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27/1963

IN THE PRIVY COUNCIL

No. 17 of 1962

ON APPEAL  
FROM HER MAJESTY'S COURT OF APPEAL  
FOR EASTERN AFRICA

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

- and -

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

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

74107

CASE FOR THE APPELLANTS

HATCHETT JONES & CO.,  
90, Fenchurch Street,  
LONDON, E.C.3.

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O N      A P P E A L

FROM HER MAJESTY'S COURT OF APPEAL FOR  
EASTERN AFRICA

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B E T W E E N

(1) ZAINAB BINT ABDULLA GULAB

(2) MOHAMED ISHACK GULAB

Plaintiffs/Appellants

- and -

10            (1) KULSUM BINT ABDUL KHALEQ

(2) HAJRA BINT ABDULLA

Defendants/Respondents

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CASE FOR THE APPELLANTS

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RECORD

1.        This is an Appeal from a judgment and order of the East African Court of Appeal (O'Connor P., Crawshaw J.A. and Newbold J.A.) dated the 19th day of July, 1961 dismissing the Appeal of the Appellants from a judgment of the Supreme Court of the Colony of Aden (Gillete J.) dated the 30th day of November 1960. Final leave to appeal to the Privy Council was granted to the Appellants by the said Court of Appeal by order dated the 26th day of March 1962.

pp.70-79

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pp.41-46

p.80

2.        The question raised in this appeal is whether a conveyance for sale of absolute title to land which is registered as such can take effect as a deed of gift in particular when the person described in the conveyance as "the Buyer" denies any gift.

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pp.1-4

3. On the 21st day of November 1959 the Appellants (hereinafter called "the Plaintiffs") issued a plaint in the Supreme Court of the Colony of Aden against the Respondents to this Appeal (hereinafter called "the Defendants"). The said plaint dealt with the position of the parties in paragraphs 1 and 3 thereof which were subsequently admitted by the Defendants, in the following manner :-

p.2 11.6-14

"1. The Plaintiffs and the Defendant No. 2 are the heirs of deceased Ismail Abdulla Gulab, who died at Aden on the 10th day of August, 1959. The 2nd Defendant is the widow of the deceased; the 1st Plaintiff is the sister of the deceased; the 2nd Plaintiff is the cousin of the deceased; and their respective shares in the estate of the deceased are (i) one-fourth to widow, (ii) one-half to sister, and (iii) one-fourth to cousin. 10 20

p.2 11.21-24

3. The 1st Defendant is a sister of the 2nd Defendant, and she is not an heir. She was brought up by the deceased since childhood and lived with her sister and the deceased for last about 25 years."

pp.81-2

4. The said plaint described a certain house which was owned by the deceased and which was conveyed to the 1st Defendant by the deceased some two years before his death. A copy of the deed of sale dated the 19th August 1957 was annexed to the plaint which showed (inter alia) that the purchase price was 25,000/- and that the transfer had been registered at Aden on the same day. 30

p.2 11.42-5

5. The Plaintiffs alleged that at the time of execution of the said deed of sale the deceased was infirm in mind and body. They alleged that the transfer was a sham and bogus and was made "with intent to deprive the legal heirs of the deceased of their rightful shares in the estate of the deceased." 40

p.3 11.1-6

6. Consequent upon the matters set out above the Plaintiffs made two submissions in the said plaint in the following terms :-

"6. The Plaintiffs submit, that the said conveyance is void in law, as being without consideration, and/or further plead it

was fraudulent with intent and object to deprive the heirs of deceased of their legal shares, and is therefore void at law.

10 7. The Plaintiffs further submit that the deceased intended to transfer the suit-property by way of gift to said Kulsum, but on being advised that such a transfer might be challenged as being without consideration, and intended to defeat the rights of the lawful heirs, had made an ostensible sale, wherein no consideration passed from the Buyer to the Seller. The alleged sale was much below the normal value of the suit-property."

p.3 11.7-15

7. The 2nd Defendant was joined as a formal party and the Plaintiffs claimed no relief against her. As against the 1st Defendant the Plaintiffs claimed as follows :-

- 20 "i) The conveyance of the suit-property aforesaid dated 19th August, 1957 from deceased Ismail Abdulla Gulab be declared null and void and the 1st Defendant be required to deliver it up for cancellation.
- ii) The suit-property be declared to be part of the estate of deceased Ismail Abdulla Gulab.
- iii) Costs of this action.
- 30 iv) Such other relief as the Court considers just and proper."

