1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

M. U. LOKUBANDA ARACHCHI *et al.*, Appellants, *and* P. M. I. L. S. MOHAMED *et al.*, Respondents

S. C. 166—D. C. Kandy, 2,791

Kandyan Law—Donation—Revocability—Covenant to render succour to a party other than the donor—Validity—Construction of deed.

A Kandyan revocable deed of gift is revoked by the donor if he executes a later and inconsistent deed.

Under Kandyan Law a deed of gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered.

A convenant in a gift by a brother to a sister that the sister should look after and render succour and assistance to their mother is valid under the Kandyan Law.

A, a Kandyan Sinhalese, donated certain immovable property to her son B in 1916, citing as title to the property a deed of 1855. Subsequently, in 1917, both A and B jointly gifted the same property to C, who was A's daughter and B's sister, and cited as title the deed of gift of 1916 only.

Held, that the deed of gift of 1917, though executed by A and B, was in fact a donation by B alone in favour of C and that, as it was a revocable deed of gift, B was entitled to revoke it.

Held further, that under the deed of gift the donee C was liable to render succour and assistance not only to B but also to A.

APPEAL from a judgment of the District Court, Kandy.

B. H. Aluvihare, for the 2nd, 3rd and 4th defendants appellants.

H. W. Tambiah, with *H. L. de Silva*, for the plaintiffs respondents.

Cur. adv. vult.

December 8, 1954. NAGALINGAM S.P.J.—

This appeal involves a dispute as regards $\frac{3}{8}$ share of a field called Halankumbura which, the parties are now agreed, is depicted as lots 1 and 2 in plan No. 1410 of the 9th of June 1951 made by E. R. Claasz, Licensed Surveyor, and filed of record marked X, lot 3 having been excluded in favour of the 1st defendant.

Admittedly one Dingiri Menike Kumarihamy *alias* Tikiri Kumarihamy, who will hereafter be referred to by the latter name, was entitled to the $\frac{3}{8}$ths now in dispute as well as to the rest of this field. The devolution of the other shares is unaffected by the dispute in the case.

Tikiri Kumarihamy by deed P5 of 1916 gifted the $\frac{3}{8}$ths in dispute to her son Mutu Banda. Thereafter by deed P6 of 1917 Tikiri Kumarihamy and her son Mutu Banda both jointly gifted the $\frac{3}{8}$ to Bettana Kumarihamy, the daughter of the first named and sister of the second named. Battana

Kumarihamy died leaving a son Gopallawa who inherited the ⅞ share and he by deed P7 of 1944 transferred the ⅞ to the 2nd plaintiff. In 1945 by deed 3D1 Mutu Banda purported to revoke and cancel the deed of gift P6 of 1917, executed, it will be remembered, not only by himself but also by his mother Tikiri Kumarihamy. The 2nd, 3rd and 4th defendants claim the ⅞ on the footing that, the deed of gift P6 of 1917 having been revoked and Mutu Banda having died possessed of the ⅞, those shares have now devolved on them as his intestate heirs.

The question therefore centres round the validity of the deed of revocation 3D1 of 1945, and this question depends upon the determination of the further problem whether deed of gift P6 of 1917 was a gift by Mutu Banda or whether, as contended for on behalf of the 2nd plaintiff, it was a deed of gift by Tikiri Kumarihamy.

It is well settled law that a Kandyan revocable deed of gift is revoked by the donor executing a later and inconsistent deed.—*Taldena v. Taldena* [1] and *Molligoda v. Abeyratne Ratwatte* [2].

The contention put forward on behalf of the 2nd plaintiff is that Tikiri Kumarihamy's describing herself as a donor in executing the deed P6 of 1917 which was not only later in point of time but also inconsistent with P5 in favour of Mutu Banda, had the effect of revoking the latter, and that the reason why Mutu Banda joined was to create an estoppel against him from his contending that he had rendered succour and assistance to his mother which would have rendered the deed P5 irrevocable. I do not think this contention is entitled to prevail. I think it is equally settled under Kandyan Law that a deed of gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered,—*Pereira 50 and 62, Morgan's Digest 7, Austin 177.* Besides, had Tikiri Kumarihamy executed deed P6 in her own proper person, without getting Mutu Banda to join her, such a deed would have had the effect of revoking the earlier deed of gift, P5 of 1916.

