IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Warnakulasuriya Aloysius Fernando,
Mungandaluwa,
Ilippadeniya.

Plaintiff

C.A. Case No. 186 / 2000 (F)

D.C. Chillaw 23664 / L

-Vs-

Warnakulasuriya Benitus Franklin Fernando,
Kanjukkuliya,
Mugunuwatawana.

Defendant

And Between

Warnakulasuriya Benitus Franklin Fernando,
Kanjukkuliya,
Mugunuwatawana.

Defendant - Appellant

-Vs-

1. Warnakulasuriya Anacletus Fernando,
   Kanjukkuliya,
   Mugunuwatawana.

2. Warnakulasuriya Ethal Miyuriel Fernando,

3. Warnakulasuriya Rexi Priyanda Nirmala Fernando,

   Mungandaluwa,

   Ilippadeniya.

4. Warnakulasuriya Janet Noelyn Fernando,

   No. 202/B,

   Ihala Katuneriya,

   Katuneriya.

Substituted - Plaintiff - Respondents

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Rasika Dissanayake with Lakshan Livera for Defendant-Appellant M.M.M. Ali Sabry, P.C. with Shamith Fernando for Plaintiff-Respondents
Argued on	:	19.01.2015
Decided on	:	04.08.2015

A.H.M.D. NAWAZ, J,

By the amended plaint dated 21st September 1992, the original Plaintiff-Respondent (a grandfather of the Defendant-Appellant) averred that he executed a deed of gift bearing number 429 dated 17th May 1978 by which he had gifted his grandson the Defendant-Appellant (hereinafter sometimes referred to as "the Appellant") half a share of a land situated at Mungandaluwa, Chilaw but subject to a reservation of life interest for himself and his wife. The original Plaintiff-Respondent (hereinafter sometimes referred to as "the Respondent") further alleged that the Appellant (the grandson) specifically demanded that the reservation of life interest be withdrawn and upon the opposition of the respondent to such a request, the Appellant on numerous occasions had abused him and on one such occasion the Appellant came to his residence, spat upon his face and pushed him aside. On that score the Respondent prayed for a revocation of his deed of gift. So this appeal raises the all too frequently litigated issue of revocation of a deed of gift on the ground of gross ingratitude.

The answer filed by the Appellant, whilst indeed repudiating several of the averments in the plaint, stated that since the Respondent grandfather had executed a deed of gift which was *irrevocable,* the deed was incapable of being revoked and it further prayed for dismissal of the plaint.

It has to be observed that whilst the Plaintiff-Respondent raised two issues, interestingly enough the Defendant-Appellant chose not to raise an issue. The two issues that were raised on behalf of the Respondent grandfather went as follows:-

I. මෙම විත්තිකරු විසින් පැමිණිලිකරුට අධික අකෘතඥ ලෙස සලකන ලද්දේ ද?
(Did the Appellant treat the plaintiff with gross ingratitude?)

II. එසේ නම් පැමිණිලිකරුට පැමිණිල්ලේ ඉල්ලා ඇති සහනයන් ලබා ගැනීමට අයිතිවාසිකම් ඇත්තේ ද?

(If so, is the plaintiff entitled to the relief prayed for in the plaint?)

As is apparent, whilst the 1st issue puts in issue the fact of gross ingratitude, the answer to the 2nd issue depends wholly, in the event of an affirmative answer to the 1st issue, on the substantive law on donations.

The learned District Judge of Chilaw by his judgment dated 19.01.2000 answered both issues in the affirmative and ordered decree to be entered in favor of the Plaintiff grandfather. It is against this judgment that the Respondent grandson has preferred this appeal to this Court. The original Respondent died during the pendency of this appeal and his four children 1st to 4th Respondents were substituted as 1st to 4th Substituted-Plaintiff-Respondents.

Before I proceed to delve into the evidence to conclude whether the evidence led in the case establishes the case of the Plaintiff-Respondent on a balance of probabilities as has been pronounced upon to be so by the District Court, it becomes apposite to deal with some basics.