p.4 11.3-12

40 8. The Defendants delivered a written statement to the Plaintiffs which was undated in which they admitted the sale referred to in the plaint and stated that the deed of sale was duly executed and registered in accordance with law. The original Deed of Conveyance was attached to the written statement. The Defendants alleged that the Plaintiffs knew about the sale during the lifetime of the deceased, who was sound in body and mind at the material time.

pp.5-7

9. In answer to the allegation of the Plaintiffs that the deed of sale was a sham and bogus the Defendants stated as follows :-

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p.6 11.12-  
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"6. It is denied that the said Deed of Conveyance is void in law. The Defendant No. 1 paid a sum of Shs.25,000/- to the deceased being the actual cost of the property and it is denied that the said transfer was without consideration. The deceased has some debts on account of purchasing Taxi and medical treatment in India. The deceased has to go to India twice and sold the said property in need. It is also denied that the said transfer was fraudulent in any way. The Defendant No. 1 submits that the said transfer is in accordance with law and the Defendant No. 1 is the absolute owner of the suit property.

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p.6 11.25-  
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7. It is denied that the deceased wanted to transfer the suit property by way of gift to the Defendant No. 1. The Plaintiffs allegation is totally untrue and it is not admitted that in order to defeat the rights of the lawful heirs the sale was made. The Defendants state the said transfer is genuine."

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10. The Defendants also denied all other allegations contained in the plaint and contended that the Plaintiffs had no cause of action against either Defendant and were not entitled to the relief claimed.

pp.7-9

11. In January 1960 the Plaintiffs delivered a Rejoinder in which (inter alia) they joined issue with the Defendants. They put both Defendants to strict proof that at the time of the execution of the deed of sale the deceased was in debt and sold the property under necessity. Particulars of the debts were asked for. In addition, the 1st Defendant was put to strict proof of having paid the purchase price. With regard to the registration of the deed of sale the Plaintiffs alleged that this took place at the house of the deceased as he was unable physically to attend at the office of the Registrar. Further it appeared from the original Deed produced by the Defendants that the deceased had made a thumb impression thereon. This the Plaintiffs attributed to his infirmity and they alleged that the deceased could read and write Arabic and Urdu.

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12. The hearing of the action commenced in the Supreme Court of the Colony of Aden on the 11th day

of May 1960 when the following issues were agreed between the parties :-

- "1) Was the conveyance made without consideration?
- 2) Was the conveyance made with intent to deprive the heirs of the deceased of their inheritance?
- 3) Did the two Defendants prevail upon the deceased and obtain execution of the conveyance by undue influence?
- 4) To what relief if any is Plaintiff entitled?"

p.11 11.8-14

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13. The 1st Plaintiff (referred to as Zainab) gave evidence that she was a sister of Ismail Abdulla Gulab (referred to as Ismail) who died without issue some 10 months previously aged about 70. Zainab knew the 1st Defendant (referred to as Kulsum) since childhood. She was not related to the deceased, but had been brought up by him. Kulsum did not have the money to buy any house and her brothers were not well to do. Zainab only knew of the transfer of the Ismail house to Kulsum after his death as a result of talk in the community to which the family belonged. She made enquiries from the Register of Documents and obtained a certified copy of the transfer. She contended that the deed was only prepared to defraud her and the other heirs of her brother by depriving them of their inheritance. Ismail was bedridden for about three years. The 2nd Plaintiff gave evidence that he was a cousin of Ismail with whom he was not on good terms and had last seen him about three years before his death. He knew about the sale some two or three days before the death of Ismail.

pp. 11-12

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p.13 11.1-15

14. Evidence was given on behalf of the Plaintiffs by Ali Abdi Murshed, sub-registrar of documents, Colony of Aden who stated that on 19th August 1957 he registered a sale deed between Ismail and Kulsum. He called that day at the property. Execution of the deed had already taken place. The execution was admitted in his presence. As well as the witnesses to the deed and one Ali Abdurahman, he thought there were two ladies present.

