1965 *Present :* **Tambiah, J., and Alles, J.**

D. STEPHEN, Appellant, *and* D. ELANDI, Respondent

S. C. 116/1963 (Inty.)—D. C. Kurunegala, 804/L

Kandyan law—Donation of undivided shares of certain lands—Subsequent partition decrees in respect of those shares—Incapacity of donor to revoke his gift thereafter—Kandyan Law Declaration and Amendment Ordinance (Cap. 59), s. 4.

By deed P3 executed on 24th February 1936 a person, who was subject to the Kandyan law, gifted undivided shares of certain lands to the defendant-appellant. By final decrees entered in 1942 in two partition actions the defendant was given divided lots in lieu of the undivided shares which had been gifted to him. In 1958 the donor revoked his gift of 1936 and, by deed P2, transferred to the plaintiff the undivided shares of the lands gifted on P3 as well as the divided lands allotted to the defendant under the partition decrees of 1942.

Held, that the partition decrees of 1942 had the effect of extinguishing the right of the donor to get back the undivided shares by revoking the gift. The plaintiff, therefore, obtained no title under the transfer deed P2.

APPEAL from an order of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *I. S. de Silva,* for Defendant-Appellant.

C. Ranganathan, for Plaintiff-Respondent.

Cur. adv. vult.

February 11, 1965. TAMBIAH, J.—

The plaintiff brought this action against the defendant for a declaration of title to an undivided half share of four lands described in schedule " A " and to the four lands described in schedule " B " of the amended plaint and prayed for ejectment of the defendant from these lands.

It is common ground that one A. D. Siri, a Kandyan, who was the owner of a half share of the four lands described in schedule " A " of the amended plaint, gifted his interest in these lands to the defendant by deed No. 40907 of 24th February 1936, marked P3.

By the final partition decree entered in D. C. Kurunegala Case No. 19534 on 29th October 1942, marked 1D2, in lieu of his undivded share in the first land described in schedule " A " of the amended plaint, the defendant was allotted lots A1 and B1 in plan No. 2128/A of 14th July 1942.

In D. C. Kurunegala Case No. 19512, in the final decree entered on 30th November 1942, marked D1, the defendant was allotted lots G1 and H1, in plan No. 2123/A of 14th July 1942, lands described as lots 3 and 4 in schedule " B " of the amended plaint in lieu of his undivided interest in the lots 2, 3 and 4 of the lands described in schedule " A " of the amended plaint. The resulting position is the partition decrees referred to wiped out the undivided interest of the defendant in the lands which he obtained on deed P3 and in lieu of his undivided shares he was given divided lots described in schedule " B " of the amended plaint.

It is the plaintiff's case that one A. D. Siri, by deed P1 of 1st November 1958, revoked the deed of gift P3 and gave a deed of transfer to the plaintiff by deed P2 of 1st November 1958. It is significant to note that the interests transferred by P2 of 1st November 1958 were the undivided shares of the lands gifted on P3 as well as the divided lands allotted to the defendant under the partition decrees. The deed P1 revoked the gift of the undivided shares of the lands in schedule " A " to the amended plaint.

Counsel for the appellant contended that although the defendant was vested with legal title to the divided portions allotted to him in lieu of his undivided shares he got on P3, yet as a result of final decrees entered in the partition actions mentioned above, the equitable right to revoke the deed of gift remained in A. D. Siri and therefore the deed P1 was a valid deed of revocation which vested the title to the divided lots described in schedule " B " of the plaint on A. D. Siri who transferred his title to the plaintiff.

In support of his proposition, the counsel for the appellant relied on the well known dictum of Bertram, C.J. in *Marikar v. Marikar* [1] to the effect that equitable interests are not wiped away by a partition decree. In that case the Divisional Court was confronted with the question whether a trust, express or constructive, was extinguished by a decree for partition.

[1] *(1920) 22 N. L. R. 137.*

The Partition Ordinance made no provision setting out the effects of a partition or sale of a land which was subject to an express or constructive trust or a fideicommissum. The court, in finding a solution to these vexed problems sought to give an interpretation to sections 2 and 9 of the Partition Ordinance.