On behalf of the 2nd to 4th defendants, however, it has been urged that the gift P6 of 1917 was in fact a gift by Mutu Banda and that Tikiri Kumarihamy joined in that deed to prevent her from effecting a revocation of the deed P5 of 1916 in favour of Mutu Banda. It seems to me that this proposition too is of doubtful value. Notwithstanding the fact that Tikiri Kumarihamy joined in the deed P6 of 1917, as there was no renunciation of the power of revocation expressed by her in either of the deeds P5 or P6, she was free by a subsequent deed inconsistent with both P5 and P6 to set at naught both these gifts. In order to reinforce the argument on behalf of the 2nd to 4th defendants, the express terms contained in the deed setting out the title of the donors have been referred to, and the deed says that " the premises (donated) . . . . . are held and possessed by us under and by virtue of the deed of gift No. 8879 dated 16th March, 1916, and attested by J. W. A. Illangatilleke, Notary Public ; " P5.

It has been asked why, if Tikiri Kumarihamy was the true donor on the deed P6, the title of the donors is recited as P5 of 1916. That question has received no adequate answer at the hands of the 2nd plaintiff.

[1] *7 Balasingham 133.*

[2] *7 S. C. C. 117.*

The defendants also point to the fact that on the same day that P6 was executed by Tikiri Kumarihamy she executed another deed of gift 1D1, whereby she gifted to a grandson of hers certain other lands the title to which she recites as deed No. 914 dated 14th May, 1855, and attested by Don Carolis de Silva Siriwardene, Notary Public. That the deed here recited is the identical deed under which Tikiri Kumarihamy was entitled, *inter alia*, to the ⅞ share in dispute and it was this title that she had recited in making the gift by deed P5 to her son Mutu Banda are clear from the recital in the deeds. It is pointed out that if Tikirihamy was in fact the donor or even part donor there was not the slightest difficulty in her having recited the same title deed of 1855 as the title under which she held and possessed the shares of which she was making a gift to her daughter Battana Kumarihamy by deed P6, for the Notary had particulars of the deed of 1855. I think there is great force in this latter contention.

It seems to me that on a careful consideration of all the circumstances the conclusion that must be reached is that Mutu Banda who had received a large number of lands under the deed P5 of 1916 and had disposed of most of them, feared that if he continued to possess the lands dealt with under P6 of 1917, he might lose those as well and not be in a position to render succour and assistance to his mother, and the mother without doing any act such as the execution of a subsequent deed inconsistent with the deed of gift P5 of 1916 which would have had the effect of bringing about strained feelings between mother and son, persuaded the son to make a gift to the sister ; and the son in his turn, in order to provide an assurance of succour and assistance being rendered to the mother, got her as well to join the deed as a donor in order that the donee may be required expressly to render succour and assistance not only to himself but also to his mother.

The view I therefore take is that on any other construction the difficulties that arise on the case presented by the 2nd plaintiff cannot be satisfactorily solved.

The learned Counsel for the 2nd plaintiff, however, submitted that a convenant whereby succour and assistance is to be rendered to a party other than the donor is not recognized under the Kandyan Law. But no authority has been cited for that proposition ; nor even any passage from a text book writer.

Having regard to the nature of the deeds of gift under Kandyan Law and the principles underlying their revocability, and the position of parents in a Kandyan family, I do not think it could be said that a provision in a gift by a brother to a sister that the sister should look after and render succour and assistance to their mother is repugnant to any conception of the Kandyan Law. In fact such a provision merely gives effect to the elementary principles of natural feelings and justice.

I would therefore hold that the deed of gift P6 of 1917, though executed by Tikiri Kumarihamy and Mutu Banda, was in fact a donation by Mutu Banda himself in favour of his sister and that being a revocable deed of gift Mutu Banda was entitled by deed 3D1 of 1945 to revoke it. In the result I set aside the judgment of the learned District Judge in so far as it

declares the 2nd plaintiff entitled to $\frac{3}{8}$ share of the filed. The 1st plaintiff however will be declared entitled to $\frac{1}{8}$ share of the field and he will also be entitled to damages at the rate of Rs. 37·50 per annum from 1st December, 1949, till he is restored to possession.

The 2nd to the 4th defendants will pay to the 1st plaintiff a quarter share of the costs in the District Court but he will be entitled to no costs of appeal. The 2nd plaintiff will pay the 2nd, 3rd and 4th defendants the costs of action and of the appeal.

FERNANDO A.J.—I agree.

Appeal allowed.