that came up in appeal for adjudication was
Whether the deed of donation executed is a revocable on the grounds:-

- That the deed was acted upon,
- Of ingratitude

(The land was conveyed to the defendant by way of gift at his request to get some advantage from the income tax, etc and as such the deed was not meant to be acted on. Plaintiff therefore sought to obtain re-conveyance as the defendant's purpose was served. Trial judge held that deed had been acted upon and was intended to operate as a gift-at page 265)

- But, when they went to see the defendant to ask for the re-conveyance, there were abuse and attempted to assault. These were the ingratitude complained of. (at page 266)
- In this case the His Lordship Basnayake C J cited important passages from various authorities and had compared Perezius's Praelections Codicis Justiniani with Voet and Van Leeuwen, and said ".. If we go back to the original source, the Roman Law, it will be seen that the wider interpretation of Voet and Van Leeuwan is preferable to the narrow view of Perezius.." – at page 266-268

The object of the power to obtain a revocation of a gift for ingratitude

- "..Lest anyone may be allowed both to take the property of another and to mock at the donor's frugality and also that the donor should not be allowed to lose his property and be ill-treated by an ungrateful recipient of a gift.." at page 269

Definition according to the Black's Law Dictionary

Ingratitude- In Roman Law, ingratitude was accounted for sufficient cause for revoking a gift or recalling the liberty of a freedman. Such is also the law of France with respect to the first case. But the English and the American Law has left the matter entirely to the moral sense. Ungrateful.
(Black's Law Dictionary, Sixth Edition)

Voet's view cited with approval – at page 269

- Ingratitude for which a donation may be revoked must be ingratitude which the court does not regard as trifling
- Of course slighter cause of ingratitude are no means enough to bring about a revocation
- But may differ according to the facts of the given case

What is ingratitude

- There is no rule to say that a revocation may not be granted on the commission of a single act of ingratitude
- Is a frame of mind which has to be inferred from the donee's conduct
- Such an attitude of mind will be indicated either by a single act or by series of acts
- It may be one instance, but the donee must take the consequence of his conduct if he donor is unwilling to forgive him
- Held-DJ was wrong in taking the view that in law there is no ground for revocation of a deed of gift
- Made order revoking the deed

Stephen v Hettiarachchi & Another
(CA) 2002 3 SLR 39

- Although ordinarily a deed of gift is irrevocable by the donor, nevertheless it is competent for the donor to *reserve to himself the right of revocation.*
- In which event the donor can, by executing a subsequent deed of revocation and without assigning or proving any reason in a court of law, revoke the earlier deed of gift

- Deed of Revocation

Deed of Revocation

- A donor may expressly reserve a power of revocation and exercise it himself without obtaining a decree of court.

  Ponnamperuma v Goonesekera 23 NLR 235

- The question is whether a donor may not expressly reserve a power of revocation and exercise himself. I do not see any principle disentitling a donor to do so. (at page 238)

- Since the gift is purely voluntary, and as it is in the power of the donor to give the property absolutely or a limited interest therein, I think that it is not contrary to law, if he makes a transitory gift, such gift to be terminated by his own act. (At page 238) .. There is no authority for holding that an express power of revocation reserved in the very deed of donation can not be validly exercised (at page 239)

Power to revoke

- It is lawful for the donor in a deed of gift to reserve to himself the power to revoke the gift and revocation made in the exercise of such power is valid.

  Government Agent, Western Province v Palaniappa Chetty
  11 NLR 151

Irrevocable deed of gifts – how to revoke

- Its clear that in order to revoke a deed of gift which is irrevocable, the donor must file an action in a court of law
- To have the deed revoked
- On the grounds recognized by Roman Dutch Law.

See further:
Fernando vs. Perera 63 NLR 236
Podinona Ranaweera Menike vs. Rohini Senanayake (1992) 2 SLR 181

However the whole thing was changed...

