Present: Shaw J.

1915.

KALU *v.* KIRIA.

364—C. R. Matale, 11,388.

Kandyan law—Mother heir to the acquired property of the children—Deed of gift subject to condition that donee should render assistance to donor—Donee dying before donor—Construction of instrument—Whether it is a testamentary disposition or deed of gift.

A Kandyan mother inherits her children's acquired properties in preference to the father. This rule is not restricted only to cases where the mother was married in *binna;* nor only to cases where the property has been acquired from a source other than the father.

A Kandyan deed of gift, subject to the condition that the children should render help and assistance to the donor during his lifetime, does not become null and void on the donee dying during the lifetime of the donor.

THE facts are set out in the judgment.

Bawa, K.C. (with him *A. St. V. Jayewardene* and *J. W. de Silva*), for appellants.

Wadsworth, for defendant, respondent.

Cur. adv. vult.

November 22, 1915. SHAW J.—

The question involved in this case is the ownership of a one-fourth interest in a land called Medugahawela. The land originally belonged to one Kaluwa, who by deed dated August 21, 1895, gave it to his wife Kiri and his three children Kalu, Bodi, and

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Kiriya. The deed provided that on the death of Kiri her one-fourth share should devolve on the three children. One of the children, Kiriya, died in 1897, in the lifetime of his father Kaluwa, who died in the year 1900 without having revoked the deed of 1895. By deed dated February 18, 1915, Kiri purported to convey to the defendant the freehold of one-fourth of the land, the position taken up by her being that she, as heir to her child Kiriya under Kandyan law, was entitled to the one-fourth gifted to him by his father by the deed of August, 1895.

The first plaintiff is Kalu, one of the other children, and the second and third plaintiffs are the representatives of the other child, who survived his father Kaluwa and died in 1907. They claim that upon Kiriya's death the one-fourth interest gifted to him by the deed of 1895 reverted to his father Kaluwa, and that they, as Kaluwa's heirs, are entitled to his share, and they have brought the present action to assert their claim. The Commissioner of Requests has dismissed the plaintiffs' action, and this appeal is brought from his decision.

The plaintiffs' case is put on three grounds. First, that the deed of August 21, 1895, is not a deed of gift, but is a testamentary disposition; and the bequest of the one-fourth to Kiriya having failed in consequence of his death before the testator, Kaluwa, died intestate as to this share, and it therefore passed on his death to his other two children. Second, that the right of the mother, under the Kandyan law, to inherit the acquired property of her children in preference to the father, is not established by any judicial authority and is not clear from the text-writers on Kandyan law, and that therefore the law of succession of the Maritime Provinces should prevail, or at any rate the *dicta* of the text-writers should be confined to the case of a *binna* married woman, and should not be extended to acquired property that has been acquired from the father. Third, that, even assuming that the deed of August 21, 1895, amounted to a deed of gift, and not to a testamentary disposition, it was subject to a condition that the children should render help and assistance to the grantor during his lifetime, and as this became impossible on the part of Kiriya in consequence of his dying in the lifetime of the grantor, the gift to him of one-fourth became null and void.

In support of the first contention the case of *Sundara v. Pieris* [1] was cited, in which a somewhat similar deed was held to be a testamentary disposition. In that case, however, the terms of the document were by no means identical to those of the one under consideration, and, as stated by Phear C.J. in his judgment, "each document must stand or fall by its own merit." The Court in that case came to the conclusion that that particular document was, in view of the circumstances and intention under which it was executed,

[1] (1878) 3 *C. L. R.* 81.

solely testamentary in character, and appears to have been largely influenced in coming to its decision by the fact that the deed passed no present interest in the property, but was at most a gift to take effect on the donor's death. This fact, however, as appears from the later cases of *In re Henaya* [1] and *In re Neina Mohammado*,[2] by no means shows that the document was a testamentary disposition. The document in the present case is as follows:—

"Now all these high and low lands, houses, and plantations are hereby made over by way of gift by me, Egodagedera Kaluwa, as I am now old and infirm, and with a view to securing all my comforts during my lifetime in this world, unto and in favour of my wife Egodagedera *alias* Nekatduragedera Kiri, of Ehelegastenna, in Battota, in Pallesiya pattu, of Matale, and my lifetime children by her, Egodagedera Kalu, Bodi, and Kiriya, residing in the same village, in the manner following:—

"*First*.—That during my lifetime in this world my said wife Kiri, my children Kalu, Bodi, and Kiriya, do render to me all help and assistance when I am in good health as also when I am ill.