At first the courts considered the question whether a land which is subject to a fideicommissum could be partitioned. With some hesitation the Privy Council expressed the view that such lands could be partitioned (vide the obiter dictum of the Privy Council in *Tillekeratne v. Abeysekere* [1]). The Supreme Court ultimately adopted this view (vide *Abeysundere v. Abeyesundere* [2]; *De Saram v. Perera* [3]).

In *Babey Nona v. Silva* [4] the Supreme Court went a step further and held that where a property was partitioned without reference to the fideicommissum attaching to it, and the share allotted to the fiduciary in severalty was bought by a bona fide purchaser, the fideicommissum attached to that lot. The reasons given for this view do not bear any examination. A sale under an interlocutory decree entered in a partition action in respect of property, which was subject to a fideicommissum, was regarded as one made under the provisions of the Entail and Settlement Ordinance No. 11 of 1876 (vide *Sathiananden v. Matthes Pulle* [5]). But what was overlooked was that under the Entail and Settlement Ordinance, the jurisdiction of the court can only be invoked by a special application made by a person who had interests in the property impressed with a fideicommissum and in such an application all interested persons should be made parties. A more serious objection is that only a District Court has jurisdiction to entertain an application to sell a property impressed with a fideicommissum under the Entail and Settlement Ordinance. Therefore the doctrine enunciated in *Sathiananden's* case. (ibid.) cannot be applied to partition cases brought in the Court of Requests Despite these fundamental defects in reasoning, the rule laid down in *Sathiananden's case* (ibid.) became the starting point of a series of decisions which firmly established this principle of law.

In *Marikar v. Marikar* [6], the case relied on by counsel for the appellant, Bertram C.J., after reviewing the cases dealing with the history of interpretation of sections 2 and 9 of the Partition Ordinance, dealt with the difficult question of the effect of a partition decree when a land sought to be partitioned was subject to a constructive or express trust. With some hesitancy, Bertram C.J. adopted the suggestion of Shaw J. and interpreted the expression " title of a party to such shares or interests " in the second part of section 9 of the Partition Ordinance to mean " the title to legal ownership ", and held that the phrase " right or title " in the first part of section 9 of the Ordinance included a *jus in re aliena* but not obligations in the nature of equitable interests, which though originally binding on the conscience have subsequently become enforceable in law on the person vested with legal ownership.

[1] *(1897) 2 N. L. R. at 200.*
[2] *(1909) 12 N. L. R. 373.*
[3] *3 Browne Reports 188.*
[4] *(1906) 9 N. L. R. 251.*
[5] *(1897) 3 N. L. R. 313.*
[6] *(1920) 22 N. L. R. 173.*

Referring to section 9 of the Partition Ordinance, Bertram C J. observed (vide 22 N. L. R. 140) as follows :

> " I would, in fact, in the first passage quoted above, construe the words ' right or title ' as meaning in the case of the word ' right ' a *jus in re aliena*, and in the case of the word ' title ' as meaning the title to the *dominium* ; and in the second passage I would construe the word ' title ' in its reference to both ' shares and interests ' as meaning ' title to the *dominium* '. "

He also held that the word " interest " was used throughout the Ordinance in the same sense as it was used in section 14 of the Partition Ordinance. Section 14 was dealing with the interest of planters to permanent plantations and the right of soil owners to institute a partition action. Having construed the words in section 9 of the Partition Ordinance in the way he did, Bertram C.J. held that the word " interest " in section 9 did not connote equitable interest. It is difficult to visualize why the word " right " should be given a narrow construction to mean *jus in re aliena* in the first part of the section 9 and the word " title " in the second part of section 9 should be construed as dominium. By dominium is meant, full ownership as understood in Roman Dutch Law. It comprises the valuable rights of an owner to use, enjoy, sell and alter the nature of the property (*jus utendi, fruendi and abutendi*). If the word " title " is given the meaning dominium as understood in common law then a person to whom a property has been given under a partition decree cannot hold it as trustee. Since a trustee has only the bare title to the land and he has to hold it for the use and benefit of the beneficiary.

