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27/1963

IN THE PRIVY COUNCIL

No.17 of 1962

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

(1) ZAINAB BINT ABDULLA GULAB and
(2) MOHAMED ISHACK GULAB Appellants

- and -

(1) KULSUM BINT ABDUL KHALEQ and
(2) HAJRA BINT ABDULLA Respondents

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
19 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.

74108

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CASE FOR THE RESPONDENTS

Record

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1. This is an appeal from an Order, dated the 19th July, 1961, of the Court of Appeal for Eastern Africa (O'Connor, P., Crawshaw and Newbold, JJ.A.), dismissing an appeal from a Decree, dated the 30th November, 1960, of the Supreme Court of Aden (Gillett, Add, J.), dismissing an action in which the Appellants claimed declarations (i) that a Conveyance of a certain house by one Ismail Abdulla Gulab (hereinafter called "the deceased") to the first Respondent was null and void, and (ii) that the said house formed part of the estate of the deceased.

p.79.

2. The following are the statutory provisions upon which reliance has been placed in the proceedings:

Contract Ordinance:

Laws of Aden, 1955, cap.30

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25. (1) The consideration or object of an agreement is lawful, unless -

- it is forbidden by law; or
- is of such a nature that, if permitted, it would defeat the provisions of any law; or involves or implies unlawful injury to the person or property of another; or

is immoral, or opposed to public policy within the principles of the Common Law of England.

Record

In each of these cases, the consideration or object of an agreement is said to be unlawful.

(2) Every agreement of which the object or consideration is unlawful is void.

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27. (1) A promise for which there is no consideration is not enforceable at law, unless -

(a) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless 10

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something, which the promisor was legally compellable to do; or unless

(c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. 20

In any of these cases, such a promise may be enforced in the same manner as a contract supported by consideration.

(2) An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given. 30

(3) Nothing in this section shall affect the validity, as between the donor and donee, of any gift.

Evidence Ordinance: Laws of Aden, 1955, Cap.58 40

100. (1) When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to

the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Provided that -

- 10 (a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;
- 20 (g) oral evidence of the acts and the conduct of parties may be admitted for the purpose of showing the true nature of a transaction.

30 3. The first Appellant was the sister of the deceased, and the second Appellant was his cousin. The second Respondent was the widow of the deceased and the first Respondent was the sister of the second Respondent. All the parties were Moslems, and in matters of succession were subject to Moslem law. According to that law the two Appellants and the second Respondent were the heirs of the deceased, the first Appellant being entitled to half his estate and the second Appellant and second Respondent each to a quarter.

p.10, 11.20-27.

p.22, 11.20-22.

40 4. The Appellants issued their Complaint in the Supreme Court of Aden on the 21st November, 1959. In it they pleaded that the deceased had died at Aden on the 10th August, 1959. He had brought up the first Respondent since childhood, and the first Respondent had lived with the deceased and the second Respondent for about 25 years. The deceased had owned a house at Section E, Street No.3. (This house is hereinafter called "the house"). The first Respondent, the Appellants alleged, about two years before the death of the deceased had obtained a conveyance of the house to her by way of absolute sale for Shs.25,000. The conveyance had been registered. The Appellants went on to allege

pp.1-4.

Record

that the deceased had died at the age of about 72, and had been infirm in mind and body for nearly three years before his death. They contended that the transfer of the house had been sham and bogus, and the Respondents had obtained it during the infirmity of the deceased with the intent of depriving his legal heirs of their rightful shares in his estate. They therefore submitted that the conveyance was void, as being without consideration, and fraudulent. They further submitted (in paragraph 7 of the Plaint) that the deceased had intended to give the house to the first Respondent and the sale had been merely ostensible, with no consideration passing. It had, they alleged, been at much below the normal value of the house. The Appellants pleaded that the second Respondent was joined only as a formal party to the proceedings, as she had been unwilling to join as a Plaintiff. They sought a declaration that the conveyance of the house, dated the 19th August, 1957, was null and void and a declaration that the house was part of the estate of the deceased.

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p.4, 1.27;
p.81.

5. Annexed to the Plaint was the Deed of Sale of the house from the deceased to the first Respondent, dated the 19th August, 1957. This deed had been duly registered in accordance with the Documents Registration Ordinance (Laws of Aden, 1955, cap.49).

pp.5-7.

6. By their Defence, the Respondents admitted that the Appellants and the second Respondent were the heirs of the deceased, and the deceased had owned the house. He had sold the house to the first Respondent by the Deed of Sale of the 19th August, 1957. The deceased had sold the house in order to pay his creditors and also to pay for his medical treatment, and the Appellants had all the time been aware of the sale. The deceased had died at the age of about 64, and had been sound in body and mind when he executed the conveyance. The Respondents denied that he had been infirm in mind and body for three years prior to his death. The Respondents denied the allegation that the first Respondent had obtained the transfer of the house in the infirmity of the deceased, and also denied that the conveyance was void or fraudulent. The first Respondent had paid Shs.25,000 to the deceased for the house, and was the absolute owner of the house. The Respondents also did not admit.

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that the sale had been made in order to defeat the rights of the heirs of the deceased, and denied that the deceased had wanted to give the house to the first Respondent.

7. The Appellants delivered a Rejoinder, the effect of which was to join issue with the Respondents. They alleged in the Rejoinder that the value of the house was approximately Shs.60,000.

pp.7-9.

p.8, 11.15-16.

10 8. The action came on for trial before Gillett, Add, J., on the 11th May and the 13th and 22nd of July, 1960. Evidence was given on both sides in accordance with the respective allegations in the Pleadings. In view of the findings made by Gillett, Add, J., and the learned Judges of the Court of Appeal, it is not necessary to go further into the evidence here.

pp.11-35.

20 9. Gillett, Add, J., reserved his judgment, which he delivered on the 30th November, 1960. Having set out the circumstances of the parties and the issues, he said he was satisfied upon the evidence that the deceased was mentally sound in August, 1957. He found no evidence that the deceased was mentally infirm until four days before his death. The learned Judge was further satisfied that, at the time of the transfer of the house to the first Respondent, the deceased had not been in immediate fear or expectation of death. Gillett, Add, J., went on to consider the evidence called by the Respondents to prove the payment of Shs.25,000 for the house. He concluded that the balance of probabilities was strongly against the first Respondent's having been able to raise Shs.25,000, and said he did not regard the witnesses who had described the actual payment as truthful. His finding on the point was that the first Respondent had given no financial consideration for the transfer. The learned Judge said the deceased had transferred the house to the first Respondent intending her to have it and keep it, but there had been nothing unlawful in that intent. By Moslem law the owner of the property could sell or dispose of it in any way he liked during his lifetime; it was only with regard to dispositions to take effect after his death, or dispositions made in extremis, that his power of disposition was limited by the rights of his heirs. On consideration of all the evidence, the learned Judge held

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pp.41-46.

pp.41-43.

p.43, 11.9-30.

p.43, 1.32 -
p.45, 1.2.

p.45, 11.3-27.

p.45, 11.28-37.

Record

p.45, l.40 -
p.46, l.25.

that the Respondents had not caused the deceased to make the transfer by undue influence. On the facts as he had found them, the position was that the deceased during his lifetime had sought to transfer the house to the first Respondent out of natural affection and gratitude. For reasons which were not clear he had purported to do this by means of a sham sale, but no consideration had in fact passed. The Respondents had continued to live in the house with the deceased until his death. The first Respondent had not pleaded, indeed, had denied, that the transfer was a gift, but the learned Judge found that the property in the house had passed to her although she had not paid money for it. The transfer had been effected by a registered document signed by the donor and attested by two witnesses. The action was accordingly dismissed with costs.

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pp.46-47.

10. The Appellants appealed to the Court of Appeal for Eastern Africa, by a Memorandum of Appeal dated the 22nd March, 1961. By their grounds of appeal they contended that the learned Judge, having found the sale transaction was without consideration, should have held it to be void in point of law, so that no transfer of the house had taken place; they also contended that he ought to have held that it was the intention of the deceased to deprive his lawful heirs of their rightful inheritance.

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pp.70-78.

pp.70-74.

p.74, l.8 -
p.75, l.19.