In civil cases when issues are raised and settled, the fact in issue comes into existence. The fact in issue is a *factum probandum*, a fact to be proved, whilst another species of facts known as relevant facts or *fact aprobans* are facts through which the proof of the fact in issue is sought to be achieved. The evidence ordinance makes this clear distinction between both facts in issue and relevant facts as Section 5 of the evidence ordinance declares that it is only relevant facts and facts in issue which may be adduced in any suit or proceeding. Only those facts which are declared to be relevant by the Evidence Ordinance become relevant facts which may be used to prove or disprove a fact in issue.

"Facts in issue" are defined in Section 3 of the Evidence Ordinance to mean and include-

Any facts which, either by itself or in conjunction with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding necessarily follows;

Further the explanation to 'facts in issue' in Section 3 of the Ordinance states,

> "Whenever, under the provisions of the law of the time being in force relating to civil procedure, any court records an issue of fact, the fact to be asserted or denied, in the answer to such issue, is a fact in issue."

So the exercise of raising issues would manifest the fact asserted or denied of a right or liability or disability the existence or nonexistence of which is the ultimate fact that the Court ultimately arrives at and the Evidence Ordinance facilitates that process of fact finding by enabling the adduction of relevant facts and the fact in issue itself.

It has to be noted that if a defence is raised by the Defendant as an issue, that would also constitute a fact in issue, as the above definitional section of what would constitute a fact in issue in Section 3 of the Ordinance leaves no room for doubt that even defences raised by Defendant become facts in issue

Be that as it may, when the aforesaid two issues pertaining to gross ingratitude were raised and recorded by Court, they constituted *the facts in issue* in the case. The items of evidence that could be led to prove the facts in issue would of course be *relevant facts or the fact in issue itself* (Section 5 of the Evidence Ordinance). As I have stated, the answer to the 1st issue, whether the Appellant did treat the

Respondent with gross ingratitude, has to be established by relevant facts and often times by evidence of specific instances of gross ingratitude.

It has to be observed that the 1st issue of gross ingratitude remained denied in the pleadings and since the position of the Defendant-Appellant was a mere traversal of the averments pertaining to gross ingratitude, the burden of proof would squarely devolve on the Plaintiff to establish on a balance of probabilities the *factum probandum or the fact in issue.*

Whilst the Plaintiff would lead his items of evidence to prove this fact in issue, the Defendant would seek to prove its rebuttal as denial of the fact in issue was the only thing that his answer alleged, apart from another legal issue that the answer raised-namely *whether a deed which recites itself as irrevocable can be revoked.*

This pure question of law viz whether a prima facie irrevocable deed of gift is capable of revocation, could be answered having regard to the substantive law on donations. So whilst the evidence led in the case would be utilized to ascertain the answer to issue No. 1, the substantive law of donations would be resorted to in order to answer the two issues in the case-namely issue No. 2 raised by the Respondent and the question of law that looms large namely whether a deed, albeit irrevocable on the face of it, can be revoked.

The proposition of pleadings receding to the background

It is trite law that once issues are raised, pleadings recede to background. This proposition is traceable to Section 3 of the Evidence Ordinance and the Explanation to Section 3. It is the Explanation to Section 3 that declares inferentially that once the issues are raised, it is within the parameters of those issues it is incumbent

upon both parties and the trier to ensure that the trial proceeds to finally ascertain whether the issues have been proved or disproved at the end of the case.

It is to be remembered that not a single issue was ever raised by the Defendant-Appellant in this case, leave alone any defences for that matter.

Though the Appellant did not raise any issues, the parties were certainly at variance on the question of fact-viz whether there was gross ingratitude and issues raised by the Respondent were sufficient to dispose of the respective cases of the parties. As I comment later, failure to raise any issues on the part of the Defendant would not amount to an abdication of the judicial duty under Section 146 of the Civil Procedure Code to raise issues, if the issues raised by the Plaintiff bring out the material propositions of fact and law on which the right decision of the case appears to the court depend.

