PRESENT PROVISIONS AND ACTS APPLICABLE TO THE REVOCATION OF DEEDS OF GIFT AND THE PROPOSED LAWS WHICH ARE CONNECTED THEREWITH OR INCIDENTAL THERETO

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A. Introduction

1. As it stands today, the general law which governs the rights of parties in Sri Lanka is Roman Dutch Law (RDL).

2. However, apart from the RDL, there are personal laws which govern certain aspects of the rights of people who are subjected to such personal laws such as Muslim Law, Kandyan Law and Thesawalamai law.

3. While the Muslim Law is personal to the Muslims who profess the faith of Islam, the Kandyan and Thesawalamai laws are regional laws.

4. The common law which is applicable to 'Gifts' and to matters arising thereunder is the Roman Dutch Law. Under the Roman Dutch Law (RDL), there are several categories of gifts.

5. A gift is a contract whereby the owner of property (Donor) gifts such property to a person (Donee) with or without conditions.

6. A Donor may gift a property with a specific condition that he reserves to himself the right to revoke it. The Donor may also gift a property wherein it is expressly stated that it is absolute and irrevocable.

7. It is incumbent on the Donee to accept the gift for it to become operative. A Donee by accepting the deed binds himself to all the conditions in the deed as does the Donor by executing it.

8. However, different legal principles apply for the revocation of gifts under Kandyan, Muslim and Thesawalamai law.

9. There is a degree of confusion as to the law which is applicable for revocation of gifts in these different circumstances.

10. Hence, in this paper we propose to analyze the law relating to revocation of gifts with particular emphasis on the Roman Dutch Law.

B. **Revocation of a gift under common law**

1. A donation under common law is irrevocable. This irrevocability is however subject to the following exceptions;

    i. On the ground of gross ingratitude,

    ii. When the donor of a gift of great value afterwards has children,

    iii. When the donation is of such magnitude that the children of the donor are thereby prejudiced in their legitimate portion.

2. **In Wille's Principles of South African Law, 9th Vol at page 1036** the said principle was described as follows;

    "Revocation of donations"

    Normally a donation *intervivos* is not revocable by the donor except for reasons justifiable in the circumstances, such as gross ingratitude on the part of the donee, or ill-treatment of the donor by the donee, eg: malicious desertion by a woman of her husband, a remuneratory donation is not revocable on the ground of ingratitude of the donee.

3. A donation may also be revoked because of a breach of a condition (modus) attached to it, but not on the ground that the donor has subsequently been reduced to dire financial straits.

4. Hence, if the parties are governed by common law, a deed of gift could be revoked only on the basis of gross ingratitude towards the donor.

    A donor is entitled to revoke a donation on account of ingratitude;

    i. If the donee lays *manusimpias* (impious hands) on the donor,

    ii. If he does him an atrocious injury,

    iii. If he willfully causes him great loss of property,

    iv. If he makes an attempt on his life,

    v. If he does not fulfil the conditions attached to the gift,

    vi. Other equally grave causes.

5. Under the RDL, if a donor of an irrevocable gift wishes to revoke it, he must file an action in a court of law to have the said deed of gift revoked on the grounds recognized by RDL.

6. In the case of **Ranaweera Manike v Rohini Senanayake 1992 (2) SLR 180** Court held in the following manner;

"Slight acts of ingratitude are insufficient for revocation, what amounts to an act of ingratitude sufficient to warrant revocation must vary with the circumstances of each case. Ingratitude is a form 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 a series of acts. A donee daughter by assaulting her donor parents was guilty of the foul offence of ingratitude. **Revocation is not however automatic. It requires a decision of the Court.** "

7. It was further held by Dr. Amerasinghe "although a gift is generally irrevocable it is revocable",

(i) if the donee failed to give effect to a direction as to its application (donatio sub mode), or

(ii) on the ground of the donee's ingratitude or

(iii) if at the time of the gift the donor was childless but afterwards became the father of a legitimate child by birth or legitimation.

8. Similarly, in the more recent case of **Ariyawathie Meemadume v Buddhikaa Meemaduma 2011 (1) SLR 124** the Supreme Court held

Per Gamini Amaratunga, J :-

" a deed of gift is absolute and irrevocable. That is the rule. However, the law has recognized certain exceptions to the rule of irrevocability. A party applying to Court to invoke the exceptions in his favour has to satisfy Court, by cogent evidence, that the court would be justified in invoking the exception in favour of the party applying for the same."

