Present: Wood Renton A.C.J. and De Sampayo A.J. 1914

KIRIYA *v.* UKKU *et al.*

234—D. C. Kurunegala, 4,737.

Kandyan deed of gift—" Descendants " mean legitimate descendants.

A Kandyan gifted to his three sons, K, S, and H, certain lands in equal shares. The deed of gift provided that should S and H leave no descendants, then their shares should devolve on K. S died without leaving any descendants, and H left only illegitimate children.

Held, that the illegitimate children of H had no right to his share under the deed.

DE SAMPAYO A.J.—I am aware of no reason for not applying to a Kandyan deed of gift the general rule of construction obtaining under the English and Roman-Dutch law that such an expression as " children, " " issue, " or " descendants " *primâ facie* means lawful children.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the appellants.

No appearance for the respondents.

Cur. adv. vult.

July 29, 1914. DE SAMPAYO A.J.—

In construing the deed of gift of 1872 I go upon the translation filed by the plaintiff, which, as the District Judge says, more accurately brings out the sense of the document than that filed by the defendants. By the deed Sitta Dureya gifted certain lands in equal shares to his three sons, Kiriya (the plaintiff), Setuwa, and Hapuwa. He thereby provided that, as regards the one-third share given to the plaintiff, the same should be possessed by him and his children, grandchildren, and succeeding generations, and that, as regards the two third-shares given to Setuwa and Hapuwa, they should only enjoy the income derived from those shares, but should not sell or mortgage the same, and that if they died leaving descendants, such descendants should succeed to those shares, but if they left no descendants, then those shares should devolve on the remaining son, the plaintiff. I may mention that the expression in the Sinhalese original, which is here reproduced as descendants, is *du puth adi pewathima*. Setuwa died without leaving any descendants, but Hapuwa left the defendants, who are his illegitimate children. The question, then, is whether the defendants became entitled to Hapuwa's one-third share, or whether it devolved on the plaintiff.

I am not aware of any reason for not applying to a Kandyan deed of gift the general rule of construction obtaining under the English and Roman-Dutch law that such an expression as " children," " issue,"

1914.

DE SAMPAYO A.J.

Kiriya v. Ukku

or " descendants " *prima facie* means lawful children, issue, or descendants. According to Voet (*36, 1, 13*), " children " do not include natural children, unless the surrounding circumstances point to a different conclusion. The English rule on this point, which appears to be even more strict, is thus summarized in the *Encyclopædia of Laws, vol. XIV., p. 704 :* " In a will or deed illegitimate children are not included in the word ' children,' unless, when the surrounding facts are ascertained and applied, some repugnancy or inconsistency, and not merely some violation of a moral obligation or of a probable intention, would result from their exclusion." Now, is there anything in this case justifying a departure from the general rule? It is argued that as, under the Kandyan law, illegitimate children are heirs of a man equally with his legitimate children, Sitta Dureya must be taken to have contemplated as objects of his beneficence even the illegitimate children of his sons Setuwa and Hapuwa. I do not think that this argument is sound. In the first place, the deed nowhere refers to the " heirs " of Setuwa and Hapuwa, and the present question is not as to who are Hapuwa's intestate heirs, but as to who are to be held entitled to Hapuwa's one-third share by virtue of the gift. In the next place, under the Kandyan law, illegitimate children are heirs to a limited extent, for they succeed only to the acquired property of the deceased; and until the decision in *Rankiri v. Ukku* [1] judicial opinion was that legitimate children, the widow, and certain collaterals would exclude the illegitimate children even as regards the acquired property. Moreover, I think there is some indication in the deed itself that Sitta Dureya had regard to lawful and honourable descent. He distinguished the donees by calling them " my own begotten children," and he clearly expressed his intention that the property gifted to them should remain in their families. It seems to me inconsistent with the sentiments pervading this deed to hold that the grantor contemplated any illegitimate persons participating in the settlement of his property upon his sons and their families. Lastly, at the date of the gift, as the deed itself stated, Setuwa and Hapuwa were minors, and the defendants themselves, who were not then in existence, could not have been in the mind of Sitta Dureya.