As Chief Justice Layard brought out the differences in Indian Civil Procedure and English Procedure in ***Attorney-General v Smith***[1], in England parties frame their own pleadings and the case is tried on **the issues raised in the pleadings** and if an issue is objected to, the judge has to decide on the sufficiency or insufficiency of pleadings and if the pleadings are insufficient, leave is given to amend... But under the Indian system, which is akin to the provisions of the Sri Lankan Civil Procedure Code, the court does not as in England try the case on pleadings; it can use the plaint, the Defendant's statements, if any, to ascertain what are the issues to be adjudicated on. They are supplemented by the examination of the parties, document produced by them and also by the statements of the respective pleaders. It is the duty of the Court in India from such material to frame the issues to be tried and disposed of in the case. Our Civil Procedure Code follows the Indian

[1] 8 NLR 229 at 241

counterpart in the matter except that it requires the Defendant to file an answer unlike the Indian Code. However, **it does not allow the court to try the case on the parties' pleadings** but requires **specific issues** to be framed. By the provisions of section 146 of Civil Procedure Code, if the parties agreed, issues may be stated by them. If not agreed, then the court must frame them. ...."

I ventured to dwell at length on issues in general as the juridical basis of the oft quoted ratio in cases such as ***Hanaffi v Nallama***[2] namely once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede into the background, can only be explained having regard to Section 3 of the Evidence Ordinance (definition of a fact in issue), Explanation to Section 3 (explanation of the definition in relation to civil trials) and Section 5 of the said Ordinance which lets in only relevant facts and facts in issue.

Moreover I wish to observe that the failure of the Defendant to raise an issue in this case in no way reflects on the trial judge's duty to frame issues in terms of section 146 of the Civil Procedure Code as the two issues raised by the Plaintiff are sufficient to dispose of the case brought before court and it is apposite in this regard to recall the principle laid down by the Privy Council in ***Bank of Ceylon v Chelliah Pillai***[3] that "a case must be tried upon the issues on which the right decision of the case appears to the court to depend" and I hasten to point out that even though the Defendant in the case failed to raise any issues, the learned District Judge had before him the necessary issues (the plaintiff's issues) for a just decision of the case. Certainly the answers to the issues raised by the Plaintiff-Respondent, without more, was dispositive of the case brought before Court, given that there was a mere traversal of the Plaintiff's case and there was no specific

[2] 1998 (1) Sri. LR 73
[3] 64 NLR 25 (PC),

defence pleaded in the answer except the plea that an irrevocable donation cannot be revoked.

The Appellant's assertion in his answer that the altruistic grandfather gave of his property to him irrevocably, even if raised as an issue, would not have advanced the case of the Defendant any further as I would presently demonstrate that a gift, though irrevocable, is capable of revocation in Roman Dutch Law and provided that this Court finds that conditions for revocation exist on the facts proved, I would have no hesitation in answering that issue in appeal, though not raised at the trial, as it engages a pure question of law.

The question of revocability of a *prima facie* irrevocable deed of donation is a minor premise which is bound up with the larger premise before Court namely the two issues on which this case went to trial. After all, was it not Thayer who stated that "the facts in issue (the ultimate *factum probandum*) would depend on substantive law or the law of pleading"?[4]

In this case the substantive law of donations as obtains in Sri Lanka will determine whether on the facts proved, the Plaintiff has established a case for revocation of the deed of gift in question and the second question whether a prima facie irrevocable deed of gift is revocable at all is also determined having regard to the same substantive law of donations namely the Roman Dutch Law of Donations as it pertains to the deed in question.

Having indulged in the above discussion just to demonstrate that it is the evidence and the substantive law that determine finally the answers to issues, I now turn to the evidence adduced on behalf of the parties to ascertain whether the evidence

[4] *Thayer, A Preliminary Treatise on Evidence,*(1898) *p. 269*

established the case of the Plaintiff-Respondent on a balance of probabilities- namely the fact in issue of gross ingratitude.

