1921.

Present : De Sampayo J.

ASSISTANT GOVERNMENT AGENT, KANDY, *v.* KALU BANDA *et al.*

187—C. R. Teldeniya, 4,833.

Kandyan law—Gifts in the nature of fidei commissum *not contrary to Kandyan law.*

Gifts in the nature of *fidei commissa* are not contrary to the spirit of the Kandyan law. There is no principle of Kandyan law which prevents a Kandyan from giving a limited interest to one person, and providing that at the termination of that interest the property should vest in another person.

THE facts appear from the judgment.

Samarawickreme (with him *Croos-Dabrera*), for ninth, tenth, and eleventh defendants, appellants.

M. W. H. de Silva, for sixth, seventh, and eighth defendants, respondents.

Cur. adv. vult.

September 30, 1921. DE SAMPAYO J.—

The point for consideration is the construction of a Kandyan deed of gift. The donor by the above deed gifted certain lands to his two nephews, Kalu Banda and Ukku Banda. As the donees were minors, power was given to their parents to take care of and possess the lands during their lifetime, and it was provided that "even when both of the said Kalu Banda and Ukku Banda reach

[1] *S. C. Min., August 2, 1892.*

their full age, they could only enjoy the produce without giving them (the lands) to mortgage security or transfer, and after the death of the said Kalu Banda and Ukku Banda, their children, grandchildren, and up to the existence of their generation to inherit and possess the said premises uninterruptedly for ever." As some stress was laid on the word "inherit" at the argument of the appeal, I have looked into the original, of which the above is a translation. There is no word corresponding to "inherit." The sentence should read more properly as "*possess in paraveni*," which has the signification of possessing "in full ownership." The translation, though not perfect, substantially reproduces the sense of the deed. There is no doubt that the deed creates a *fidei commissum*; that is to say, it grants the property to Kalu Banda and Ukku Banda for life and thereafter to their children and other descendants absolutely. But it is contended that the deed should not be construed on the principles of the Roman-Dutch law, to which *fidei commissa* are peculiar, that *fidei commissa* are unknown to the Kandyan law, and that, therefore, the conditions in the deed should be ignored and the immediate donees should be taken to have acquired absolute title to the property. It is true that the ordinary text books on Kandyan law do not specifically treat of *fidei commissa* or gifts subject to similar conditions. But it should be remembered that these text books are not institutes of the Kandyan law, and do not profess to deal with the whole law as a system. Nor is there anything in these text books or anywhere to show that gifts in the nature of *fidei commissa* are contrary to the spirit of the Kandyan law. In this case, as I ventured to remark in the course of the argument, it is not a question of applying any particular rules of the Roman-Dutch law to the construction of this deed of gift. It is rather a question of the right of an owner of property to dispose of it according to his pleasure. I am not aware of any principle of the Kandyan law which prevents a Kandyan from giving a limited interest to one person, and providing that at the termination of that interest the property should vest in another person. Such a disposition would, of course, be called in the Roman-Dutch law a *fidei commissum*. It may not be a proper expression to describe a similar disposition by a Kandyan. It is, however, a convenient expression, and if the thing itself may be done among the Kandyans, the Court will not hesitate to give effect to it, simply because the disposition may also amount to a *fidei commissum*. During a century or more of administration of the law applicable to Kandyans there must have been numerous cases in which deeds of gift of this description formed the basis of claims to property, but there is no single reported case in which their validity has been called in question. It is not unreasonable to conclude that these gifts were recognized as good and valid. The only case Mr. Samarawickreme, for the appellants, was able to

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cite is *Dantuwa v. Setuwa*.[1] There, too, a Kandyan deed of gift had to be construed, and both Hutchinson C.J. and Middleton J., who decided the case, considered the terms of the deed, and were of opinion that under it the donee in question obtained an absolute title to the share she claimed. The decision turned upon the wording of the deed, and not upon any particular view of the Kandyan law. Mr. Samarawickreme, however, relies on this passage in the judgment of Middleton J.:—"This is a Kandyan deed of gift, and I do not think it was intended that any analogy to the Roman-Dutch law of *fidei commissum* should be applied to its construction." I find it difficult to understand what the learned Judge really meant. The passage stops there, and the point is in no way developed. The remark probably had reference to some argument of counsel who might have relied on Roman-Dutch authorities, in order to show that this donee had only a life interest and not any absolute title. In any case the decision is no authority for the contention on behalf of the appellants in this case.

In my opinion the Commissioner was right in holding that Kalu Banda and Ukku Banda obtained under the deed of gift only an estate for life, and that after them their children and descendants would be entitled to the property.

The appeal is dismissed, with costs.

Appeal dismissed.