1953 *Present :* **Pulle J. and Swan J.**

P. THEPANISA *et al.*, Appellants, *and* P. HARAMANISA *et al.*, Respondents

*S. C. 228—D. C. Kegalle, 4,722*

*Kandyan Law—Fideicommissary deed of gift—Revocability.*

The creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability.

APPEAL from a judgment of the District Court, Kegalle.

*C. Thiagalingam, Q.C.*, with *B. S. C. Ratwatte*, for the defendants appellants.

*Cyril E. S. Perera, Q.C.*, with *P. Somatilakam*, for the plaintiffs respondents.

*Cur. adv. vult.*

June 12, 1953. PULLE J.—

The appellants are the 1st, 2nd and 3rd defendants. They appeal from a decree declaring the three plaintiffs in the action entitled to two lands called Yakambe Mukalana and Yakambewatta. The 1st plaintiff and the 1st and 2nd defendants are the children of one Pallewelayalage Bandiya by his first marriage. The 2nd and 3rd plaintiffs are the children of Bandiya by a second marriage. According to the plaintiffs Bandiya was a Kandyan. The questions raised in this appeal concern primarily the legal effect of a deed of gift P4 executed by Bandiya in 1911 to his children by the first marriage and before he contracted the second marriage. This deed was revoked by deed P5 of the 5th July, 1943, on which date the lands comprised in P4 were by another instrument P6 transferred to the plaintiffs.

It was argued that the execution of deed P5 did not operate as a valid revocation. An attempt was made to prove that Bandiya was not a Kandyan. It failed for the reasons set out in the judgment of the learned District Judge with which we are in agreement and which need not be repeated. It was next submitted that P4 was a settlement by a donor in favour of his children in contemplation of a second marriage and that, therefore, it was irrevocable. The revocability of this very deed was considered in *Romanis v. Haramanissa* [1] and it was held that it did not fall within the exception that the circumstances which constitute non-revocability must appear most clearly on the face of the deed itself.

It was next contended that the donees had rendered succour and assistance to Bandiya and he was thereby precluded from revoking P4. This involves a question of fact which the learned Judge has decided against the appellants and there is no reason for taking a contrary view.

The last point taken was that the deed P4 created a *fideicommissum* which is a concept unknown to the Kandyan law, at least in the sense that there are no rules peculiar or indigenous to that law relating to *fideicommissum*. On this premise it was argued, on the authority of *Weerasekere v. Pieris* [2], that the donor's right to revoke the gift must be ascertained solely within the framework of the Roman-Dutch law and that by the application of that law it was not competent for Bandiya to revoke the gift. The learned District Judge expressed a doubt as to whether P4 created a *fideicommissum*. I do not propose to set down here the clause which according to the appellants created a *fideicommissum*. One translation of the clause appears in the judgment reported at *51 N. L. R. 575*. The translation in the present case is different. In the course of the argument a further translation was prepared which appeared to support the contention on behalf of the appellants. Without deciding the question whether the clause creates a *fideicommissum* we propose to decide the appeal on the assumption that it does.

In my opinion there is no true analogy between *Weerasekere v. Pieris* [2] and the present case. The parties to the deed of gift in *Weerasekere v. Pieris* [2] were Muslims. The donor reserved to himself the right to revoke

[1] *(1950) 51 N. L. R. 575.*

[2] *(1932) 34 N. L. R. 281.*

the deed, as if it had not been executed, and to deal with the property as he thought fit. Further, the donor reserved to himself the rents and profits during his lifetime and it was only after his death that the property was to go to the donee and to be possessed by him subject to a *fideicommissum* in favour of his children. As a gift *inter vivos* according to Muslim law it was at the outset open to attack by reason of the reservation of the right in favour of the donor to receive and enjoy the rents and profits of the property. Viewed from the aspect of Kandyan law there is nothing in the deed P4 of 1911 which is in conflict with the principles of that law. Of the authorities cited at the argument it suffices only to refer to the case of *Assistant Government Agent, Kandy v. Kalu Banda et al.*[1] in which de Sampayo J. said,

> "Nor is there anything in these text books or anywhere to show that gifts in the nature of *fideicommissum* are contrary to the spirit of the Kandyan law. In this case, as I ventured to remark in the course of the argument, it is not a question of applying any particular rules of the Roman-Dutch law to the construction of this deed of gift. It is rather a question of the right of an owner of property to dispose of it according to his pleasure. I am not aware of any principle of Kandyan law which prevents a Kandyan from giving a limited interest to one person and providing that at the termination of that interest the property should vest in another person. Such a disposition would, of course, be called in the Roman-Dutch law a *fideicommissum*. It may not be a proper expression to describe a similar disposition by a Kandyan. It is, however, a convenient expression, and if the thing itself may be done among the Kandyans, the Court will not hesitate to give effect to it, simply because the disposition may also amount to a *fideicommissum*."

In my opinion one can properly infer from the observations made by this learned Judge that the creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability. In my view no valid reason can be formulated for holding that while a gift simpliciter can be revoked one which is subject to restrictions becomes irrevocable.

At the hearing of the present appeal the case of *Noorul Muheetha v. Sittie Rafeeka Leyaudeen and others*[2] was pending before the Privy Council and it was anticipated that the judgment of their Lordships might assist us. It raised the question whether in the matter of an acceptance of a gift subject to a *fideicommissum*, by a Muslim mother on behalf of her minor children, the Roman-Dutch law or the Muslim law was applicable. That case has since been decided but no principle can be extracted from it which would support the contention on behalf of the appellants.

In my opinion the appeal fails on all points and should be dismissed with costs.

SWAN J.—I agree.

*Appeal dismissed.*

[1] *(1921) 23 N L. R. 26.*

[2] *(1953) 54 N. L. R. 270.*