IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an application for Special Leave to appeal against Judgment dated 30.05.2012 delivered by the Court of Appeal of the Democratic Socialist Republic of Sri Lanka Case bearing number C.A. 541/1998(F) D.C. Kuliyapitiya Case No. P/10428.

IN THE DISTRICT COURT.

R.M. Siriwardena of Ihalagama,
Alahenegama.

Plaintiff.

S.C. Appeal No. 221/2012
SC (Special) LA No. 121/2012
C.A. Appeal No. 541/98(F)
D.C. Kuliyapitiya Case No. 10428/P

Vs.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant.

AND BETWEEN IN THE COURT OF APPEAL.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant – Appellant.

Vs

R.M. Siriwardena of Ihalagama,
Alahenegame.

Plaintiff- Respondent.

AND NOW BETWEEN IN THE SUPREME COURT.

Rathnayake Mudiyanselage Jayathilaka
of Thalahenegama,
Alahenegama.

Defendant – Appellant – Petitioner.

Vs.

R.M. Siriwardena of Ihalagama,
Alahenegama.

Plaintiff – Respondent – Respondent.

Before : Prasanna Jayawardena, PC, J.
P. Padman Surasena, J. &
E.A.G.R. Amarasekara, J.

Counsel : Ms. Sudarshani Cooray for the Defendant – Appellant- Appellant.
Jacob Joseph for the Plaintiff – Respondent – Respondent.

Argued On : 18.02.2019

Decided On : 19. 12. 2019

E. A. G. R. Amarasekara J.

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the Plaintiff) by plaint dated 13.07.1992 instituted proceedings against the Defendant – Appellant – Petitioner (hereinafter sometimes referred to as the Defendant) in the District Court of Kuliyapitiya seeking to partition the land called "Bogahamulla Pahala Hena" more fully described in the schedule to the plaint. The position of the Plaintiff was that the Plaintiff and the Defendant were entitled ½ share each as per the pedigree set out in the plaint. Among other things the Plaintiff averred in his plaint that;

i. The original owner of the aforesaid land was one Jayamanna Arachchige Reginahamy.

ii. The said Jayamanna Arachchige Reginahamy had transferred ½ share to the Defendant, R.M. Jayathileke on a deed which cannot be traced since the documents in the Land Registry, Kurunegala had been destroyed.

iii. The other half share was also gifted to the Defendant, R. M. Jayathileke by the said original owner by Deed No. 6120 dated 21/12/1979 which was later revoked by Deed No. 9115 dated 10/10/1990.

iv. Thereafter, by Deed No. 9116 aforesaid original owner sold the said ½ share to Rathnyake Mudiyanselage Mendis Singho.

v. The said Rathnyake Mudiyanselage Mendis Singho transferred the said half share by Deed No. 844 on 10/10/1992 attested by P. Paranawithana, Notary public to the Plaintiff, R.M. Siriwardena.

vi. Accordingly, the land in suit should be partitioned giving ½ share each to the Plaintiff and to the Defendant.

The Defendant in his statement of claim dated 13/09/1994 had stated that,

i. The said original owner Jayamanna Arachchige Reginahamy was subject to the Kandyan Law.

ii. The said original owner transferred half share to him by deed of transfer No. 4847 dated 14/10/1968 attested by A. I. de S. Jayathileke, Notary Public.

iii. The said original owner by executing Deed of Revocation No. 57 dated 29/07/1991, revoked the gift of half share given in the form of a transfer deed by deed No. 9116 to Mendis Singho referred to in the plaint and gifted the said half share to the Defendant by Deed No. 58 dated 29/07/1991.

iv. Accordingly, the Defendant is entitled to the whole land in suit and the Plaintiff did not have any right to the land sought to be partitioned.

v. The Defendant is entitled to the land depicted in plan No. 93/6 dated 03.02.1993 made by licensed surveyor H.A.M.C. Bandara also by possession for a long period of time. (The said plan No.93/6 appears to be the preliminary plan made for the purposes of this case)

Thereby, the Defendant prayed for dismissal of the plaint and for a declaration that the Defendant is the owner of the land depicted in the aforesaid plan No. 93/6.

At the commencement of the trial, the parties admitted paragraphs 1,2,3,4 and 5 of the Plaint. Thus, the followings are among the admissions made by the parties.

