1971 *Present :* Silva, S.P.J., and Samerawickrame, J.

M. SUMANASIRI, Appellant, *and* R. M. TILLEKERATNE BANDA, Respondent

S. C. 315/67 (F)—D. C. Kandy, 6437

Kandyan Law Declaration and Amendment Ordinance (Cap. 59)—Sections 2 (a), 4, 5 (1) (d)—Deed of gift—Revocability.

A Kandyan gift which was executed after the commencement of the Kandyan Law Declaration and Amendment Ordinance, although it purported to be "absolute and irrevocable", did not contain a special clause of renunciation expressed in the particular manner stated in section 5 (1) (d) of the Ordinance. There was appended to the deed a condition requiring the donee to render to the donor all needful assistance during the period of her natural life.

Held, that the deed created a gift that was revocable. It could not be contended that, by virtue of the condition relating to the performance of certain services, the deed was not a gift within the meaning of section 2 (*a*) of the Kandyan Law Declaration and Amendment Ordinance.

APPEAL from a judgment of the District Court, Kandy.

W. D. Gunasekera, with *W. S. Weerasooria*, for the 1st added defendant-appellant.

T. B. Dissanayake, for the plaintiff-respondent.

Cur. adv. vult.

March 9, 1971. G. P. A. SILVA, S.P.J.—

This was a partition action in which the only contest was regarding the interests which the plaintiff claimed through one Rankiri who was alleged to have gifted her interests upon a deed of gift No. 10850 dated 13.2.1947 to Kalu Banda, the plaintiff's immediate predecessor in title. The first added defendant, who is the appellant, claimed the interests of Rankiri as against the plaintiff-respondent on the ground that the said deed of gift was revocable and that the said Rankiri in fact revoked it by deed No. 15248 of 16.9.1970 and thereafter, by deed No. 15249 of the same date, conveyed her interests to him. The learned District Judge held that the said deed of revocation No. 15248 was not effective to revoke the original deed of gift to Kalu Banda, the plaintiff's predecessor in title, and that therefore the first added defendant-appellant got no title to the land on deed No. 15249. The present appeal is against this order.

The contention of the appellant is that any deed of gift can be revoked in terms of Section 4 of the Kandyan Law Declaration and Amendment Ordinance (Chapter 59), subject to the exceptions contained in Section 5. Section 5 (1) (*d*) provides one of the exceptions to Section 4 and precludes a gift given after the commencement of the Ordinance from being revoked when the right to cancel or revoke it has been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. Counsel also relied on the most recent Privy Council case of *Tikiri Banda Dulleve v. Padma Rukmini Dulleve and another* [1] in which the Privy Council held that a renunciation of a Kandyan gift is not valid unless the deed expressly contains a special clause of renunciation expressed in the particular manner stated in Section 5 (1) (*d*). They held further that an adjectival description of the gift as irrevocable in a deed would not

[1] (1963) 71 *N. L. R.* 289.

satisfy the condition for irrevocability prescribed by this section and that where only such words are contained in a deed of gift, such a deed is subsequently revocable by the donor. The relevant wording in this deed of gift No. 10850 dated 17.2.1947 is as follows: "I, N. Rankiri of Gurugama....hereby give grant convey transfer set over and assure unto the said donee his heirs executors administrators and assigns by way of gift absolute and irrevocable all those lands and premises described in the schedule hereto and of the value of Rupees Two thousand (Rs. 2000) of lawful money of Ceylon". It would therefore appear that this deed marked P 5 does not conform to the requirements laid down by the Privy Council in this case. Moreover there is appended to this deed a condition that the donee shall and will render to the donor all needful assistance during the period of her natural life and after her death bury her remains decently according to the customs of the Buddhist religion. Even the ordinary implication of this condition is that the deed would be of no force or avail if the condition is not satisfied. Apart from not conforming to the requirement laid down by the Privy Council therefore, I think that this condition not merely whittles down but entirely takes away the effect of the words "by way of gift absolute and irrevocable". If there was any doubt on this matter, the subsequent deed of revocation No. 1524 of 1.6.1950 (1D4) in which Rankiri recited that the donee Kalu Banda failed and neglected to render her the succour and assistance in consideration of which she gifted the land, removes such doubt and confirms that she intended the earlier gift on P 5 to be revocable. If that be the position, when Kalu Banda on 5.6.1950, four days after this deed of revocation, transferred the interests which he purported to possess by virtue of the deed of gift by Rankiri to him, he in fact had no interests to transfer as the said deed of gift had already been revoked by Rankiri. In these circumstances, if P 5 was intended to be a deed of gift, the only question for consideration is whether it is revocable or irrevocable and the factual consideration which influenced the learned District Judge as to whether the condition in the deed could not be fulfilled due to any default on the part of the donee or due to the conduct of the donor or the first defendant does not arise.

