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Present : Akbar J.

TIKIRA *v.* TIKIRA.

43—C. R. Kandy, 4,581.

Kandyan law—Deed of gift—Revocation for failure to maintain—Mother and son—Compensation for improvements.

Where, under the Kandyan law, a gift was revoked because the donee, who was a child of the donor, failed to observe the condition of the gift as regards maintenance,—

Held, the donee was not entitled to compensation for improvements effected on the land donated.

THE plaintiff claimed the value of improvement effected by him on a land which was gifted to him by his mother, the second defendant. Subsequently she revoked the gift on the ground that the plaintiff had failed to carry out the conditions of the gift, viz., to render assistance, and sold the land to the first defendant. At the trial the plaintiff admitted the title of the first defendant. The learned District Judge dismissed the plaintiff's action.

N. E. Weerasooria, for plaintiff, appellant.—Roman-Dutch law, and not Kandyan law, should be applied in this case. The District Judge having held that the plaintiff was a *bona fide* possessor should have given him compensation. If it is claimed by the defendant that Kandyan law applies, he should have raised an issue on the point.

Even under the Kandyan law compensation would be payable. See *Tikiri Banda v. Banda,*[1] a Full Bench case.

This deed is not revocable. See clause in the deed " The heirs . . . . . of me the said Dotu shall cause no dispute whatsoever by word or deed hereafter contrary to this donation. "

Defendant alleged non-observance of the condition in the deed, and it was for him to prove such non-observance.

Even if this deed is revocable, it was wrongly revoked, and the plaintiff is entitled at least to compensation for improvements as a *bona fide* possessor.

Wendt, for defendant, respondent.—The parties are Kandyans resident in the Kandyan provinces ; so, clearly the Kandyan law is applicable. It was for the donee, as plaintiff in the case, if he contended that Roman-Dutch law should apply, to raise an issue on the point to prove his case completely.

[1] *3 S. C. C. 31.*

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Gifts to a child when revoked give the child no claim to compensation (Perera's *Armour, p. 91*).

Where the cause of revocation is non-fulfilment of the condition of maintenance contained in the deed, no compensation is payable to the donee on revocation (Perera's *Armour p. 92*).

Tikiri Banda v. Banda(supra) is distinguished from the present case as it was not the case of a gift to a child, and the revocation was apparently capricious (see Berwick J.'s judgment). The above passages in *Armour* were also not before the Court in that case.

This deed of gift is obviously revocable. See clause " And *after my death* the said two children may hold and possess . . . . absolutely and for ever free of dispute as paraveni. "

Here the deed was given on an executory and not an executed condition; therefore it was revocable. Further, the burden of proof is on the party alleging performance of the condition. See Perera's *Collection, pp. 38 and 39.*

June 4, 1929. AKBAR J.—

In this case the plaintiff-appellant appeals from a judgment dismissing his claim for the value of improvements effected by him on a land which was gifted to him by his mother, the second defendant in this case (now dead), but the deed was afterwards revoked by her under the Kandyan law and the land sold to the first defendant.

It is clear from the plaint that he based his claim as a *bona fide* possessor under the Roman-Dutch law. In the answer the defendants denied that any cause of action had accrued to him to recover from them the value of the improvements. At the trial the plaintiff admitted the title of the first defendant, and the value of the improvements was also admitted as Rs. 77·75.

The following issues were framed :—

(1) Did plaintiff possess the land and improve same ?
(2) Was such possession *bona fide* ?
(3) Is the plaintiff entitled to any compensation for improvements ?

After evidence was led, Counsel for the first defendant, second defendant being then dead, cited the Kandyan law from Mr. Hayley's book, page 316. In the judgment the Judge states that if the parties were governed by the Roman-Dutch law the plaintiff would be entitled to compensation as a *bona fide* possessor, but that under the Kandyan law the party will not be entitled to any compensation for improvements if the revocation of the deed of gift was due to the failure of the donee to fulfil the condition of the deed. He held that as the deed of revocation specifically stated that plaintiff and his brother had failed to

render their mother any assistance the plaintiff was not entitled to succeed. Before I proceed further, I may mention that in my opinion, on the authorities which I shall mention later, it is clear that the deed of gift in favour of the plaintiff and his brother by his mother (P 1) is revocable under the Kandyan law. The deed (P 1) is in the following terms :—

> "I . . . . being old, with the object of receiving all assistance, and succour during my lifetime, do hereby donate, grant, and convey by way of gift with my good will and pleasure unto my most dutiful and beloved two children Yamanegedera Tikira and Ukkuwa, both of Ranawana aforesaid, all that eastern half share in extent 1 timba sowing out of the portion in extent 8 lahas paddy sowing below the minor road towards the south out of the land called Kasakaragedera Kotuwa of 1 pela paddy sowing in extent, situate at Ranawana, &c., which said 1 timba paddy sowing extent is bounded, &c., together with the plantations and everything thereon, valued at Rs. 70, which said premises have been held and possessed by me free of dispute upon the annexed registered deed of gift No. 2,726 dated January 10, 1868, attested by Warakagoda Ranhamy, Notary.
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> "Therefore the heirs, &c., of me the said Dotu shall cause no dispute whatsoever by word or deed hereafter contrary to this donation; and my children the said Tikira and Ukkuwa shall during my lifetime from this day render me all assistance and succour ungrudgingly; and after my death shall bury my dead body in a fit manner according to customs of the world; and shall also perform all religious rites and ceremonies for the repose of my soul in the next world. And after my death the said two children Tikira and Ukkuwa, their heirs, &c., may hold and possess the aforesaid land and plantation absolutely and for ever free of dispute as paraveni; which I do hereby authorize."