Section 14 of the Partition Ordinance gave special rights to persons, who were soil owners and persons who have made permanent plantations, to initiate partition actions, although strictly they are not co-owners. There is no valid reason to interpret the word " interest " in section 9 to mean interest referred to in section 14 of the Partition Ordinance. Thus it is clear that in order to meet a special situation, Bertram C.J. had to resort to a strained interpretation by stretching words of the Partition Ordinance, which were only intended to partition lands between co-owners, in order to give relief to beneficiaries.

The dictum relied upon by learned Counsel for the appellant is in conflict with the dictum of Garvin J. in *Fernando v. Cadiravelu* [1], in which he took the view that upon the issue of the certificate of sale to a purchaser under a decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser. The dictum of Garvin J. was adopted by Gratiaen J. in *Britto v. Heenatigalle* [2] where he went to the extent of holding that the rights of a statutory tenant, which may be equated to a *jus in re aliena*, were not wiped out by a certificate of sale under the Partition Ordinance. Therefore the dictum of Bertram C.J. relied on by Counsel for the appellant should not form the basis to meet new situations which are not covered by the *ratio decidendi* in that case.

[1] *(1927) 28 N. L. R. 492 at 498.* [2] *(1956) 57 N. L. R. 327.*

Counsel for the appellant contended that the right of a Kandyan to revoke the gift is an equitable right. Equitable rights referred to by Bertram C.J. in the case of *Marikar v. Marikar*, necessarily refer to the rights of a beneficiary, where the property which was the subject matter of the partition was impressed with a constructive or express trust. The right of a Kandyan to revoke a deed of gift is a statutory right given to him now by the Declaration and Amendment of Kandyan Law Ordinance (Cap. 59). The early Kandyan Law did not recognise wills. A person who became feeble and could not perform his feudal obligations transferred his property to a child or close relation and often sought succour and assistance from the donee. Since his transfer was regarded as a testamentary disposition, he was given the right to revoke a deed of gift, subject to certain exceptions. A Kandyan was given a right to revoke a deed of gift even where the property has passed to the hands of a bona fide purchaser from the donee (vide *Molligoda Unamboowe Ratemahatmaya v. Abeyratne Ratwatte* [1]).

The right of the donor to revoke his deed of gift is not an equitable right since the donee, under a Kandyan deed of gift, had full dominium over the property (vide Hayley 315).

The deed of revocation P1 was effected after the Declaration and Amendment of Kandyan Law Ordinance (Cap. 59) came into operation and the donor's right to revoke his deed of gift must be found in section 4 of this Act. Section 4 of the Act only enables him to " cancel or revoke whole or in part a gift." He could therefore only revoke what he gave on deed P3. What he gifted on P3 was the undivided interest in the land described in schedule " A " to the plaint. As a result of the decree entered in the partition case referred to, the defendant acquired a new title to the divided lots described in schedule " B " of the amended plaint (vide *Bernard v. Fernando* [2]). The undivided interest transferred by P3, in the lands described in schedule " A " to the plaint were wiped out and are no more in existence. Therefore, A. D. Siri cannot get back the undivided shares by revoking deed P3, as they are not in existence. He, therefore, had no title to transfer the undivided interest in the lands in schedule " A " and the divided lots in schedule " B " of the amended plaint, by deed P2 to the plaintiff.

For these reasons I hold that the plaintiff has no title to the lands described in schedules " A " and " B " to the amended plaint and the defendant is vested with title to the lands in schedule "B" of the amended plaint. I, therefore, set aside the order of the learned District Judge and dismiss the plaintiff's action with costs in both courts.

ALLES, J.—I agree.

Appeal allowed.

[1] *(1885) S.C.C. 117.*

[2] *(1913) 16 N. L. R. 438.*