Evidence on Behalf of the Plaintiff- Respondent

In the course of the trial the Plaintiff-Respondent grandfather clearly explained the nature of the ingratitude manifested by the Defendant-Appellant. Adverting to the Deed of Gift No. 429 dated 17th May 1978 marked as the Appellant stated as follows:-

> "ඒ ඔප්පුවේ උපලේඛණයේ සඳහන් දේපළ මුණුබුරාට තැගි කරන්න යෙදුනා. ඊට පසු 1990 දි මගෙන් ඇවිල්ලා ඇහුවා ඔප්පුව අවලංගු කරලා දෙන්න කියලා. වටිනාකම මදි වටිනාකම වැඩිකරලා ලියලා දෙන්න කියලා. ජීවිත භුක්තිය අවලංගු කරලා ලියලා දෙන්න කිවා. වටිනාකම මදි උකස් කරලා ප්‍රයෝජනයක් ගන්න ඒක අවලංගු කරලා දෙන්න කිවා. ඉන්පසු 1990 අන්තිම වතාවට මගෙන් ඇවිල්ලා ඇහුවා නොදුන්නොත් හොඳ වැඩක් කරන්නම් කියලා තර්ජනය කලා.
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> පස්සේ නාකියා, වේසිගේ පුතා, පාදඩයා, වරත්තුවා, මසබාදුවා කියලා මට බැනලා බෙල්ලෙන් අල්ලලා තල්ලු කරලා ගියා. 1991 ජනවාරි මාසේ සිද්ධියක් වුනා. ආයෙත් ඇවිල්ලා ඒ විදියටම ඉල්ලුවා. ඊට පසු මම දෙන්න බැහැ කිව්වා. මම මැරෙනකන් දෙන්නේ නැහැ කිව්වා. මූනට කෙල ගහලා තල්ලු කරලා ඇරියා.
>
> නත්තල් කාලයට මට කතා කරන්න මුණුබුරා එන්නේ නැහැ. මා එක්ක කතා කරන්නේ නැහැ තරහයි. මගේ භාර්යාව කියන්නේ ඔහුගේ ආච්චි. ඒ අවමංගල්‍යටවත් ආවේ නැහැ."

(vide page 63 of the brief)

Thus one could see as to how emphatic the donor had been in describing the suffering he underwent at the hands of a rapacious and ungrateful donee. The

Respondent has testified that apart from the verbal abuses-the unseemly expletives one should not hear from a grandson if he was brimful of gratitude, the Appellant on two occasions laid his impious hands on the Respondent and physically assaulted him. So much for the debt of gratitude that the Appellant owed the Respondent.

During the cross examination answering the question as to why he did not lodge a police complaint or did not complain to the Gramasewaka of the area regarding the assaults and verbal abuses of the Appellant, the Respondent answered in the following manner,

> "මම පොලිසියට ගියේ නැහැ මට තර්ජනය කලා පොලිසියට කිවොත් ගෙදර ඉන්න දෙන්නේ නැහැ කියලා. මම තනිවම ඉන්න නිසා ඔයට පොලිසියට ගියේ නැහැ."

(Vide page 78 of the proceedings)

Thus there is evidence of intimidation to the effect that the Respondent would not be spared if he went to police - (please vide page 78 of the brief). It is the opinion of this Court that the cross examination of the Respondent did not shake the testimonial trustworthiness of the witness. It has to be noted that he was emphatic that he had no reason to implicate his grandson.

So having regard to the totality of the Respondent's evidence one could observe that acts of intimidation and physical assaults have been quite categorically spoken to by the Respondent and with corroborative evidence emanating from one Miyuriel Fernando - a daughter of the Respondent the assertion of ingratitude becomes unassailable.

Miyuriel Fernando, the daughter of the Respondent also testified that the Appellant on several occasions verbally abused the Respondent and once subsequent to a heated argument the Appellant spat on the face of the Respondent, caught hold of him and pushed him.

