

*Present:* Garvin and Lyall Grant JJ.

1926.

KALU BANDA *v.* MUDIANSE.

124—D. C. Kandy, 32,602.

*Kandyan law—Gift of inherited property—Partition decree—Acquired property—Inheritance.*

Where a Kandyan, who was vested with title to property by inheritance, donated it and was subsequently declared entitled to such property in terms of a partition decree,—

*Held* (on a question of inheritance arising among the heirs) that such property was acquired property.

**T**HIS was an action for declaration of title to a land which belonged to one Sirimala by paternal inheritance. By a deed dated November 3, 1906, he gifted a specific portion of the land to his illegitimate son Sarana, who conveyed his interests by a deed dated October 27, 1919, to one Punchi Ukku, from whom the defendant acquired them upon a deed of October 6, 1924. Before Sarana parted with his interest a partition action affecting the whole land was instituted, to which Sirimala was made a defendant. By the final decree entered on July 4, 1913, Sirimala was declared entitled to the portion of land. Sirimala died in 1919, leaving him surviving his illegitimate son Sarana, a brother, and two nieces. By deed dated January 22, 1925, Sirimala's brother and the two nieces sold the premises to the plaintiffs. The District Judge held that by virtue of the decree passed in the partition action Sirimala was vested with title in the land, and that on his death it devolved on his brother and nieces, to the exclusion of his illegitimate son.

*H. V. Perera*, for defendant, appellant.

*Hayley*, for plaintiff, respondent.

December 9, 1926. GARVIN J.—

The facts material to this appeal are these. One Sirimala was by paternal inheritance entitled to an undivided one-third share of a land called Herassagalehena. By a deed dated November 3, 1906, he gifted to his illegitimate son Sarana a specific portion of this land and various interests in several other lands. Sarana conveyed his interests in the specific portion of this land by a deed of October 27, 1919, to one Punchi Ukku, from whom the defendant acquired it upon a deed of October 6, 1924. Before Sarana parted with his interest in this land a partition action affecting the whole land was

1928.

GARVIN J.  
 Kalu Banda  
 v.  
 Mudianse

instituted and Sirimala was made defendant to the action. He filed an answer consenting to the partition, and claimed that a specific portion, the very portion which was the subject of the gift to Sarana, had been planted, possessed, and improved by him, and should at the partition be allotted to him. A decree for partition was entered, and by the final decree entered in the case Sirimala was declared entitled to the portion claimed by him. In the result he acquired to the subject-matter of this action a title under this final decree which was entered on July 4, 1913. Sirimala died early in 1919, leaving him surviving his illegitimate son Sarana, a brother, and two nieces. By deed P 3 of January 22, 1925, Sirimala's brother and his two nieces conveyed the premises to the plaintiff, claiming to have acquired title thereto by right of inheritance. The learned District Judge held that by reason of the final decree entered in the partition case Sirimala was vested with title in these premises, and that on his death they passed under the Kandyan law of inheritance to his brother and nieces to the exclusion of his illegitimate son. It was, however, contended on behalf of the appellants that the premises were not inherited property of Sirimala but acquired property, and as such passed to his illegitimate child. It was not disputed that if this is to be deemed the acquired property of Sirimala that Sarana, his illegitimate son, would be entitled thereto in the absence of legitimate issue. The foundation of the argument is that inasmuch as Sirimala had by a deed of gift divested himself of the title to the premises and thereafter acquired a title to it by the decree which was obtained by concealment from the Court of the fact that at the date of the action he had by his deed of gift passed on all his interests therein to Sarana the premises must be deemed to be acquired property and not inherited property. A partition decree declares a person entitled to a specific allotment of land in severalty. In the case of a Kandyan who dies vested with such title, the devolution upon his death depends on whether the premises come within the category of inherited property or of acquired property. It becomes necessary, therefore, to go behind the partition decree and inquire into the history of the title to ascertain, if possible, whether the property was inherited or whether it was acquired property. The title set up by Sirimala was a title by inheritance. It is contended for the defendants that such an investigation must be limited to the proceedings taken in the partition case, and that inasmuch as the title set up is a title by inheritance, that is conclusive of the matter. It may be that as between the immediate parties to the action the declaration of title is not only conclusive as to title but is *res adjudicata* as to the nature of the title which was set up by the party to the partition proceedings, but I am unable to agree that as between those who claim to be the intestate heirs of a person a declaration of title to a specific