pp.13-14

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RECORD

Ismail was also there sitting in a chair. He was not asked to read and appeared in good health. No medical certificate was produced. In cross-examination this witness stated as follows :-

p.14 11.12-  
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"I did not ask Ismail before registering the document whether he admitted receiving consideration. I do sometimes do this and endorse the documents accordingly. The regulations do not require me to do this unless requested by the parties." 10

pp.14-17

15. Evidence was also given on behalf of the Plaintiffs by Ahmed Abdul Rehman the husband of the 1st Plaintiff to whom he had been married for more than 30 years. He knew Ismail who had been ill and in bed for about 3 years. He had heart disease and was blind for a year or two before his death. This witness had not seen him for a year before his death. The witness only knew about the transfer to Kulsum after the death of Ismail and he applied to the Registrar of Documents in his wife's name for a copy of the deed of sale. He knew Kulsum was dependant on Ismail and had no money. He also knew Kulsum's six brothers. They were all married and earned between 300/- to 400/- per month. None of them owned a house. He was convinced the conveyance was bogus. He thought Ismail was well to do and not in debt. 20 30

pp.17-18

16. Further evidence on behalf of the Plaintiffs was given by Suleman Ahmed the Senior Member of the Chief of the Jamad in Aden of which Ismail was a member. After confirming that Ismail was sick for 3-4 years before his death he stated that he did not know if he was bedridden and continued :-

p.17 1.27  
p.18 1.6

"About 3 years ago when he was sick he told me that he wanted to settle about the house. He wanted me to bring the Registrar so that the matter might be disposed. He said that he wished to transfer the house into the name of the girl who was with him, so that during his lifetime the building might be transferred. This was so that after his death there might be no dispute or 40

quarrel. I asked why he was in a hurry about this and deceased replied that I have other relatives, and I do not wish there to be a quarrel after my death.

He said he had a cousin and a sister. The cousin was Plaintiff 2. I said that if there were relatives, they had their rights. I said I was busy and could not do the work and I avoided it.

10 Deceased said that the girl had looked after him and he wanted to transfer the house in her name. He did not say he wished to sell the house.

I did not have further conversations with him."

17. After the conclusion of the Plaintiffs' case on 11th May 1960 the hearing was adjourned until the 13th July 1960 when evidence was given on behalf of the Defendants by Chief Inspector Anwar Khan who stated that he had dealings with Ismail in March 1959 in connection with the transfer of a taxi licence in his wife's name. His mental faculties were normal and had been so since 1955. He was an old man who came to the police station in a taxi. He was unable to get upstairs. p.20

18. The 1st Defendant gave evidence that she was about 45 years old and had been living with Ismail and his wife Hajra since she was aged 2. She was the daughter of Hajra who gave her clothes and money and kept her savings. She bought the property some six months before the deed was executed. Ismail said he was in debt. She described how she had raised the purchase price of 25,000/- which was given to Ismail the day before the sub-registrar came to the house. The sub-registrar asked if the purchase price had been paid and took thumb impressions of Ismail and the witness as the sale was to be registered. Ismail was all right mentally. He had no income and high medical expenses, including three visits to Bombay. In cross-examination the 1st Defendant stated that to her knowledge Ismail never considered giving her the house or bequeathing it to her. She did not ask him about his debts and did not know where the pp.20-25



RECORD

purchase price went. In re-examination she admitted she was illiterate.

pp.25-27

19. Evidence was given on behalf of the Defendants by Hasson Abdul Khaleq a brother of Kulsum who stated that on the 18th day of August 1957 he paid 3,000/- to Kulsum which was contributed by himself and all her other brothers. Later that day he was present with others when the sum of 25,000/- was handed over to Ismail. No document was executed that day. The witness was also present the following day when the Registrar came to Ismail's house. In cross-examination this witness stated that Ismail was blind and that the sum of 25,000/- was tied up in a handkerchief. Further evidence was given by Chief Inspector Ibrahim Ramedham who stated (inter alia) that on 10th March 1957 Ismail was in a normal physical and mental condition.

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p.28

Abdulla Salim Sheer Ali deposed that he counted and handed the sum of 25,000/- to Ismail. No receipt was taken. He did not ask why payment was to be made before execution. On the same occasion he gave 6,000/- to the second Defendant who put it under the pillow on her bed.

pp.28-31

20. The last witness for the Defendants was Doctor Mohamed Ahmed who produced a medical certificate dated 19th day of August 1959 in the following terms :-

pp.34-35

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"It is to certify that Ismail Abdulla Gulab aged 62 years has been examined by me today. He is both physically and mentally quite fit. He has sold his house Grant No. 2168 to Kulsum Bint Abdul Khaliq and I am aware of transaction."