චිත්තිකරු මගේ අයියගේ පුතා. පැමිණිලිකරුගේ මුණුබුරා. තාත්තා ඉන්නේ මගේ ළඟ. මේ චිත්තිකරු තාත්තා බලන්න එන්නේ නෑ. තාත්තට චිත්තිකරු සලකන්නේ නෑ. කිසිම දෙයක් කරලා නෑ. නත්තල් කාලෙට තාත්තව බලන්න එන්නේ නෑ. ඉදල හිටලා ඇවිල්ලා තාත්තට කරදර කෙරුවා. ජීවිත භුක්තිය එයාගේ නමට ලියලා දෙන්න කියලා කරදර කලා ඇවිල්ලා. නාකියා, මූසලයා, ජඩයා කියලා බැන්නා.

ප්‍රෑ වෙන මොනවද කලේ?

උ: කටින් කට ගිහිල්ලා කෙල ගහලා බෙල්ලෙන් අල්ලලා තල්ලු කෙරුවා. චිත්තකරු තාත්තට කෙලෙහිගුණ සලකන්නේ නැහැ.

(vide proceedings at page 86 and 87 of the brief)

Furthermore during the cross examination the same witness testified that she saw the Appellant physically assaulting the Respondent.

ප්‍රෑ තමා පවසන අන්දමට කෙල ගැසීමක්වත් නරක වචනයෙන් පැමිණිලිකරුට හිරිහැර කලේ නහැ කියලා යෝජනා කරනවා.

උ: මම පිලිගන්නේ නැහැ. මම ඇස්වලින් දැක්කා.

(vide proceedings at page 93 of the brief)

Here was a witness who had personal knowledge of the act of intimidation and assault. She was giving direct evidence of what she saw in terms of Section 60 of the Evidence Ordinance. Having perused the examination in chief and the cross

examination of these witnesses, I am fortified in my view that these witnesses were speaking the truth as to the abuse and assault.

The evidence of both the Respondent and Miyuriel Fernando discloses that the donee grandson (the Appellant) has manifested a course of conduct which amounts to serious invasions of the personal rights of the donor Respondent and in fact there is a slew of authority in this country for the proposition that a donation could be revoked on the ground of ingratitude which would envelope the kind of conduct displayed by the donee-Appellant-***Dona Podi Nona Ratnaweera Menike v Rohini Senanayake***[5]***, Krishnaswamy v Thillaiyampalam***[6]***, Manuel Pillai v Nallamma***[7]*and* ***Stella Perera v Silva.***[8]

It has to be noted that it was held in the case of ***Fernando v Perera***[9]-

> "A threat by a donee to cause bodily injury to the donor constitutes an act of ingratitude and is, therefore, a valid ground for the institution of an action by the donor to have the deed of gift set aside."

As was held in ***Dona Podi Nona Ranaweera Menike v Rohini Senanayake*** (supra)- 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.

As opposed to the evidence of the Plaintiff-Respondent and Miyuriel Fernando which tended to show ingratitude, the evidence of the Respondent who alone gave

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[5](1992) 2 Sri.LR 180.
[6] 59 NLR 265
[7] 51 NLR 221
[8] (2004) 3 Sri.LR 233.
[9] 63 NLR 236

evidence for the defence has to be taken into account. Bearing in mind the principle encapsulated in Section 134 of the Evidence Ordinance that no particular number of witnesses shall in any case be required for proof of any fact or even disproof thereof, I take the view that the mere repudiation of the allegations in the witness box does not take the case of the Defendant-Appellant so far as to induce any disbelief in the version of the donor who was quite categorical in his assertions that he had no reason to concoct a fictional story against his grandson. Having gone through his evidence carefully, I am not persuaded that the direct evidence of both the Plaintiff-Respondent and Miyuriel Fernando has been dented by the testimony of the Appellant. His evidence does not rebut the evidence in such a way as to disprove the version of the Respondent or show that the grandfather was uttering a tissue of falsehoods. In fact the learned District Judge of Chilaw has correctly evaluated the evidence led in the case by both contending parties and supports his affirmative answers to the Respondent's issues with the evidence. In fact I venture to state that the learned District Judge who witnessed the demeanor of the witnesses has come to the correct conclusion that the Respondent has proved the alleged acts of the Appellant amounting to gross ingratitude and granted the reliefs as prayed for in the prayer to the plaint. In this context it is pertinent to recall the observations of Court in ***Rahumath Umma v Anser and Others***[10]-