"a mere ipse dixit like, 'he threatened to kill me' is not sufficient to discharge that burden."

9. In the case of **Ponnamperuma V Gunasekara 23 NLR 235** it was held that a conditional gift particularly given on a *donatio propter nuptias*on the occasion of a marriage could be revoked

for want of fulfilment of the condition. The said principle was also reiterated in the more recent case of **Stephen v Hettiarachchi and another 2002(3) SLR 39**.

10. However, in view of the aforesaid, it is clear that a deed of gift which is unconditional could be considered as irrevocable without the aid of an order of a competent court.

11. In a case decided on 12.07.2007 **D.B. Wilson vs. Sumanawathie and Others – CA 535/95 (F)** – DC Kalutara 348/L – the Court of Appeal upheld a judgment of a District Judge wherein the Court had held that a Donor can revoke an irrevocable Deed of Gift by executing a Deed of Revocation without filing action and obtaining a decision of Court. This judgment had also considered the application of Kandyan Law to revocation of Deeds of Gifts: the case of **Dullawe Vs. Dullawe 71 NLR 289,** which was a case under the Kandyan Law, had been cited in the Court of Appeal Judgment.

12. In view of this judgment, the title of a Donee in whose favour there is an irrevocable Deed of Gift has been put in jeopardy and in a state of uncertainty, as the Donor may now at any time unilaterally execute a deed of revocation setting out reasons for revoking the irrevocable deed of gift.

13. Thus, the reasons given in such a deed by the Donor for revoking the deed are to be accepted without challenge by the Donee in a court of law. In these circumstances such title cannot be recommended, and the Donee will be unfairly placed, as he cannot improve the land or use it as collateral to obtain financing for building or commercial purposes or even dispose of it.

14. Therefore, this has an impact on his, as well as the country's, economic development and welfare. This case has given rise to a situation where lending institutions, who had prior to this judgment accepted title of the Donee and taken the land as collateral in granting loans, are now placed in a disadvantaged position, as on unilateral revocation by the donor, they will lose the security on which the loan was granted.

15. There is also the possibility that the Donee in connivance with the Donor for the purpose of defrauding the lending institutions can now execute deeds of revocations without going to Court.

16. This judgment has also added to the serious issue in this country of uncertainty of title to land which has seriously affected the development of the country. Thus another segment of valuable collateral which was hitherto available to the people to obtain funds for development or in times of financial need, has been lost to them as title to such property has now been placed in the category of "unacceptable and uncertain title".

17. In the aforesaid circumstances, in view of the conflicting circumstances which have arisen as to the law relating to revocation of gifts, many have expressed the opinion that legislative intervention is inevitable to settle the issue once and for all(or at least in relation to gifts under the RDL).

C. **The Act passed by the Parliament to deal with revocation of gifts.**

1. In the light of the aforesaid developments, the law has been passed by the Parliament the title called "Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act, No. 5 of 2017."

2. The Act specifically provides that it should apply only to actions in relation to revocations of irrevocable gifts under the common law. In terms of Section 3 of the Act,an irrevocable deed of gift could only be revoked by an order made by a competent Court.

3. Furthermore, Sections 4,5 and 6 provide for registration of *lis pendens* with a view to give notice of a pending action in respect of a land so that *bona fide* purchasers maybe protected by law.

4. However, the Act as it stands now make provision for revocation of (irrevocable deeds of gifts),in other words giving the impression the revocable deed of gifts or conditional gifts could be revoked by a donor without a action filed in a competent Court of law.

5. As it is submitted above the cases referred to suggest all gifts are considered irrevocable in Roman Dutch Law.

6. Hence there is a contentious issue whether a deed of gift which does not referred that it is irrevocable or which is a conditional gift could be revoked without going to Courts.

7. On the other hand, as the authorities referred to above suggest, all gifts are considered irrevocable other than conditional gifts under certain circumstances.

D. **Kandyan Law**

1. According to Kandyan Law, which is set out in the Ordinances No.39 of 1938 and 25 of 1944, a deed of gift could be cancelled by effecting an instrument in writing subject to certain exceptions.

2. Section 4 of the Kandyan Law Ordinance reads as follows;

   Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime 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.

3. Therefore, unlike the common law, under Kandyan law a deed of gift is always revocable by executing a deed of declaration subject to the exceptions contained in Section 5 of the Ordinance. Those exceptions are as follows;

   i. Any gifts by virtue of which the property which is subject of that gift shall vest in the trustee or the controlling viharadhipathi of a temple governed by the Buddhist Temporalities Ordinance,

   ii. Any Gift in consideration of and expressed to be in consideration of future marriage, which marriage has subsequently taken place,

   iii. Any gift creating a charitable trust,

   iv. Any gift, the right to cancel or revoke which shall have been renounced by an express renunciation by the donor,

4. The deed which effects the cancellation of the gift must be executed according to the provisions of the Prevention of Frauds Ordinance.

5. It is noted that the above provisions are applicable only for those who are governed by the Kandyan Law.

6. Section 5 (1) (d) of the Kandyan Law Ordinance specifically provides as to how the right to revoke should be renounced in order to make such gift irrevocable.

E. **Muslim Law**

1. In terms of Section 3 of the Muslim Intestate Succession Ordinance No. 10 of 1931, the general explanation is that a deed of gift under Muslim Law is revocable. The said Section reads as follows;

> "for the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving usufructs and trust, and made by Muslims domiciled in Sri Lanka or owning immovable property in Sri Lanka, shall be the Muslim law governing the sect to which the donor belongs
>
> Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed".

2. In terms of the aforesaid Section, a deed of gift is not valid until the possession is handed over to the donee.

3. In the case of **Sultan Vs. Peiris 35 NLR 57** the court held that the impugned deed of gift was not valid where the donor had not given the possession to the donee.

4. However in the case of **Mahamadu Vs. Marikkar 21 NLR** the court held that the possession could be either actual or constructive.

5. Even though the law is not clear about the revocation of gifts under Muslim Law, there are specific instances where the deeds of gifts are irrevocable.

6. Under Muslim Law, gifts between spouses are irrevocable.

F.SURVIVAL OF AN ACTION FILED UNDER GROSS INGRATITUDE

1. Section 395 of the Civil Procedure Code reads as follows;

   *"in case of **the death of** a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action."*

2. Hence, even the death of a sole plaintiff will not *ipso facto* guarantee the end of litigation as long as the right to sue survives.

3. In ascertaining the right to sue, the court will have to consider whether the right alleged to have been with the Plaintiff could be survived after his death. In assessing such right to sue, if the action is in personam (in other words, personal to the Plaintiff), it will not survive.

4. Since revocation of a deed of gift on gross ingratitude is an action in personam, it will not survive for the heirs of the plaintiff to sue under normal circumstances.

5. In the case of **Jayasuriya V Samaranayake 1982 (2) SLR 460** it was held ;

   "that the action for revocation of a deed of gift on the grounds of gross ingratitude was an action in personam and did not survive on the Plaintiff".

6. However, in the case of **Mahawewa and Another v Hemachandra Mahawewa 2010 (1) SLR 270** it was held ;

   "In the instant case, at the time of the original Defendant's death, the trial had commenced and the Respondent had completed his evidence and closed his case. The deceased Defendant had also commenced his case but died prior to the conclusion of the cross examination of his case. Unmistakably, the stage of Litis Contestatio had been reached at the time of Defendant's death.

   Held -

1. *the maxim personalismoritur cum persona cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the facts and circumstances of the case.*

2. *The Plaintiff-Respondent-Respondent-Respondent should be permitted to continue the action for revocation of gift against the Defendant-Petitioner-Petitioner-Petitioners after due substitution.*

7. In view of the above, though an action filed under gross ingratitude to revoke a gift is personal in nature, the survival of the cause of action after the death of the donor depends on the stage of the trial at the time of the death, and in that, the vital evidence of the donor had been concluded and the stage of the trial had reached what is known as *Litis Contestatio*. The cause of action would survive even after the death of the donor.

G. CONCLUSION

1. In the premises aforesaid, a deed of gift under a common law which is unconditional is deemed to be irrevocable.

2. Such deeds of gifts canonly be revoked by an order of a competent court of law on a ground recognized by the Roman Dutch law.

3. However, since the judgment in the case of **Wilson v Sumanawathie and Others** (supra) has caused tremendous uncertainty in the minds of the public, it is admirable that the legislature intervened to settle the said issue once and for all.