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The Doctor also said in evidence that he had been attending the deceased for about 10 years. He was blind in one eye and could see 40 with the other with glasses.

pp.41-46

21. The learned trial judge gave his judgment upon the 30th day of November 1960. After pointing out that the Defendants had not pleaded that the transfer was by way of gift and must therefore abide by their elected defence that there was a bona fide sale for

25,000/-, the following findings of fact were made :

- (1) Ismail was mentally sound in August 1957.
- (2) He was not in immediate fear of expectation of death.
- (3) The market value of the house is about 50,000/-.
- (4) The Plaintiffs' witness Suleman Ahmed was telling the truth.
- (5) The 1st Defendant and the witnesses Hasson Abdul Khaleq and Abdulla Salim were not truthful as regards payment.

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Therefore on the first issue the learned trial judge found that no financial consideration was given by the first Defendant for the transfer of the property.

pp.44 1.45  
p.45 1.2

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22. On the second issue the learned trial judge found that there was nothing unlawful in any intent Ismail had to deprive the heirs of their inheritance and on the third issue the finding was that the Defendants did not cause Ismail to make the transfer by undue influence.

p.45 11.3-27

p.44 11.28-37

23. The learned trial judge concluded his judgment as follows :-

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"On the facts as I have found them the position is briefly that Ismail during his lifetime sought to transfer the suit property to Kulsum out of natural affection and gratitude. For reasons which are not clear he purported to do this by means of a sham sale for Shs.25,000/-. No consideration in fact passed from Kulsum for this sale. Ismail and Kulsom continued to reside in the suit property with Hajra (Defendant 2) until Ismail's death. Kulsum has not pleaded that the transfer was a gift and under cross-examination she has expressly denied on oath that it was a gift.

p.45 1.40  
p.46 1.13

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RECORD

I find that property in the house has passed to Kulsum even though she has not paid money for it. The transfer was effected by a registered document signed by the donor and attested by two witnesses.

For these reasons this suit is dismissed with costs to Defendant."

24. The Plaintiffs respectfully submit that the learned trial judge fell into error in holding that the property had passed in that he was not entitled to find that there was any acceptance of any gift. Further the registration at all times purported to be and was held out to be that of a deed of sale and therefore there was no signature by any party in the capacity of a donor. Section 119(1) of the Transfer of Property Ordinance (Cap. 154 of the Laws of Aden) states as follows :-

"119.(1) "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

pp.46-47

25. On 22nd day of March 1961 the Plaintiffs filed a Notice and Grounds of Appeal which included the following grounds relevant to this Appeal :-

p.46 1.34  
p.47. 1.4

"1. The Learned Judge erred in Law, in not decreeing the Plaintiff's claim, on his finding that the sale transaction in issue was without consideration and therefore it was sham and void in point of law.

p.47 11.5-8

2. The Learned Judge erred in Law in holding that the property had passed to the Respondents, because under a sham and/or void contract no transfer of interest or property takes place."

pp.70-77

26. The Appeal was heard on the 20th day of June 1961 and judgment was delivered on the 19th day of July 1961. The principal judgment was delivered by O'Connor P. who after referring to the facts and the findings and decision of the learned trial judge,

considered the effect of Section 27 of the Contract Ordinance (Cap.30 of the Laws of Aden) which in so far as is relevant states as follows :-

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

10 (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;"

The learned President considered that it was unnecessary for him to decide whether the transaction in question fell within this exception since he thought that :-

20 "The transaction was valid as a gift by a Mohamedan made during his life-time."

p.75 11.17-19

No reason was given for this conclusion, but during argument reference had been made to the Transfer of Property Ordinance (Cap.154 of the Laws of Aden) section 126 of which states :-

30 "Nothing in this Part relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohamedan law."

The Plaintiffs submit that the learned President fell into error in applying this section of the Ordinance so as to give effect to the transaction as a gift (which was denied not only in the written statement of Defence but also by the 1st Defendant when giving evidence) and thereby exempt Mohamedans from the provisions of section 120(1) of the Transfer of Property Ordinance which states :-

40 "120.(1) For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

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The Plaintiffs contend that the said section relates to rules of substantive Mohamedan law concerning such matters as capacity, circumstances and extent to which a Mohamedan may dispose of property by way of gift and therefore that the words "or shall be deemed to affect any rule of Mohamedan law" must be construed ejusdem generis with the words "made in contemplation of death." The Plaintiffs respectfully submit that the said section cannot properly be construed so as to exempt a Mohamedan from the provisions of the Ordinance which relate to the registration of property upon sale or gift.