> *"that the trial judge who had the greater advantage of hearing, seeing and observing the demeanor of the witnesses has accepted the evidence of the witnesses as to the due execution of the deed. It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal..."*

[10] (2003) 2 Sri.LR 376

Comparable dicta in ***De Silva and Other v Seneviratne and Another***[11] as to when the Appellate Courts can interfere with the factual findings of the trial judge repays attention:

> ".....when the findings on questions of fact are based upon the credibility of witnesses on the footing of trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration will be reserved only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest consideration that it would be justified in doing so...."

As I observed at the beginning, proof of gross ingratitude raised as a fact in issue in Issue No. 1 has to be achieved by proving relevant facts and the fact in issue itself oftentimes by adducing specific instances of ingratitude and I hold that the learned District Judge who witnessed the demeanor of the witnesses and the weight of the evidence has correctly arrived at the right decision in answering the 1st issue and the consequential 2nd legal issue in the affirmative. Whilst the cogent evidence led on a balance of probabilities supports the answer to the issue of gross ingratitude, the substantive law of donations permits the affirmative answer to issue No. 2 namely if gross ingratitude is proved, the deed of gift becomes liable to be revoked on the ground-vide the judicial precedents cited above.

Irrevocable Deeds of Gifts-Are they revocable?

The other question of law which was never raised as an issue but could be answered in the appeal namely whether a deed of gift which declares itself as

[11] (1981) (2) Sri.LR 7

irrevocable could be revoked as in this case, has received attention and in the case of ***Ariyawthi Meemaduma v Jeevani Bhodika Meemaduma***[12] Gamini Amaratunga J recognized revocation on the ground of gross ingratitude as an exception to the rule of irrevocability. It has to be borne in mind that Gamini Amaratunga J who proceeded on the basis that the petitioner in ***Ariyawthi Meemaduma v Jeevani Bhodika Meemaduma*** had failed to prove the act of gross ingratitude before the District Court held as follows:-

> "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. Standard of proof is required to invoke any recognized exceptions to defeat the rule of irrevocability. A mere *ipse dixit* like "He threatened to kill me" is not sufficient to discharge that burden."

Of course Justice Amaratunga was unequivocal in his assertion that a deed of gift, albeit irrevocable, could be revoked in judicial proceedings on proof of recognized exceptions to irrevocability. One such recognized exception would be ingratitude, gross or ingratitude *simpliciter* that would enable Court to invalidate a deed of gift. When Amaratunga J alluded to standard of proof and cogent evidence, the learned Judge is not to be construed as having imposed a higher burden than is customarily imposed in civil litigation such as preponderance of evidence or proof on a balance of probabilities. The cogency or weight of an item of relevant evidence is the extent to which the evidence affects the probability of the existence of the fact in issue

[12] SC Appeal 68/2010, WP/HCCA/COL/98/(F) DC Colombo 7402/SPL SC Minutes dated 26.07.2011

item of evidence would not connote a variation of the standard of proof in these types of cases namely preponderance of evidence or proof on a balance of probabilities. Probative value, unlike logical relevance, is a question of degree. "Nothing is to be received which is not logically probative of some other matter requiring to be proved."[13]

So the legal position is quite clear. Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to move a court of competent jurisdiction to invalidate the donation by adducing proof that the donee has turned out to be an ingrate *post* execution of the donation.