lot by a partition decree does not permit them or any of them to show as a fact that the title pleaded by their predecessor in the partition proceedings was not the title by which he held the property, or that in point of fact he had no title at the time he made his claim. It would, I think, be open to a party to prove that whereas the title pleaded was a prescriptive title, the interests had actually accrued by right of inheritance, or in a case where a title by inheritance was pleaded, that it had, in point of fact, been acquired by purchase. The fact that at the date of the partition action Sirimala had parted with his interests in this property is not disputed. Sirimala, therefore, had no title to the property, and the only title he had at the time of his death was a title attributable to the partition decree. The Kandyan law classifies the property of an individual with reference to the manner in which he became entitled to that property into three classes, viz., (1) *Daa himi*, paternal or procreate right; (2) *Wadda himi*, maternal or parturiate right; and (3) *Lat himi*, right of acquist (see *Pereira's Armour*, page 49). The expression "*lat himi*" is used to express a right to property where that property has been acquired by gift or bequest, by purchase, prescription, or otherwise. It has been repeatedly held that a gift or sale by a father of his inherited property to his son constitutes such property the acquired property of the son. (*Tennekoongedera Ukkurala v. Samarasinghe William Tillekeratne*,<sup>1</sup> *Mudalihami v. Bandirala*,<sup>2</sup> and *Kiri Menika et al. v. Mutu Menika*.<sup>3</sup>) When a person who is vested with title by inheritance donates the property thus inherited and afterwards repurchases the property, it must be deemed to be acquired property. Sirimala in this case divested himself of his title by inheritance by donating it to Sarana. The title with which he was vested at the date of his death was not a title acquired by gift, bequest, purchase, or prescription, nor was it a title by inheritance. It was a title which must be ascribed to the partition decree, and to that alone. A search for express authority of the writers on ancient Kandyan law cannot be profitably undertaken in a case such as this. The Partition Ordinance was only enacted in 1863. Nor does any similar point appear to have been considered in any of the reported cases of this Court, but the classification referred to appears to proceed upon the principle that all property acquired otherwise than by inheritance falls into one class, whereas inherited property is classified into two main heads, paternal or maternal. A closer examination of the Kandyan law discloses that these two main heads under which inherited property was classified are made the subject of further special divisions. The broad distinction, therefore, would seem to be between inherited and property acquired otherwise than by inheritance. This, it seems to me, is clearly acquired

1926.

GARVIN J.  
*Kalu Banda*  
*v.*  
*Mudianse*

<sup>1</sup> (1882) 5 S. C. C. 46.<sup>2</sup> (1898) 3 N. L. R. 209.<sup>3</sup> (1899) 3 N. L. R. 376.

1926.

GARVIN J.

*Kalu Banda*  
v.  
*Mudianse*

property to which the plaintiff became entitled otherwise than by inheritance, and as such its devolution must be regulated by the rules applicable to acquired property. It was contended for the respondent to this appeal that the act of Sirimala in appearing in the partition proceedings and claiming to take a share of the property as his own to the exclusion of Sarana and all others amounts to a revocation of the gift. Beyond these facts there is nothing to indicate that when Sirimala filed his answer in the action to which, as I have already said, he was made a defendant, he did so with the deliberate intention of revoking the gift. The learned District Judge in the course of his judgment has referred to a series of other deeds relating to land which was the subject of this deed of gift to which both Sirimala and Sarana were parties which appear to indicate the affirmation of the deed of gift by Sirimala. There is no reason to suppose, knowing these villagers as we do, that Sirimala intended either to defraud Sarana or to revoke the deed in his favour. The more natural explanation is that being a Kandyan he still regarded himself as vested with some sort of right to the land which he had gifted to his illegitimate son, and having been made a defendant and noticed to appear he went forward and vindicated their rights to the land without any intention of revoking the deed of gift or of acquiring fraudulently a title to the prejudice of his illegitimate son. The District Judge appears to have taken a correct view of the evidence when he declined to hold that the gift had been avoided by revocation. For these reasons, I think that at the date of his transfer to Punchi Ukku, Sarana was vested with title to these premises by right of inheritance from Sirimala, whose illegitimate son he was.

The appeal is accordingly allowed, and judgment will be entered dismissing the plaintiff's action, with costs to the defendant in both Courts.

LYALL GRANT J.—I agree.

*Appeal allowed.*