"*Secondly*.—After my death the said Kiri, Kalu, Bodi, and Kiriya shall be at liberty to possess the said high land, low lands, houses, and plantations.

"*Thirdly*.—The fourth share, which my wife Kiri shall become entitled to on my death, be possessed by her up to the end of her lifetime, and on her death the said share to devolve on her three children, and they and their heirs, &c., do possess the same fully at all times.

"*Fourthly*.—This . . . that against this grant my heirs, &c., shall not make any dispute.

"*Fifthly*.—This deed of gift was accepted by me, Egodagedera, *alias* Nekatduragedera Kalu, above named, for myself and on behalf of the said Kalu, Bodi, and Kiriya, as they are minors.

"In witness whereof, &c."

The deed appears very similar to that under consideration in *Carolis v. Davith*.[3] It is called throughout a "gift" and "grant" and "deed of gift," and is accepted as a gift by one of the donees on behalf of himself and his infant brothers, and is not directed solely against the donor's heirs, as was the document in *Sundara v. Pieris*,[4] and I have no hesitation in holding that it is and was intended to be a gift, and not a testamentary disposition.

It was suggested that *Carolis v. Davith* [3] was not a Kandyan case; but I see no reason why a Kandyan document of this sort should be construed in a different manner than any other, and the fact that a Kandyan deed of gift is generally revocable, if it affects the

[1] (1905) 2 *Bal.* 78.
[2] (1891) 2 *C. L. R.* 52.
[3] (1907) 17 *N. L. R.* 17.
[4] (1878) 3 *C. L. R.* 81.

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construction at all, seems rather to show that the document is a gift, and not a testamentary disposition.

With regard to the second contention, I felt some difficulty during the argument. The right of a Kandyan mother to inherit her children's acquired properties in preference to the father rests principally on a statement found in *Armour 87* that the mother is heiress to the acquired property of all kinds left by her child. This, however, is supplemented by the passage in *Armour 89* that "if the mother has departed this life previous to the demise of her child, then the father will be entitled to the reversion of the child's acquired property." *Sawyer 17* also appears to lay down the law to the same effect, and later writers have accepted the position. Judicial recognition of the rule is to be found in D. C. Kandy, 21,994,[1] and *Ranhami v. Menik Etana*;[2] and although some reservation of the father's rights seems to be suggested in *Ukkuhamy v. Bala Etana*,[3] I think the law is sufficiently settled to prevent a different rule being applied except by an act of the Legislature. The mere absence of direct authority in the face of the unanimous statements of the text-writers appears to me to show that the position taken up by them has been generally accepted, and although it is somewhat difficult to find a cause of origin for the rule, it probably lies in the former uncertainty of Kandyan marriages, which could be dissolved at will, and in the custom of polyandry, which in some cases rendered it impossible to say who the father was.

I can find no statement in any of the books or judicial authorities restricting the rule to cases where the mother was married in *binna*, and can see no good reason for any such restriction; neither can I find any authority for supposing that it applies only to cases where the property has been acquired from sources other than the father. No distinction between different classes of property for the purposes of inheritance seems to be recognized other than "paraveni" and "acquired," and the case of *Dingiri Banda v. Medduma Banda*[4] establishes that when "paraveni" property has once been "acquired", even from an ancestor, it thereafter loses its attributes as "paraveni" property.

With regard to the third contention, it appears to be directly negatived by the Full Court decision in *Pula v. Doti*.[5]

In my opinion the plaintiffs have failed to make out any right to the property in dispute, except to the one-half granted them by the deed of 1895 and to the reversion in one-fourth on the death of their mother Kiri. The appeal is therefore dismissed, with costs.

Appeal dismissed.

[1] (1850) *Austin 133.*
[2] (1907) *10 N. L. R. 153.*
[3] (1908) *11 N. L. R. 226.*
[4] (1913) *17 N. L. R. 201.*
[5] (1875) *Ram. 169.*