11. The appeal was heard by O'Connor, P., Crawshaw and Newbold, JJ.A., on the 20th June, 1961. Judgment was reserved, and was delivered on the 19th July, 1961. The learned President first summarized the facts and the pleadings and the judgment of Gillett, Add, J., in the Supreme Court. He then said it had been argued for the Appellants that, by virtue of Section 27 of the Contract Ordinance, a sale without consideration was void and would not pass ownership of property. Counsel for the Appellants had conceded that the deceased could have made a valid gift of the house, but had argued that the Respondents, not having pleaded a gift, could not be heard to allege that the transaction was a gift. He had further argued that, if the transaction was a gift, it had been made by the deceased when in extremis and consequently was invalid. The Learned President said that Section 27 had no application to a completed transfer of

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- property without consideration, where no question of enforcing an agreement arose. Even if that were wrong, he thought that the transaction in the present case might well have fallen within the exception in Section 27(1)(a); it was, however, unnecessary to decide this point, as he thought the transaction was valid as a gift made by a Moslem during his lifetime. O'Connor, P. then said that Counsel for the Appellants had argued that the Respondents could not be heard to say that the transaction had been a gift, as they had not pleaded this and the first Respondent had denied it. The Appellants themselves, however, in paragraph 7 of their Complaint, had pleaded an ostensible sale without consideration, in fact intended to transfer the house by way of gift. This was what the learned Judge had found to have occurred, and upon the Appellants' own pleadings it had been entirely open to him to do so. This transaction, the learned President said, constituted in law a gift of the house by the deceased during his lifetime, which would be valid under Moslem law. He had not been in extremis when he made the gift, and the learned President agreed with the finding of Gillett, Add. J. that he had not then been in immediate fear or expectation of death. Counsel for the Appellants had argued that the transaction was void under Section 25 of the Contract Ordinance, because the intention had been to deprive the heirs of their rights in the estate of the deceased. O'Connor, P. said there was nothing unlawful in a Moslem disposing of his property by a gift made two years before his death when he was not in extremis or in imminent fear or expectation of death. Certainly such a gift was not unlawful merely because it deprived the apparent heirs of their expectations. The learned President agreed with the finding of Gillett, Add. J. that the Respondents had not caused the deceased to make the transfer by undue influence.
14. Crawshaw and Newbold, JJ.A. agreed with the judgment of O'Connor, P., and the appeal was dismissed with costs.
15. The findings of fact made by Gillett, Add. J. upon the evidence included the following:
- i) that the deceased was mentally sound in 1957;

p.75, Ll.20-49.

p.76, ll.1-27.

p.76, l.28 -
p.77, l.8.

p.78.

Record

ii) that the deceased was not in immediate fear or expectation of death when he transferred the house to the first Respondent;

iii) that the Respondents did not cause the deceased to make the transfer by undue influence.

In the Court of Appeal, O'Connor, P, with whom the other learned Judges agreed, expressly concurred in (ii) and (iii) of these findings, and the Respondents respectfully submit that it is implicit in his judgment that he also concurred in (i). There are, therefore, concurrent findings of the Courts below upon these matters of fact. 10

16. Both the Supreme Court and the Court of Appeal held that the deceased gave the house to the first Respondent. The Respondents respectfully submit that this conclusion was open upon the pleadings, since the Appellants themselves expressly contended in the Plaint that the deceased intended to give the house to the first Respondent and there was merely an ostensible sale, with no consideration passing. In view of the findings of fact set out in paragraph 15 above, the gift of the house thus held to have been made by the deceased to the first Respondent was, in the Respondents' respectful submission, perfectly lawful and valid, and is not liable to be set aside either on the ground of an intention to deprive the heirs of the deceased of their rights in his estate or on any other ground. 20 30

17. The Respondents respectfully submit that S.27 of the Contract Ordinance has nothing to do with the case, because the transfer of the house from the deceased to the first Respondent was completed in 1957 and no question arose in these proceedings of enforcing any agreement between them. Alternatively, the Respondents respectfully submit that the agreement between the deceased and the first Respondent was enforceable under the provisions of s.27. 40

18. The Respondents respectfully submit that the Order of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal ought to be dismissed with costs, for the following (amongst other)

R E A S O N S

1. BECAUSE the conclusion that the deceased

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Record

gave the house to the first Respondent was open upon the pleadings:

2. BECAUSE the Court of Appeal and the Supreme Court made concurrent findings of fact:

3. BECAUSE upon the facts thus concurrently found the transfer of the house to the first Respondent was valid in all respects and not liable to be set aside:

10 4. BECAUSE of the other reasons given by the learned Judges of the Supreme Court and the Court of Appeal.

J. G. Le QUESNE.

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ON APPEAL FROM THE COURT
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BETWEEN

(1) ZAINAB BINT ABDULLA GULAB and
(2) MOHAMED ISHACK GULAB

Appellants

- and -

(1) KULSUM BINT ABDUL KHALEQ and
(2) HAJRA BINT ABDULLA

Respondents

CASE FOR THE RESPONDENTS

T.L. WILSON & CO.
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Respondents