Johanness Voet explicitly recognizes the power of the donor to change his jural relations with the donee, even though he has sworn not to revoke.[14]

Before I part with this judgment, let me expatiate on the other grounds of revocation which are referred to by Gamini Amaratunga J in ***Ariyawthi Meemaduma v Jeevani Bhodika Meemaduma*** (supra). Roman Dutch Law authors whose views have been oftentimes alluded to in several of our judgments have laid down the other grounds of revocation in their recognized works. Even on the ground of ingratitude, some of them refer to ingratitude whilst others prefer the nomenclature gross ingratitude. Though what I may set down below may not be relevant to the resolution of the issues in the instant case before me, it is useful to bear in mind the agreement of the Roman Dutch Law authors on revocability and the grounds of revocation.

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[13] Thayer, *A Preliminary Treatise on Evidence,* (1898) p.530.

[14] See Johanness Voet *The Selective Voet being the Commentary on the Pandects* vol 6 (translated by P.Gane). Butterworth & Co (Africa Ltd), Durban (1957) 39.5.1

Roman Dutch Law

Most so-called pure Roman-Dutch authors dealing with the issue are in agreement. An evaluation of the authors who set forth the law is appropriate in chronological order:

Grotius *Inleidinge* 3 2 17 deals with the circumstances under which a donation is revocable:

Lee translated Grotius as follows:-

> "Unless the donee has attempted the donor's death, beaten him, or sought to deprive him of all his property. Outrageous slander or other great injury gives the same right of revocation, except to mothers who contract a second marriage. Causes of equal or greater weight are held to have the same effect, and amongst them if the donee, having the means has refused to support the donor in his utmost need" *(An Introduction to Roman-Dutch Law* (1953) 237).

Lee rightly comments that this view is based on Justinian's *Codex* 8 55 (56) 10. It has to be noted however that Grotius does not mention "ingratitude" or "gross ingratitude".

Van Leeuwen *(Commentaries on Roman-Dutch Law* revised and edited by Decker and translated from the Dutch by Kotze Vol. 2 (1923) 4 30 7 235) states that donations "may also be revoked and cancelled by reason *of great* ingratitude and injury *(grooteondankbaarheid, enondaad:* Van Leeuwen II *Het Roomsch Hollandsch Recht* (1783) 4 30 7 *ad Gr* 3 2) done to the donor; as where the donee has attempted to take the life of the donor, assaulted him, or publicly slandered him, or has

support to the donor who has been reduced to poverty, *and the like" (*sic). He refers to *Codex* 8 55(56) 10 for this statement. Van Leeuwen is the first author to add the qualification of "great" to "ingratitude".

Huber (1636-1694) mentions ingratitude *(Heedendaegse Rechtsgeleertheyt* (1742) 3 14 36) as one of the reasons for invalidation of a donation. With reference to *Codex* 8 55 (56) 10 he lists **five species or instances of ingratitude**:

> (1) if the done attempted to take the life of the donor; (2) if the donee has laid violent hands on the donor; (3) if he has grievously insulted the donor; (4) if he has wrought great damage to the donor's property; and (5) if the donee has not observed the conditions of the donation (Huber *Heedensdaegse Rechtsgeleertheyt* trans I Gane I *The Jurisprudence of my Time* (1939) 477, translation of Huber 3 14 39).

Huber adds that jurists rightly added the case where the donee refuses to support the donor who has become destitute (Huber 3 14 37).

Huber further explains what the donor can claim from the donee or his heirs in any of the above instances. The donor can claim for revocation and invalidation of the donation; restoration of the property donated or money paid over; with all fruits and profits since *litis contestatio;* together with damages and interest (Gane 477).

Voet (1647-1713) in his commentary on the Pandects *(The Selective Voet being the Commentary on the Pandects* (Paris ed 1829) by Voet (1647-1713) and the Supplement to that work by Van der Linden (1756-1835) transl Gane vol. 6 (1957) *ad* 39 5 22 112) emphasises that a donation may be revoked by reason of ingratitude, even where the donor solemnly undertook not to do so. He refers to *Codex* 8 55 (56) 10 and summarises the grounds for revocation as follows:-

"These causes are when the donee has laid wicked hands upon the donor, or has contrived a gross and actionable wrong, or some huge volume of sacrifice or a plot against his life, or finally has not obeyed conditions attached to the donation."