Counsel for the respondent, apart from pointing to the description of the gift in deed P 5 as being absolute and irrevocable was unable seriously to argue that if the deed was in fact a deed of gift, it was irrevocable. He however sought to argue that the transaction in the instant case was not a gift within the meaning of the Kandyan Law Declaration and Amendment Ordinance. A "gift" is defined in Section 2 (*a*) of the Ordinance as meaning "a voluntary transfer, assignment, grant, conveyance, settlement or other disposition *inter vivos* of immovable property, made otherwise than for consideration in money or money's worth". The submission of the Counsel is that when a property is given to someone subject to a condition that the donee performs certain services, if a money value can be placed on such services, then the transaction would cease to be a gift within this definition. If this submission

is correct, the question whether the gift which is the subject matter of deed P 5 is revocable or not does not arise and the respondent would be entitled to succeed.

There are however many obstacles in the way of accepting this submission. In the first place, the deed P 5 describes the transaction as a gift even though the adjectives "absolute" and "irrevocable" are used to qualify the nature of the gift and the word is repeated later on in the clause: "To have and to hold the said lands and property hereby gifted and conveyed...." On the face of it one is entitled to conclude that what is conveyed by the deed is a gift. Secondly, the consideration in the deed is set out as: "the natural love and affection which I have and bear unto Ratnayake Mudiyanselagegedera Kalu Banda". It is significant that the donor Rankiri does not use here words such as "In consideration of the grantee undertaking to render me all needful assistance during the period of my natural life". By using the words "In consideration of the natural love and affection which I have and bear...." at the forefront of the deed and by omitting such other words as I have set out above which would point to the performance of services as the consideration, we are precluded from giving to this deed the interpretation which Counsel for the respondent contends for. Thirdly, even in the clause where the deed is made subject to a condition, there is no suggestion of the transaction being of no force or avail if the condition is not fulfilled. Had there been any words to that effect there might have been some basis for considering that the transaction was not a gift but was something in the nature of a conditional transfer for a consideration which was assessable in money value, the amount being what is stated in the deed. Fourthly, if the clause setting out the condition proceeded to estimate the services to be rendered in terms of a pecuniary value, there would have been some justification for a court to give the words a construction favourable to the submission of counsel and to hold that the transaction was not meant to be a gift within the meaning of the definition in the Ordinance.

This is not all. There is yet another consideration which militates against our acceptance of the contention of counsel for the respondent. Our experience in these courts has shown that the inclusion of a clause containing the words that a gift is subject to the donee rendering all necessary succour and assistance to the donor or words to that effect is not at all uncommon in deeds of gift in the Kandyan provinces. That being so, the words used in the condition attaching to the present deed would seem to lack any special significance, and is little more than the expression of a hope or an expectation, in conveying the gift.

For all the above reasons it seems to us that the transaction which formed the subject of P 5 is a gift such as is contemplated by the Ordinance. In view of what we have stated earlier, in the absence of specific words in the deed showing an intention on the part of the donor

to renounce his right to revoke the gift we are compelled to take the view that the deed was revocable. We therefore hold that the learned District Judge was in error in coming to the conclusion that the deed of gift P 5 was irrevocable and that the plaintiff had acquired a good title to the land in question on the subsequent deeds. As the gift conveyed by P 5 was thus revoked, the first added defendant whose claim was based on a deed subsequent to the deed of revocation acquired a good and valid title to the land as against the plaintiff. The plaintiff having thus not acquired a title to the subject matter of the litigation, his action must fail. We accordingly set aside the judgment and interlocutory decree entered by the District Judge and make order dismissing the plaintiff's action. The appellant is entitled to his costs in this court and in the court below.

SAMERAWICKRAME, J.—I agree.

Appeal allowed.