*Privy Council Appeal No.* 17 *of* 1962

**Zainab Bint Abdulla Gulab and another** – – – *Appellants*

*v.*

**Kulsum Bint Abdul Khaleq and another** – – – *Respondents*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER, 1963

*Present at the Hearing:*
LORD JENKINS
LORD GUEST
SIR KENNETH GRESSON
[*Delivered by* SIR KENNETH GRESSON]

This was an appeal from the judgment of the Court of Appeal of Eastern Africa dismissing an appeal against a judgment of the Supreme Court of Aden, which had dismissed an action brought by the appellants, who were plaintiffs in that action. The plaintiffs (as they will be called hereinafter) were heirs according to Mohammedan Law, of one, Ismail Abdulla Gulab, who in his life time, owned a house property in Aden. On 19th August, 1957, Gulab executed a document in the form of a Deed of Sale which after reciting that Kulsum Bint Abdul Khaleq, an Indian lady, a Moslem aged 42 years, had agreed to buy the property for 25,000 shillings, witnessed that in consideration of such payment, the receipt of which was acknowledged, Gulab (also a Moslem) as seller transferred the land in terms usual in such conveyances of land, and including the words, " The Seller hereby gives possession of the aforesaid property to the Buyer ". Kulsum, a sister of Gulab's wife, had been brought up from childhood by Gulab and his wife and had lived with them for about 25 years. The deed was duly registered in conformity with statutory provisions. After the execution of the deed, Kulsum continued to live in the house as before. Gulab died on the 10th August, 1959, then about 74 years old.

The plaintiff in the action sought a declaration that the conveyance of the 19th August, 1957, was void and should be delivered up for cancellation; and that the property be declared to be part of Gulab's estate. This was based upon two allegations, the first, that Gulab, at the time of the transfer, was aged 72 years and had been for three years, infirm in mind and body, secondly, that the transfer was " a sham and bogus transfer " which was in the main based upon a submission that possession had not effectively been given by the donor to the donee. It is well settled that for a gift *inter vivos* to be valid under Mohammedan Law, three conditions are necessary:— (*a*) manifestation of the wish to give on the part of the donor, (*b*) acceptance by the donee, either impliedly or expressly, and (*c*) the taking of possession of the subject matter of the gift by the donee, either actually or constructively. (*Mohammad Abdul Ghani and Anor. v. Fakhr Jahan Begam and Others* (1922): 49 I.A. 195, at p. 209.)

It was common ground that the personal law of the parties was the Mohammedan Law. The relevant statute of Aden, provided that nothing therein should be deemed to exclude the rules of Mohammedan Law.

In the Supreme Court of Aden, there were findings of fact that the evidence had not warranted any conclusion, that Ismail had been induced to make the

transfer by undue influence; that no financial consideration had passed between Kulsum and Gulab; and that there was nothing to warrant a finding that the transfer was made with intent to deprive the heirs of Ismail, of their inheritance.

These findings of fact were not challenged before the Board, but it was contended by counsel for the appellant that the transaction was not made as a gift by Ismail Gulab, during his life time, but was obtained during the infirmity of the deceased, with the intent of depriving the legal heirs of the deceased, of their rightful shares in the estate of the deceased. There was, too, a further allegation of some relevance, that the deceased had intended to transfer the property by way of gift to Kulsum, but being advised that such a transfer might be challenged as being without consideration and intended to defeat the rights of the rightful heirs, had made an ostensible sale, wherein no consideration had passed from the buyer to the seller. It was further alleged (and apparently established) that the alleged price was much below the normal value of the property. The defendant pleaded by way of defence, that the first named defendant—Kulsum—was the absolute owner of the property; denied that the transfer was without consideration and denied that the deceased wanted to transfer the property by way of gift. There are many decisions which have recognised that no departure from the property by the donor is necessary, where it has been established that both the donor and donee were residing in the house at the time of the gift, and the registration of a deed has been regarded as showing an unequivocal declaration on the part of the donor to give the property. Such a case was *Humera Bibi v. Najm-un-nissa Bibi* (1905) 28 All. 147, in which the fact that the donor continued to reside in the home of her nephew, was held to be of no effect in the face of the established manifestation of the intention of the donor to transfer the property to the nephew as donee. The donor in that case was a childless widow, who had brought up her brother's son as her own son. In every case, the intention of the donor is to be looked to and each case will depend on its own facts.

Counsel for the appellant contended strongly that there had been no such absolute relinquishment by the donor of the possession of the subject matter of the gift as to constitute a gift under Mohammedan Law. Their Lordships are unable to uphold this contention, for in their opinion it was not necessary in order to perfect the gift that the donor should have vacated the house and removed his goods and chattels, even for a time. Where as in this case, the parties were living together, it is sufficient that an intention on the part of the donor to transfer possession, should have been unequivocally manifested. An appropriate intention where two are present on the same property may put the one out of, as well as the other into, possession, without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer, has been unequivocally manifested. (*Ex parte Fletcher* (1877) 5 Ch.D. 809).

It was also contended for the appellant, that the Deed of Sale could not be treated as a Deed of Gift, because the document recited a consideration—and indeed the defendant had denied that there had been any gift, and alleged that there had been a Sale. But in the case of *Ismail Mussajee Mookerdum v. Hafiz Boo* (1906) 10 C.W.N. 570, notwithstanding that the transaction in issue in that case purported to be a sale and the price was mentioned in the conveyance, it was held by the Board, on the evidence, to be a gift and not a sale, the question being regarded purely as one of intention. Sir Arthur Wilson, in that case said (at page 580) the fact that the sum of Rs.10,000 was mentioned as the price, a sum which according to the evidence, was far short of the actual value of the property, and the fact that it was not paid at all, went to show that the transaction was not a sale, but a gift with an imaginary consideration inserted " in a manner common in such transactions in India ".

Their Lordships are therefore of opinion that the judgement of the Court of Appeal for Eastern Africa, was right and will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the appeal.

88405) Wt. 8052/97 60 10/63 Hw.

**In the Privy Council**

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**ZAINAB BINT ABDULAL GULAB**
**AND ANOTHER**

*v.*

**KULSUM BINT ABDUL KHALEQ**
**AND ANOTHER**

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DELIVERED BY
SIR KENNETH GRESSON

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