That Voet refers to "ingratitude" and not "gross" ingratitude is worthy of cognizance. Voet also mentions the fact that his list is not exhaustive, but that other *similar or more serious grounds of ingratitude* may be invoked. However, he expressly states that slighter causes of ingratitude will not suffice.

Van Bynkershoek (1673-1743) reports a case where an attempt to revoke a donation on the ground of ingratitude was turned down by reason of the fact that the heirs (executors in the particular case) of the donor are not entitled to claim restitution by reason of ingratitude It has to be noted that the donor can proceed against the heirs of the donee. The grounds for ingratitude relied upon in this case were the fact that the donee (son of the donor) litigated against his mother concerning his father's will and wrote her a letter containing insults. The court found that the litigation itself did not constitute an *iniuria* against his mother and that the letter he wrote to his mother was in reaction to her letter in which she called his wife a whore *(meretrix)* (II *Observations Tumultuariae* (1934) case 1479).

The court probably regarded this as a ground of justification for the *injuria* committed by the son. This judgment therefore gives us an indication of a factual situation which the court will not regard as an *iniuria* indicative of ingratitude.

Van der Keessel (1738-1816) in his lectures on Grotius also basically repeats the grounds set out in *Codex* 8 55(56) 10, and subsequently, very importantly, elaborates on one of the grounds. As examples of ingratitude he mentions: (1) an attempt on the

life of the donor: (2) thrashing of the donor by the donee: (3) an insidious attempt to diminish the estate of the donor: and (4) serious insults. Van der Keessel then points out that Grotius neglected to mention the fifth ground of the *Codex,* namely breach of the conditions of the donation.

It is very interesting that Van der Keessel expands on the third ground: he explains that two situations are possible here: (a) the situation where the donee attempts or plans to cause damage to the whole estate of the donor: and (b) where he causes damage not to the whole estate but to a large part of it. The effect of the difference between the two is that the former applies not only to donations made out of liberality, but to all donations - even to those made by a mother who remarries and makes the donation to her children from a previous marriage. It is relevant to note that he merely mentions the grounds without referring to ingratitude.

Van der Linden (1756-1835) mentions that a donation is revocable on the grounds of *gross ingratitude* and *ill-treatment (Institutes of Holland ox Manual of Law, Practice and Mercantile Law* by Van der Linden (transl Juta (1891) 1 15 1 125).

As authority he refers to Grotius and Voet discussed above. He thus includes the grounds for revocation under this broad heading without mentioning the different instances. Van der Linden adds two additional grounds: where the donor of a donation of great value afterwards begets legitimate children and the case of an excessive donation prejudicing children in their legitimate portion.[15] Van der Linden's usage of *gross ingratitude* seems to be the genesis of its currency in later sources and case law.

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[15]see also Sonnekus "Birth of children and the revocability of donations - historical and comparative perspectives" 2000 *SALJ* 80 82 *et seq)*

From the above exposition it is clear that the Roman-Dutch authors are in agreement and follow the *Codex* of Justinian conscientiously. They have further added the last two examples mentioned by Van der Linden.

The repugnance with which the Roman – Dutch and the South African law have viewed donees who maltreat their donors, indicates that this is a universal and timeless attitude. The Sri Lankan courts have time and again echoed an identical opprobrium and abhorrence of an ungrateful donee and society too has continued to strongly disapprove of blameworthy acts of ingratitude against the donor. This proclivity for disapproval is premised on the basis that if someone receives something for nothing, he is expected to demonstrate his gratitude by his actions and not by slanderous and abominable behavior towards a munificent donor.

From the foregoing analysis of the relevant evidence and having regard to the substantive law on donations, I hold that the learned District Judge made a correct evaluation of evidence and rightly answered the issues in the affirmative. There is no error in fact or law that taints the judgment dated 19.01.2000 and I affirm the judgment in the case and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL