1955 *Present :* Pulle, J., and Weerasooriya, J.

K. V. DINGIRI NAIDE *et al.*, Appellants, *and*
K. N. KIRIMENIKE, Respondent

S. C. 67—D. C. Anuradhapura, 3,566

Construction of Deeds—Two deeds executed contemporaneously—One single transaction—Kandyan Law Declaration and Amendment Ordinance, No. 3 of 1938—Section 2—" Gift "—Evidence Ordinance, s. 92, proviso 1— Fideicommissum—Revocability.

Where several deeds form part of one transaction and are contemporaneously executed each deed must speak only as part of the one transaction.

While a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable, yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

By deed P2, A, a Kandyan, conveyed to her father, B, certain property for a consideration in money paid by B. By a separate deed, P3, executed on the same day as deed P2, B purported to make a fideicommissary gift to A of the identical property which he obtained on deed P2.

Held, that P2 and P3 constituted a single transaction and that, when they were read together, P3 did not fall within the definition of the word " gift " in section 2 of the Kandyan Law Declaration and Amendment Ordinance.

APPEAL from a judgment of the District Court, Anuradhapura.

Sir Lalita Rajapakse, Q.C., with *E. R. S. R. Coomaraswamy* and *A. Karunatilleke*, for the 1st to 3rd defendants-appellants and 1st added defendant-appellant.

H. W. Jayewardene, Q.C., with *E. S. Amarasinghe* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1955. PULLE, J.—

This appeal relates to a contest in an action instituted on the 18th August, 1952, to partition two allotments of land described in the schedule to the plaint. The parties are Kandyans. It is beyond dispute that at the date of action the plaintiff was entitled absolutely to a 4/20th share of the land and a further 7/20th share subject to a life interest in favour of her father, the 1st added defendant, who is one of the appellants. The 7/20th share was the subject matter of two deeds P2 and P3 bearing respectively numbers 3597 and 3598 executed almost at the same time on the 1st July, 1950. By P2 the plaintiff conveyed to the 1st added defendant-appellant 7/20th share of the two allotments, the subject matter of the action, and ten others for the sum of Rs. 500. It would appear that the interests conveyed by P2 were worth about Rs. 4,000. By deed P3 the 1st added defendant-appellant purported to gift to the plaintiff the identical interests which he obtained on P2, reserving to himself a life interest. The gift contained a clause which was the subject of much discussion both in appeal and in the trial court as to whether it created a fideicommissum.

The trial of this case commenced on the 13th August, 1953, but pending the trial the 1st added defendant-appellant executed the deed 4 D1 of the 8th January, 1953, by which he sought to revoke the deed of gift P3 on the ground of plaintiff's ingratitude. Several interesting but difficult questions were argued before us. To dispose of this appeal it is not necessary to answer every one of them. It was contended on behalf of the plaintiff that upon reading P2 and P3 it is manifest that they constituted a single transaction and the implication flowing therefrom negatived the contention on behalf of the 1st added defendant-appellant that P3 was a Kandyan deed of gift. Then, assuming that P3 was a gift, it was contended that the deed, inasmuch as it created a fideicommissum, was irrevocable. On this point it was submitted that the decision in *P. Thepanissa et al. v. P. Haramanissa* [1] was erroneous and was contrary to *James Singho et al. v. Dingiri Banda* [2]. The final argument was that in any event the deed of revocation 4 D1 was void as being in contravention of section 67 of the Partition Act No. 16 of 1951.

The trial Judge held that P3 was not a deed of gift, having regard to the evidence of the circumstances in which it was executed and that the deed of revocation 4 D1 contravened section 67 of the Partition Act No. 16 of 1951. In his view P3 did not create a fideicommissum.

We are of the opinion that deeds P2 and P3 must be regarded as a single transaction and that when they are read together P3 does not fall within the definition of the word "gift" in section 2 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938. The authorities for reading the deeds together are set out in Norton on Deeds [3] where the judgment of Fletcher-Moulton, L. J., in *Manks v. Whiteley* [4] which was approved on appeal to the House of Lords is quoted. In that case the Lord Justice stated :

> " Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all others being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. "

It was submitted to us on behalf of the 1st added defendant-appellant that the two deeds could not be regarded as a single transaction. Whether one looks at the evidence of the admitted circumstances in which they came to be executed or only the deeds themselves it is clear that in return for the money which the 1st added defendant-appellant paid as consideration for the purchase of the lands scheduled in P2 he agreed not to retain the whole of the beneficial interests but only a life interest, upon the termination of which the plaintiff was to enter into possession as a fiduciary, assuming that the 1st added defendant-appellant succeeded in giving effect to his intention to create a fideicommissum. On this

[1] *(1953) 55 N. L. R. 316.*
[2] *(1927) 5 T. C. L. R. 77.*
[3] *Pp. 86 to 88 Second Edition.*
[4] *(1912) 1 Ch. 735.*

view the deed P3 cannot be regarded, within the definition of "gift" in the Ordinance, as a voluntary transfer, grant or conveyance made otherwise than for consideration in money or money's worth. The case of *Belgaswatte v. Ukku Banda et al.* [1] supports the plaintiff in her contention that while a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

Mr. Coomaraswamy was constrained to admit that, if oral evidence of the circumstances in which P2 was executed by the plaintiff could be looked at, the 1st added defendant-appellant was under a legal obligation to execute P3 and he could not by executing 4 D1 in 1953 nullify the rights flowing from P3 any more than he could have done so immediately after the execution of P3.

We have been invited to hold that since the decision of the Privy Council in *Saverimuttu v. P. Thangavelauthen* [2] and of this court in *B. M. G. Setuwa et al. v. B. T. Ukku* [3] the case of *Belgaswatte v. Ukku Banda* (*supra*) must be regarded as overruled. We are unable to accept this contention. In the first of these cases it was held that a transferor of a property for a consideration appearing on the face of the transfer was not entitled to prove a contemporaneous oral agreement by the transferee to reconvey the property, as being contrary to section 2 of the Prevention of Frauds Ordinance. In the second case the transferee sought to prove by parol evidence that although the conveyance purported to be one for valuable consideration it was in reality not a sale but a mortgage. It was held that parol evidence was not admissible. In the present case the plaintiff has only relied on the first proviso to section 92 of the Evidence Ordinance to show the true consideration for the conveyance P3.

If the deed P3 creates a fideicommissum attaching to a 7/20th share it has to be specified in the decree for otherwise the party to whom the share is allotted would take it free of the fideicommissum in terms of section 48 (1) of the Partition Act. The argument centering round P3, both here and below, as to whether it created a fideicommissum was intended on either side to serve a subsidiary purpose. For the plaintiff it was contended that if there was a fideicommissum then the transaction fell outside the purview of Kandyan Law and that, therefore, the deed P3 had only the qualities of a gift governed purely by the Roman Dutch Law. On that view it resulted, so it was argued, that P3 was irrevocable. For the 1st added defendant-appellant it was not seriously disputed before us that the donor on P3 did intend to create a fideicommissum but it was submitted that in the ultimate result the fideicommissum failed because there was no acceptance on behalf of the fideicommissarii and that, therefore, the application of the Roman Dutch Law did not arise nor the question whether *Thepanissa v. Haramanissa* (*supra*) was rightly decided. A decision that in any event P3 was irrevocable leaves the 1st added defendant-appellant indifferent as to whether there was a fideicommissum or not.

[1] *(1942) 43 N. L. R. 281.* [2] *(1954) 55 N. L. R. 529.*
[3] *(1955) 56 N. L. R. 337.*

The clause in question reads in the translation as follows :—

> " Therefore all the right title and interest of me the said donor in and to the said lands be entitled to the said donee subject to the said life interest from today but shall not sell mortgage gift exchange or otherwise alienate the same except among the other heirs and after her death the same shall be entitled to her children or other heirs to possess and enjoy the same for ever so that they may do whatever with the same. "

The words " except among the other heirs " seem to be meaningless in the context and they can be excluded without impairing the rest of the clause which to my mind creates a fideicommissum in favour of the children of the donee. The donee was a married woman who at the date of action had two minor children by a man who was not her husband. Whether the word " children " in the clause means her lawful children is a question that does not fall to be determined in this case. Whether they exclude her minor children or not it is clear that the acceptance by the fiduciary donee created an irrevocable interest in favour of the fideicommissarii. Vide the case of *Mudaliyar Wijetunga v. Duwalage Rossie* [1]. I would amend the decree by providing that the 7/20th share allotted to the plaintiff be further subject to the fideicommissum created by deed No. 3598 of 1st July, 1950, attested by D. J. M. Mahipala, Notary.

Subject to the amendment indicated above the appeal should be dismissed with costs.

WEERASOORIYA, J.—I agree.

Appeal mainly dismissed.