In view of these considerations, I do not think that the circumstances surrounding the gift can be said to lead to the conclusion that Sitta Dureya intended to benefit any but his lawful posterity, nor would any repugnancy or inconsistency arise if the illegitimate children of Hapuwa are excluded from the provisions of the deed of gift. I think, therefore, this appeal fails, and should be dismissed with costs, but without prejudice to the defendants' right, which was reserved to them by the District Judge, of maintaining an action on the basis of the alleged revocation of the deed of gift in question by Sitta Dureya.

[1] *10 N. L. R. 12.*

WOOD RENTON A.C.J.—

This case turns on the construction of a deed of gift. Sitta Dureya, the admitted owner and possessor of the land in suit, gifted them by deed No. 4,008 dated September 14, 1872, to his sons, Kiriya (the plaintiff-respondent), Hapuwa, and Setuwa. As the learned District Judge has pointed out, much depends on the meaning of a condition embodied in this deed of gift. I adopt for the purposes of this judgment the translation accepted by the learned District Judge. It is in these words:—

> "Should Setuwa and Hapuwa, having possessed the share allotted to them during their lifetime, die leaving children or their descendants, then they shall be at liberty to possess it in any manner they like; but if they die leaving neither children nor descendants of such, then the two shares given to them shall also go to Kiriya aforesaid or his heirs or executors."

Setuwa died without issue. The case for the plaintiff was that Hapuwa also died without legitimate issue, but that he had left the second, third, fourth, and fifth defendants by a woman named Ukku, the first defendant, who are the principal appellants in the present case. Under the deed of gift of September 14, 1872, Hapuwa was entitled to a one-third share of the property in suit. That share will pass to the defendants if, being illegitimate children, they are entitled to come in under the deed of gift. Various issues were framed, but the learned District Judge has dealt with only the first and the second. These issues are as follows:—

(1) Do the terms of deed No. 4,008 of September 14, 1872, allow illegitimate children to succeed to the one-third share gifted to Hapuwa ?

(2) If not, to what damages is the plaintiff entitled ?

The District Judge has answered both of these issues in the negative. The defendants appeal. The main ground argued before us in regard to the first issue was that as the property in question was acquired property, even illegitimate children have a right of succession to it under the Kandyan law. That such a right of succession exists is not in dispute. But it does not appear to me to have any real bearing on the point with which we have here to deal. Hapuwa's illegitimate children must take the property, if they can take it at all, under the above-cited condition in the deed of gift. The question is whether Sitta Dureya, when he gifted his prpoperty to his three sons, intended that the illegitimate children of any of them should be provided for. I agree with the learned District Judge that the whole structure of the deed shows that he did not. His object was to keep the property in the family.

1914.

WOOD RENTON A.C.J.

Kiriya v. Ukku

A subsidiary point was brought to our notice. The fourth and fifth issues raised respectively the questions whether deed No. 4,008 had been revoked by Sitta Dureya, and if so, to what extent. No deed of revocation was produced at the trial. But the defendants' counsel informed us at the argument of the appeal that he had received a telegram to the effect that a deed of revocation had now been found. The matter appears to me to be of no importance for our present purpose. The record shows that it was agreed between the parties at the trial that any rights arising from such a deed, if it existed, should be "reserved." The defendants' counsel suggested that this admission meant that such rights should be "reserved" in the sense that they could be asserted in the present action. I do not think that point is tenable. For the record itself shows that, when the admission to which I have just referred was made, issues 4 and 5 were "elided." Nothing in the present judgment will preclude the defendants from asserting the rights above mentioned in independent proceedings should a necessity for doing so arise.

I would dismiss the appeal with costs in the terms proposed by my brother De Sampayo.

Appeal dismissed.