I. Jurisdiction of the court.

II. The original owner of the land was the aforesaid Jayamanna Arachchige Reginahamy

III. The said Jayamanna Arachchige Reginahamy had transferred ½ share of the land sought to be partitioned to the Defendant.

IV. The said original owner gifted the other half share to the Defendant, R. M, Jayathileke by Deed No. 6120 and later on revoked the said gift by deed No. 9115 dated 10.10.1990.

V. Thereafter, by Deed No. 9116 the said original owner transferred (**සින්නක්කර විකුනා ඇත**) the said ½ share to Rathnyake Mudiyanselage Mendis Singho by deed No. 9116 dated 10.10.1990.

As per the issues raised before the learned District Judge the main points of contest between the parties were focused on the following matters;

- Whether the aforesaid deed No. 9116 was a deed of transfer for valuable consideration or a deed of gift executed in the form of a transfer,
- Whether it could be revoked by the original owner by the deed no. 57 dated 29.07.1991,
- Whether the original owner gained title back to a ½ share due to the said revocation by deed No.57 to gift it to the Defendant by deed No.58 dated 29.07.1991 and accordingly whether the Defendant is entitled to the whole land sought to be partitioned,
- Whether the Defendant is entitled to the land in suit by long period of possession, or
- Whether the said deed Nos. 57 and 58 are of any force or avail in law since deed No.9116 is a deed of transfer for valuable consideration,
- Whether the Plaintiff gets title from the aforesaid Rathnayake Mudiyanselage Mendis Singho through deed No.844 dated 10.01 1992.

Thus, at the trial in the District Court, the main contention revolved around whether Deed No. 9116, which was written in the form of a transfer, is a deed of gift or not, since if it is a deed of gift, it is subject to the subsequent revocation by deed No.57 executed by Reginahamy as a person subject to the Kandyan Law. The judgement was delivered on 08.09.1998 holding with the Plaintiff and ordering to partition the land sought to be partitioned. Thus, the learned District Judge held in favour of the Plaintiff rejecting the stance of the Defendant that the deed no. 9116 is a deed of gift which could be cancelled under the Kandyan Law by a subsequent deed.

Being aggrieved by the said judgement the Defendant lodged an Appeal to the Court of Appeal on the following grounds;

- Although the deed No. 9116 marked as P3 at the trial is titled as a Deed of Transfer (සින්නක්කර ඔප්පුවක්), truly, it is a Deed of Gift due to the fact that the consideration of Rs.25000/= had been renounced as a donation owing to the compassion towards the vendee as per the attestation of the said deed which was confirmed by the Notary Public while giving evidence.
- Said Deed had been revoked by the Deed No. 57 marked 1V2 and the property contained therein belongs to the Defendant through Deed No. 58 marked 1V3.
- Thus, the Defendant – Appellant is entitled to the whole land.

After hearing both parties, the Court of Appeal dismissed the Appeal of the Defendant and affirmed the judgment of the Learned District Judge of Kuliyapitiya by its Judgment dated 30.05.2012. The learned Court of Appeal Judge in his judgment while dismissing the appeal has commented as follows;

"*In fact, on the face of deed P3 it is nothing but a transfer deed. To state otherwise would certainly offend section 92 of the Evidence Ordinance. Notwithstanding the evidence of the Notary as held in Fernando v Cooray* ***(59 NLR 169)*** *parol evidence, even if admitted without objection will continue to offend section 92 of the Evidence Ordinance. No evidence to vary the consideration referred to in deed P3 would be admitted. The basic rule being that parol evidence cannot be adduced to contradict vary, add to or subtract from its terms. Rule is founded on obvious inconvenience and injustice. Lord Coke calls the uncertain testimony of slippery memory (The Conveyancer and Property Lawyer. E.R.S.R. Coomarasmamy pg.417) Oral evidence is not allowed where the effect of a document incidentally comes up for determination. Velan Alan Vs. Ponny 41 NLR 106. The mere statement of Notary is not sufficient to establish the truth of the payment of such consideration (****E.A. Diyas Singho v E.A. Hearath****) 64 NLR 492. I have also to stress that paragraph 5 of plaint was admitted by the Defendant-Appellant*." (Highlighted references in bold letters are inserted by me.).

When leave to appeal application was supported before this court, leave has been granted on the following questions of law as stated in paragraph 15(a) to 15(d) of the petition dated 09.07.2012, which are reproduced here verbatim;

a) "*Did the learned Court of Appeal and District Court erred in coming to finding that Deed No. 9116 (P 3) is a deed of transfer?*

b) *the court of Appeal and District Court err by failing to pay sufficient attention to the Section 2 of the Kandyan Law Declaration and Amendment Ordinance where a "Gift" has been also defined as a 'voluntary transfer'.*
c) *the Court of Appeal has erred by failing to pay sufficient attention to written submissions made to the Court of Appeal on behalf of the Defendant Appellant; the court of Appeal has not paid attention to the law laid down in Mudiyanse v Banda 16 NLR 53; Sujitha Kumarihamy v Dingiri Amma 72 NLR 409; Sumanasiri v Thilakarathne Banda 74 NLR 155; P.B.Rathnayake v M.B.S.J. Bandara 1990 1 SLR 156.*
d) *did the Learned Court of Appeal err in coming to the conclusion that since the title of the Deed No.9116 states as 'Transfer' the said Deed is a Deed of gift*. "(**Sic**)

(It must be noted that the Court of Appeal has not come to the conclusion that the Deed No.9116 is a deed of gift as suggested by above (d) but has affirmed the lower Court judgment considering the said deed as a deed of transfer.)

As per the journal entry dated 14.12.2012, both counsel have agreed that the appeal could be argued on the briefs that are available. Hence Parties have communicated to court that what is available in the brief is sufficient for the arguments they relied on.

Though there is no admission recorded at the commencement or during the trial that Reginahamy was subject to Kandyan law, it appears that it was common ground between the parties that she was subject to Kandyan law. For example, the Defendant had taken up the position that she revoked the deed No. 9116 by a subsequent deed as a person subject to Kandyan law. On the other hand, the Plaintiff also had referred to revocations by said Reginahamy of previous deeds of gift by subsequent deeds. Furthermore, no issue had been raised to challenge the position taken up by the Defendant stating that she was subject to Kandyan Law or to challenge deeds of revocation found in pedigrees of both side on the ground that she was not a person subject to Kandyan Law. Hence, from trial to the Appeal to this court, parties by their conduct have indicated that it is not in dispute that Reginahamy was subject to Kandyan Law.

As said before the dispute between the parties revolves around as to how one shall interpret deed No. 9116 to find the intention of the executant or grantor of the same, namely whether the intention was to execute a deed of gift or deed of transfer for a consideration at the time of its execution. In construing a deed, *the expressed intention of the parties must be discovered* - Vide **Jinaratana Thero Vs. Somananda Thero (1946) 32 C.L.W. 11.** In the said case then learned judges of this court had cited as follows;

"The *question is not what the parties intended to do by entering into the deed, but what is the meaning of the words used in the deed : a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions*."- Vide Lord Wensleydale's remarks in **Monneypenny Vs Moneypenny 1861 9 H.L.C. 114 at p.146**.

"It *is quite true I am not to conjecture or guess what might have been the intention of the parties but I am to consider the whole instrument. If there is a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give that construction*." – Vide Lord Denman C. J's Remarks in **Clayton Vs Glengall (1841, 1 Dr. and W 1**).

E.R.S.R. Coomaraswamy with regard to the interpretation of deeds and Intention Rule also has referred to the above citations and while further referring to **Gravenor Vs. Dunswart Iron Works (1929) A.D. 299 at 303, Mallen Vs. May 14.L.J.Ex. 48, Evidence Ordinance Section 98, Holland Vs Commissioner of Crown Land,(1877) Buch.105** has stated as follows;

"It is not the function of the judge to decide whether the words used by the parties do not possess some hidden meaning different from their true meaning. The surest method of arriving at the true meaning of the parties is to assume that they intended their words to have their ordinary grammatical meaning. But if this would lead to an absurdity or to something, which from the instrument as a whole it is clearly apparent the parties could not have intended, then the Court is justified in departing from the literal meaning of the words so as to give effect to the true intention of the parties. There are some exceptions to this rule: -

a) *If the deed contains words or phrases which have acquired a technical meaning, the Court will give to them their technical sense.*
b) *When words have acquired a special meaning by trade usage or the custom of a particular locality, the apparent meaning will not be the true meaning, and in such a case evidence of the trade usage or custom can be led.*
c) *Where it is clear from the contract taken as a whole, that the parties did not intend to use the words in their popular and ordinary meaning, the Court will give effect to their intention."* – Vide **THE CONVEYANCER AND PROPERTY LAWYER, Vol 1 Part 1, First Edition** Pages 423 and 424.

In **Reid Vs Coggans 1944 A.C. 91 at page 98** Lord Russell held that "*we must not start with any assumption or surmise of probability of intention on the part of the executant. His intention must be gathered from words of the document".*

Such intention may and usually does appear from the very form and commencement of the document. (E.R.S.R Coomaraswamy in his aforementioned book citing Burrows 46-47).

In **The North Eastern Railway Company Vs Lord Hastings (1900) A.C. 260**, H.L at pages 267 & 268, Lord Davey stated "*The principle on which an instrument of this description should be construed is not doubtful. It is (to quote the words of Lord Watson in an unreported case **Chamber Colliery Co. Limited V Twyerrould, H.L. July 20 1893**) that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible, or (as was said by Lord Selborne) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation: **Caledonian Ry.Co v North British Ry.Co. 6App. Cas 114*****).**

The afore quoted legal texts, decisions and authorities indicate that when interpreting a deed, a court has to;

- Find the expressed intention of the parties,
- Find such intention through the meaning of the words used in the deed while considering the whole document to ascertain the true meaning of its several clauses. Sometimes the very form of the document may help in ascertaining the intention.
- Interpret each clause in a manner to bring each and every clause or provisions in the deed into harmony with each other.
- Assume that words have been used to give their ordinary grammatical and literal meaning unless it leads to absurdity or it is clearly apparent that such interpretation departs from the true intention of the parties involved, where the court is allowed to deviate from the ordinary literal meaning to give effect to the true intention.
- Give technical meaning or special meaning in trade or customary usage or otherwise when the words are used to give such technical or special meaning.

It is worthwhile to see how the courts have interpreted when there was a conflict or ambiguity between two clauses of a deed. E.R.S.R Coomaraswamy refers to local and foreign cases in relation to inconsistencies between the recital and operative clause- Vide page 425 of the aforementioned Book.

'*If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred'-* ***Per Lord Esher in Ex parte Dawes 17 Q. B. D. 275 at 276****. Thus, where there is a conflict between the operative part of a deed of conveyance and the recitals, the terms of the operative part prevail-* ***Kumarihamy Vs. Maitripala 44 N.L.R. 153****. The recitals cannot control the operative part when the latter is clear. -* ***Bailey Vs. Lloyd, (1829) 5 Russ. 330 at 334.; l. R. C. Vs. Raphael. (1935) A.C. 96****. But they may be used to clear up doubts which arise on the words of the operative part. -* ***Orr vs. Mitchell, (1893) A.C. 238 at 254; Crouch Vs. Crouch, (1912) 81 L.J.K.B. 275.'***

The above quoted passage indicates that, if the operative part is clear it gets the priority over the other parts of the deed but other clauses can be used to clear up doubts that arise in relation to the words in the operative part.

In the backdrop of above rules and examples, now I would proceed to see whether the impugned deed No. 9116 had been properly construed by the learned District Judge as well as by the Court of Appeal.

At the commencement of the deed No.9116, just after its number it is titled as "**විකුනුම්කරය - රුපි: 25000.00**" (Deed of Transfer – Rs.25000.00). Just prior to the number of the deed, along with the date it is written **ඉඩම් 1 යි** (One Land). Thus, the titling at the beginning of the deed indicates it is a deed of transfer of a land for a monetary consideration. In other words, it's a deed written in relation to a sale of land. Further, the following terminology in Sinhala has been used in the operative part of the deed to indicate that it was a sale of land subject to the vendor's life interest for a consideration of Rs.25000.00 paid to the seller, payment of which has been admitted by the seller.

"…….. **රත්නායක මුදියන්සෙලාගේ මෙන්ඩිස් සිංඤේ මහතා විසින් මට ගෙවන ලද (ඒ බව මා විසින් මෙයින් පිලිගත්) ශ්‍රී ලංකාවේ භාවිතා වන මුදලින් රුපියල් විසිපන්දහසක් (රු.25000.00) කරණකොට ගෙන ඉහත කී විකුණුම්කාරී වන මට, මාගම්මන ලුවී ආරියසිංහ ප්‍රසිද්ධ නොතාරිස් මහතා සහතික කල අංක 9115 සහ වර්ෂ 1990 ක්වූ ඔක්තෝබර් මස 10 වෙනි දින දරණ තෑගි අවලංගු කිරීමේ ඔප්පුව පිට අයිති වූ මෙහි පහත උප ලේඛනයෙහි විස්තර කරනු ලබන දේපල සහ ඊට අයිති සියලුදේත් එකී ජයමාන්න ආරච්චිගේ රෙජිනාහාමි වන මගේ ජීවිත බුක්තියට යටත්ව හෙවත් මා ජීවත්ව සිටිනාතුරු එකී දේපල වල ආදායම් ප්‍රයෝජන මා විසින් ලබා ගෙන බුක්ති විඳීමේ බලයට යටත්ව ඉහත කී රත්නායක මුදියන්සෙලාගේ මෙන්ඩිස් සිංඤේ මහතාට මෙයින් සින්නක්කරයේ විකුනා අයිතිකර, හිමිකර පවරා බාර දුනිමි.**

The intention of the vendor indicated by the form of the deed, commencement of the deed as well as the most important operative part of the deed is nothing other than a sale of the land described in the schedule to the deed for a valuable consideration of Rs.25000.00. Moreover, the vendor has admitted that the consideration was paid to her. Once the money is paid the obligation on the part of the buyer is fulfilled. The seller has to respect his obligations as there are no other conditions imposed on the buyer. On the other hand, the agreement between the two parties is contained mainly in the operative part and other clauses may be helpful in interpreting when there is obscurity in the operative part. As shown above there is no ambiguity in the operative part. The dispute with regard to the intention of the vendor is based on what the Notary public has mentioned in his attestation. The attestation does not contain the terms or conditions of the agreement between the parties. It is not among what is read to the parties before they sign the deed in agreement. The attestation is solely done by the Notary, most probably not in the presence of the parties. It generally contains facts in relation to the identity of the parties; the correction of typographical or clerical errors done by him; whether the deed was read over and explained to the parties before they signed it in the presence of each other, the witnesses and the Notary public; whether the consideration was passed before him or not. In the case at hand, the Notary has mentioned in his attestation that the consideration mentioned in the deed was renounced as a donation due to the compassion towards the vendee. (….නවද ඉහත ඔප්පුවේ සඳහන් මුදල වන රුපියල් විසිපන්දහස ගැනුම් කාරයාට ඇති දයාව නිසා පරිත්‍යාගයක් වශයෙන් අත්හල බවද .).The meaning of the Sinhala word ’පරිත්‍යාගය. generally connotes ‘a donation’ or ‘a sacrifice’ like in ‘මුදල් පරිත්‍යාගය. or ‘ජීවිත පරිත්‍යාගය.. However, the Appellant’s contention is that the consideration was not passed and the deed No.9116 is a deed of gift which can be revoked by the donor. As said before the aforesaid phrase in the attestation cannot be a term read over to the parties and explained before they signed the deed. The operative part, the form of deed and the words contained in the body of the agreement for which parties signed after being read over by the Notary have no uncertainty that warrants any interpretation. As per the operative part of the deed, the vendor has admitted payment of money as consideration for the sale of land. Thus, the transaction of sale was culminated with such payment and acceptance. After that, if the money is renounced it has to be considered as a gift of money but not the land already sold.

Thus, when the impugned deed is considered as a whole and each clause is interpreted in harmony with other clauses while giving natural grammatical and literal meaning to the words used one cannot come to any other understanding than that the said deed is a

deed of transfer for consideration of Rs.25000.00 which money was accepted and thereafter renounced as a gift due to the compassion towards the Vendee. Accordingly, as far as the parts of the impugned deed that contains the facts in relation to the meeting of the minds of the parties involved are concerned, it is clear that the deed was executed in view of the sale of the land described in its schedule. Even the attestation part which is an act of the Notary Public refers to a renunciation of the consideration money paid as a donation, but it does not reveal which party instructed or stated that to the said Notary Public or whether the vendee accepted the returned consideration. Furthermore, the admission no. 5 made at the commencement of the trial is in fact an admission of the sale of land by the impugned deed. For the foregoing reasons, it is my considered view that on the face of it, the impugned deed is a deed executed in view of a transfer of a land on payment of a consideration i.e. sale of a land for money.

This court is also mindful of the following decisions, which favours the stance taken up by the Defendant and some of which have been referred to in the Court of Appeal Judgment.

Fernando V Cooray 59 NLR 169 where it was held that '*in the absence of any allegation of fraud or trust, it is not open to a party, who conveys immovable property for valuable consideration by a deed which is ex facie a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. Such parol evidence, even if admitted without objection, would offend the provisions of section 92 of the Evidence Ordinance and cannot be acted upon'.* (This indicates that parties cannot lead oral evidence to prove that conditions or terms of contract which are there in writing on the document are meant for a different kind of contract than what is ex facie understood by the terms and conditions of the contract when there is no allegation of Trust or Fraud. In the case at hand there is no allegation of Fraud or existence of a Trust.)

D. Thomas V D.R. Fernando 57 NLR 521 - "The *consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction*."

In **Nona Kumara v Abdul Carder 47 NLR 457**, where transferor did not receive the consideration mentioned in the deed, it was held that '*the deed which, on the face of it, was a transfer for consideration could not be held to be a donation merely because the transferor did not receive the consideration. The Plaintiff's remedy was an action to recover consideration and not to claim a cancellation of the conveyance*'.

In **Velan Alvan v Ponny 41 NLR 106** the claim to lead oral evidence for the purpose of showing that the deed was given for a consideration different from that stated in the deed was not permitted.

In **E.A Diyes Singho v E.A. Hearth 64 NLR 492** it was held that '*the court is unable to agree that proof of the existence of a statement in the deed or instrument by the Notary that the consideration was paid is sufficient to establish the truth of the payment of such consideration'.* (In the case at hand the Defendant also relies on a statement made by the Notary in his attestation. Neither the attestation nor the oral evidence of the Notary available in the brief reveal on whose instruction or under what circumstance he included that statement nor whether the Vendee accepted the said renounced money. As per the evidence available in the brief, the vendee, Mendis Singho had given evidence but no question was put to him suggesting that the consideration was returned to him.).

Yet, the Appellant argues that the learned judges of the lower courts erred by failing to give sufficient attention to the section 2 of the Kandyan Law Declaration and Amendment Ordinance where a 'Gift' has been also defined as a 'voluntary transfer'. The relevant portion of the said section 2 reads as follows;

"'*Gift' means a* ***voluntary transfer****, assignment, grant, conveyance, settlement or other disposition inter vivos of immovable property,* ***made otherwise than for consideration in money or money's worth*****".** (emphasis in bold letters by me).

It is pertinent to note that the said Section 2 does not equalize every voluntary transfer to a gift. As per the said section, only voluntary transfers made otherwise than for consideration in money or money's worth are considered as gifts. As elaborated above the transaction elucidated in the impugned deed is a transfer for money or money's worth, even though the money paid was thereafter renounced as a donation. Hence, the said argument cannot hold water for the benefit of the Appellant.

Further the Appellant has questioned the correctness of the lower courts' judgments stating that those courts failed to consider the decisions in **Mudiyanse v Banda 16 NLR 53; Sujitha Kumarihamy v Dingiri Amma 72 NLR 409; Sumanasiri v Thilakarathne Banda 74 NLR 155; and P.B.Rathnayake v M.B.S.J. Bandara 1990 1 SLR 156.**

In **Mudiyanse V Banda** it was held that '*under Kandyan law a deed which purports to constitute a donation and which is presumably intended by the donor to operate as a donation, and is accepted by the donee as such whatever the motive for deed may is as general rule, revocable.'*

The above does not apply to the case at hand as the impugned deed is not a deed of gift as elaborated above and the intention of the vendor as at the time of executing the deed was to sell the land for the consideration mentioned therein though she appears to have renounced the consideration as a donation after admitting the payment of consideration.

In **Sujitha Kumarihamy V Dingiri Amma** the issue to be decided was quite deferent from the issue at hand in the present case. There the issue was whether certain properties which were the subject matter of a deed fall within the ambit of 'Paraveni Property' or 'Acquired Property' which had to be interpreted in relation to the mode of acquisition of ownership but here it is a simple question of interpreting the deed itself and the nature of the transaction contained therein. Thus, this can be distinguished from the said case.

