Present : Jayewardene A.J.

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MENIKA *v.* BANDA.

132—C. R. Badulla, 3,052.

Donation by Kandyan to his wife subject to condition that after her death property was to go to her lawful heirs—Wife dying childless—Husband entitled to property—Fidei commissum.

A Kandyan donated a land to his wife subject to the condition that the donee shall not have the right to sell or alienate the same, but that on her death it shall devolve on her lawful heirs. The wife died childless.

Held, that by virtue of the deed of gift the property donated became the acquired property of the wife, and as the husband was the only lawful heir to her acquired property, on the wife dying childless the wife's sister was not entitled to the property.

" The deed of gift, although it creates a *fidei commissum,* is valid under the Kandyan law. Although we may resort to the Roman-Dutch law to ascertain whether the deed creates a valid *fidei commissum* or not, yet to ascertain who the lawful heirs are we have to resort to the Kandyan law."

In construing a deed of gift, the intention of the donor cannot be considered if the language used is clear.

THE facts are set out in the judgment.

M. W. H. de Silva, for plaintiff, appellant.

July 30, 1923. JAYEWARDENE A.J.—

The judgment in this case is in my opinion right. One Dingiri Appu, being the owner of certain lands, by a deed of gift No. 291 of August 5, 1912, donated them in equal shares to his wife, Sudu Menika, and his adopted son, Ganeti. The donation was subject to the restriction " that the donees shall not have the right to sell or to alienate the said premises during their respective lifetime, but on their death the same shall devolve on their respective lawful heirs, provided, however, the donees shall have the power of disposing of the same by gift amongst their respective lawful heirs in such manner as they shall think proper." The donor also reserved to himself the right to receive and enjoy the rents and profits during his life. The half share of Ganeti is not in question in this case.

Sudu Menika died in April, 1917, leaving no children. Dingiri Appu died in 1918. A sister and a daughter of another sister of Sudu Menika bring this action, claiming a share of the half donated

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to Sudu Menika, as her lawful heirs. The defendant is the administrator of the estate of the donor, Dingiri Appu, who he alleges became the heir to this property, which was Sudu Menika's acquired property, in the absence of any children of the marriage. By virtue of the deed of gift the property donated became " acquired property " in the hands of Sudu Menika. The deed of gift, although it creates a *fidei commissum*, is valid under the Kandyan law, which governs the rights of the parties to this case. Although we may resort to the Roman-Dutch law to ascertain whether the deed creates a valid *fidei commissum* or not, yet to ascertain who the lawful heirs are we have to resort to the Kandyan law, the law of the domicil of the parties. See *Voet 36, 1, 25*, where he lays down this principle, which, I think, is of universal application.

Now, in the terms of the deed of gift the property is to vest in " the lawful heirs " of the donee on her death. It is conceded that in the case of acquired property the husband (in this case the donor) is the only lawful heir on the failure of issue, but counsel for the plaintiff contends that inasmuch as the donation is by the husband, he is excluded, and the property must devolve on the other heirs—the next of kin—of the donee. This, he says, is clearly the intention of the donor. This is, however, not a will, but a deed of gift—a contract *inter vivos*—and the intention of the donor cannot be considered if the language used is clear : *Tyagarajah v. Tyagarajah*,[1] for as Voet remarks in the passage which I have referred to, where the testator (grantor) has " expressed his desire in inambiguous terms to the effect that he wished the *fidei commissum* to devolve on his legitimate heirs or those succeeding *ab intestato*, and as the law of his domicil points out clearly who these are, we cannot take refuge in conjectures suggested by family affection, by pity, by love, by the usual course of the affections and the like. For it is a rule that no question can be raised as to the intention when there is no ambiguity in the language employed." See also the judgment of the House of Lords in *Boyce v. Wasbrough*.[2] There is nothing in law or in the deed of gift itself to prevent the husband, the donor, from succeeding to the acquired property of his wife, the donee. Therefore, on the death of Sudu Menika he became entitled to the property as the lawful heir.

The learned Commissioner has upheld this view and has dismissed the action. As I said, he is right. The appeal is dismissed, without costs, as there was no appearance for respondent.

Appeal dismissed.

[1] *(1921) 22 N. L. R. 433.*

[2] *(1922) A. C. 425.*