The gift does not state that it is irrevocable. Further, the only condition is that the heirs, executors, or administrators of the donor are not to cause any dispute whatsoever; and that it is only after the donee's death the two donees are to hold and possess the land absolutely and for ever free of dispute as paraveni. Therefore, on the face of the deed I hold on the authority of the various decisions of this Court, namely, *Mudiyanse v. Banda*,[1] *Kirihenaya v. Jotiya*,[2] *Ukku Banda v. Paulis Singho*,[3] that this deed is revocable by the donor. Indeed, as I have stated, the

[1] *16 N. L. R. 53.* [2] *24 N. L. R. 149.*

[3] *27 N. L. R. 449.*

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plaintiff has admitted the first defendant's title in this case. The passage on which the Commissioner bases his judgment, quoted from Mr. Hayley's book, does not, however, give the full passage from Mr. Perera's *Armour*. The full passage is as follows :—

> " All deeds or gifts, " says Sawers, " excepting those made to priests and temples, whether conditional or unconditional, are revocable by the donor in his lifetime, but should the acceptance of the gift involve the donee in any expense, he, the donee, must be indemnified, on the gift being revoked, to the full amount of what the acceptance of the gift may have cost him, either directly or by consequence, but this rule applies only to gifts made by laymen. Moreover, this rule is to be understood to apply only to gifts of land, or of the bulk of the donor's fortune, of goods and effects : as presents if given out of respect or from affection at the moment (or in thankful acknowledgment of a benefit or service rendered to the donor) are not revocable. And in respect to the claims of indemnification by the donee, on the gift being revoked this is only to be understood to apply to the gifts made to strangers or other persons, not heirs by law to the donor ; for gifts to children, if revoked, give such a donee no claim to compensation ; but with this exception—if a parent having several children makes a donation of a principal part of his lands or effects to one of his children those lands or effects being burthened at the time with debts, at the donee paying the debts, as by mortgage or otherwise, and the donee paying the debts or dismortgaging the property that had been so given ; should the parents afterwards revoke the gift and bequeath his lands and effects equally among his children or legatees ; in this case, the former donee, who paid the debts or dismortgaged the property of the donor, must be indemnified by the other heirs or legatees in proportion to the alteration made by the parent in the former gift, by the subsequent disposal of the property. It being however premised that the former donee had not already derived so much profit from the property, as was adequate to indemnify him for his expenses. With respect to bequests, and testamentary disposals, whether documentary or verbal, the right to revoke or alter them remains absolutely with the devisor, so long as he retains his life and reason. "

According to this authority no claim for compensation is to be allowed when the donor, as in this case, makes a gift to his children and subsequently revokes it.

The rule requiring payment of compensation is only to apply when the gift is made to a stranger or other person who is not an heir-at-law. So that the plaintiff's claim in this case is not recognized under the Kandyan law.

The case of *Tikiri Banda v. Banda*[1] was quoted as a contrary authority by the appellant, but it will be seen that in that case this point was never raised. In fact, it will be seen from Berwick J.'s judgment that he refers to the probability of the deed of gift in that case having been revoked " capriciously or spitefully " ; nor was the point raised in the later case of *Mudiyanse v. Banda* (*supra*). One other point remains to be determined. It was strongly urged by the appellant's Counsel that no issue on the

[1] *S. C. C. 31.*

applicability of the Kandyan law was raised at the trial and that, therefore, this case should be sent back for decision on the law. I do not think any useful purpose can be served by this course, because I think the third issue is wide enough to include this question.

The plaintiff should have known that this case must be governed by the Kandyan law (see the judgment quoted above of Berwick J. in *Tikiri Banda v. Banda* (*supra*)). Further, under the Kandyan law the burden seems to be on the plaintiff (see Perera's *Collection, pp. 38 and 39*). The following passage occurs in this book :—" The deed in favour of the plaintiff was granted on a specific condition, not *executed* but *executory*. There can be no doubt, therefore, that a failure in the performance of that condition must defeat the instrument ; it was for the plaintiff to show a real *bona fide* performance of that condition. In this he has certainly failed. " For these reasons I think that the judgment of the trial Judge was correct. I hold accordingly (but not for the reasons stated by the Judge) and dismiss the appeal with costs.

Appeal dismissed.