In **Sumanasiri V Thilakarathne Banda**, the issue revolved around whether the impugned deed in that case was a revocable deed of gift or not. There the deed, on the face of it, was a gift. The Respondent in that case tried to argue that the said deed was not a gift within the meaning of section 2(a) of the Kandyan Law Declaration and Amendment Act owing to the condition which required the donee to perform and render to the donor all needful assistance during the period of her natural life and after her death to bury her remains decently according to the customs of the Buddhist religion. The counsel for the Respondent in that case appears to have argued that as the donee had to perform certain services and, if a money value could be placed on such service it was not a gift. But the court held otherwise. The court found that the consideration was natural love and affection towards the donee and the deed described the transaction as a gift. Furthermore, the court said that inclusion of a clause containing the words that a gift is subject to the donee rendering all necessary succor and assistance to the donor or words to that effect was not uncommon in deeds of gifts in the Kandyan Province. Thus, there the attempt to interpret a deed of gift as a 'transfer on a consideration' in view of a clause contained in the main part of the deed was refused. If the same wisdom is applied here to the case at hand, owing to the reasons mentioned before, the argument that the deed is a deed of gift owing to the aforesaid statement of the Notary which is not even a condition or term in the main part of the deed must fail. On the other hand, the consideration in the instant case is money paid as per the operative part of the deed.

Though the decision in **P.B. Rathnayake v M.B.S.J. Bandara** was made in relation to deeds of gifts made under Kandyan Law, there is no similarity in the issue discussed there with the present case. There the issue was whether the majority decision of Privy Council in **Dullewa v Dullewa 71 N L R 289**, which held that a Kandyan deed of gift is

revocable unless renunciation of the right of revocation is expressed in the particular manner stated in section 5(1) of the Kandyan Law Declaration and Amendment Ordinance No.59 of 1939, was correct or not. Issue at hand in the present case is whether a deed which is on the face of it is a deed of transfer for valuable consideration could be interpreted as a deed of gift due to a statement made by the Notary Public in his attestation. Thus, the ratio decidendi of that case has no relevance to this case. However, it appears that the Appellant relies on the following comment made by Thambiah J as he then was:

"*The General Rule under Kandyan Law was that all deeds of gift, even transfers by sale were revocable by the grantor in his life time, subject to the right of the grantee to be compensated by the grantor for improvements*."

However, the Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 has no provision for the revocation of deeds of transfers made for consideration paid in money or money's worth. In this regard following passages from "**A Treatise on The Laws and Customs of the Sinhalese, by Frederic Austin Hayley** at page 305 **and Kandyan law and Buddhist Ecclesiastical Law by T.B. Dissanayake and A. B. Colin de Soysa** at 104 are relevant.

"*A proclamation of July 14.1821,which, it may be noted, recognized the existence of the right to re-purchase "in some of the said [Kandyan} Provinces ,"declared that all sales of land should be final and conclusive, and neither seller nor his heirs should have any right to re-purchase, unless an express stipulation to that effect were contained in the deed, in which case the right must be exercised within three years, and during the life of the grantor, and the purchase money be repaid together with compensation for improvements "*.(from aforesaid page 305)

"***Right to repurchase**. In former times the vendor had in some cases a right to repurchase the land which he had even absolutely sold in paraveny. A proprietor who had definitely sold his land, may resume possession at any time during his life time, after paying the amount which he received and the value of any improvements.*

But this right was annulled by proclamation dated 14th July 1821 which enacted that all sales of land made in writing according to the provisions of proclamation dated eighth day of October 1820 in the Kandyan provinces shall be final and conclusive and that neither the seller nor his or her heirs shall have any peculiar right to repurchase the same, unless an express stipulation reserving such privilege shall be inserted in the deed of sale. This was done with the object of giving purchaser an immediate and permanent interest in the property and inducing him to improve it." (form aforesaid page 104, which

refers to Perera's Armour on Kandyan Law pages 109 and 90 and Constitution of the Kandyan Kingdom by Doyly page 60).

In the impugned deed in this case, there is no reservation made by the vendor that enables her to repurchase or revoke it.

For the foregoing reasons this court does not see any reason to hold with the Appellant to say that the impugned deed No. 9116 is a deed of gift or deed of transfer which is revocable under the Kandyan Law and the issues of law has to be answered in favour of the Plaintiff Respondent.

For the reasons elaborated above, this court finds no reason to interfere with the findings of the learned District Judge as well as of the Learned Judge of the Court of Appeal.

Hence the Appeal is dismissed with costs.

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E.A.G.R. AMARASEKARA, J

Judge of the Supreme Court.

I agree.

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Prasanna Jayawardena, P C, J

Judge of the Supreme Court.

I agree.

……..

P. Padman Surasena, J

Judge of the Supreme Court.