- In D. B. Wilson vs. Sumanawathie & others- CA 535/95(F) decided on 13.07.2007 the Court of Appeal upheld a judgment of a District Court where it was held that the Donor can revoke an

irrevocable deed of gift by executing (merely) a deed of revocation without filing an action and obtaining a decree of Court

- The court heavily relied on the application of Kandyan Law to revocation of deed of gifts and the case of Dullawe vs. Dullawe 71 NLR 289 which was a case under the Kandyan Law.
- In SC Spl. L.A. No. 07/2008 the Supreme Court refuse to grant special leave (minute dated 20.06.2008)

The resulting position- Law Commission's concerns

- Title of a donee has been put in jeopardy and in a state of uncertainty as the donor may now at anytime unilaterally execute a deed of revocation setting out reasons for such revocation and revoke such an irrevocable deed of gift.
- Thus the reasons given by the donor are to be accepted without challenge in a Court of Law.
- Further, such title cannot be taken as security/ collateral in obtaining financial facilities from such financial institutions including Banks
- As such, the title of the donee has had no value and he was placed in a disadvantageous position
- He could not even dispose of it.
- This caused havoc.
- The lending institutions were also placed in a very disadvantageous position as they may lose the security on which the facility was granted.
- Furthermore, there was also a possibility that donee, in connivance with the donor, for the purpose of defrauding the lending institutions can now could execute deeds of revocations, as resorting to court of law has become nugatory.

The Legislature intervened.

- A new Act was introduced, though it was bit too late. It says "better late than never"
- It has only 7 sections.
- **Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act**, No. 5 of 2017 which was certified on the 4th of April, 2017.

An irrevocable deed of gift may be revoked...

- On the ground of gross ingratitude
- Only on an order made by a competent Court of Law in an action filed within a period of 10 years from the date of the execution of such deed of gift and within 2 years from the date on which the cause of action arose
- Such an action should be filed by the donor of such deed against the donee to have the said deed revoked

  section 2 & 3

The recommendation of the Law Commission that when an action is filed to revoke such irrevocable deeds, public should be given notice is given effect to...

- It is mandatory that a *lis pendens* is registered
- Thus it is mandatory for the plaintiff to make an application for registration of *lis pendens*

  section 4 (1)
- Such application should be in triplicate and marked *original, 1st copy and 2nd copy*
- Shall be substantially in the form set out in Registration of Documents Ordinance (Chapter 117)
- Shall contain a blank space for the insertion of the number to be assigned to the action by the Court

Advice to Notaries to avoid pitfalls, as the topic of the presentation suggests...

- To avoid the use of term "irrevocable" from such deeds of gifts

will the donor be happy about it?

- To draw up a special Power of Attorney from the donor giving the donee the right to sign on behalf of the donor in respect of mortgage bonds

sounds good!

Continuation... Deed of transfer instead

- As per the provisions of the Act, within the time periods given donor can file an action.
- As such, to avoid such situation is it advisable to advice the client to write a deed of transfer instead of a deed of gift?

Sound good... again!

- If this is done, then, the transferor(donor) is aware of the true nature of the instrument
- And the Stamp duty payable on the true value thereof is paid and thus the matter is over and concluded and thereafter the donor has no role to play
- The difference between the amount of the Stamp duties on gifts and transfers may be considered negligible under the given circumstances

Continuation... How about a deed of declaration...?

- Should a deed of declaration be written by the donor declaring that he shall never cancel the deed of gift already written?
- Can the party by agreement of law avoid the operation of law and would such deed of declaration be considered as against the public policy
- "..(As per the rule of law relating to ingratitude as a cause for the revocation)...*This is so although it had been arranged by agreement at the time of the donation, even by agreement confirmed on oath, that the gift would not be withdrawn on the ground of ingratitude. Such a covenant is void as being a temptation to wrongdoing, and as involving the forgiveness of a future offence.."*

As cited by Basnayake C.J. in Krishnaswamy v. Thillaiyampalam 59 NLR 268

Thank you and I welcome, with gratitude your comments, suggestions and guidance to improve my work and as such please write to me on
chandanaliyanapatabendy@gmail.com