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27. Upon the argument that the Defendants could not be heard to say that the transaction was a gift as this had not been pleaded and also the 1st Defendant had denied it in the witness box, the learned President found as follows :-

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p.75 1.30-  
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"But the Plaintiffs themselves, in para. 7 of the plaint quoted, pleaded an ostensible sale without consideration which was in fact intended to transfer the suit property by way of gift. That was what the learned judge found to have occurred and it was entirely open to him to do so upon the Plaintiff's own pleading. The legal effect of that finding is a matter which it is open to us to determine. It is not correct, as Mr. Sanghani suggested, that a deed of sale cannot be treated as a deed of gift because the document recites a consideration which was not in fact given, and Section 100 of the Evidence Ordinance (Cap.58 of the Laws of Aden) corresponding to Section 92 of the Indian Evidence Act does not prevent evidence being adduced to show that no money was in fact paid: Serajuddin Haldar v. Isab Haldar (1921) 49 Cal. 161, 165; and proviso (a) to Section 100(I) of the Evidence Ordinance."

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The Plaintiffs respectfully submit that the said paragraph 7 (which is fully set out in paragraph 6 above) is not capable of the interpretation put upon it by the learned President in that it was not pleaded that the transaction "intended to transfer the suit

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property by way of gift." The Plaintiffs made the said plea in amplification that the deed of sale was bogus and a sham and specifically referred in the last sentence of the said paragraph 7 to "the alleged sale".

Section 100(1) of the Evidence Ordinance (Cap. 58 of the Laws of Aden) states as follows :-

10 "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:

20 Provided that -

(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;"

30 Section 99 deals with the mode of proof of a written document by production of the original except in these cases where secondary evidence is admissible.

40 The Plaintiffs respectfully submit that Proviso (a) to Section 100 is not capable of the interpretation put upon it by the learned President in particular since it gives "want or failure of consideration" as examples which would invalidate a document. The Plaintiffs will seek to distinguish the case of Serajuddin Halidar v. Isab Halidar 49 Cal. 161, on the ground (inter alia) that this case was concerned with whether an exchange of gifts could take effect as a simple gift. The issue was not decided as the case was sent back to the lower Court for evidence to be received regarding the intention of the donor.

RECORD

28. The learned President apart from striking out a formal cross-appeal concluded his judgment as follows :-

p.76 1.32-  
p.77 1.8

"I see nothing unlawful in the Mahomedan Owner of Property disposing of that property by a gift made two years before his death and when he was not in extremis or in fear or expectation of imminent death, provided that there is a bona-fide intention to make a gift, an acceptance express or implied and a sufficient delivery of possession. I think that all these circumstances obtained here and that the transaction was not unlawful merely by reason of the fact that it purported to be effected by a sham deed of sale stated to be for a consideration which the donor well knew would not be paid and which was not paid. It would certainly not be unlawful merely because the disposition deprived the apparent heirs of their expectations. I agree also with the learned judge's finding that the Respondents did not cause Ismail to make the transfer by undue influence. I would dismiss the appeal with costs." 10 20

The Plaintiffs respectfully submit that there was no evidence to show any "bona fide intention to make a gift" nor was there any acceptance of any gift whether express or implied. The Plaintiffs will contend that such findings of the learned President are imcompatible with the subsequent reference to "a sham deed of sale". The Plaintiffs will also contend that there never was in law a "donor". 30

29. Formal concurring judgments were delivered by Crawshaw J.A. and Newbold J.A.

30. The Appellants humbly submit that the dismissal of the appeal by the East African Court of Appeal dated the 19th day of July 1961 be set aside, that the Judgment and Order of the Supreme Court of the Colony of Aden dated the 30th day of November 1960 be reversed for the following amongst other 40

R E A S O N S

1. The learned trial judge erred in law in finding that the property in the house passed to Kulsum when he also found that she had paid no money for it.
2. The learned trial judge erred in finding that Ismail had signed a registered document in the capacity of donor.
- 10 3. The Appellate Court erred in law in finding that the transaction was valid as a gift by a Mohamedan made during his life-time.
4. The Appellate Court placed a wrong construction upon paragraph 7 of the Plaint in the action.
5. The Appellate Court placed a wrong construction upon Section 100 of the Evidence Ordinance.
- 20 6. The Appellate Court erred in their findings that there was evidence of a "bona fide intention to make a gift" followed by an acceptance of such gift.
7. The issue whether the transaction could take effect as a gift was not put before the Court by the Defendants either in evidence or upon their pleadings and therefore it was never open to the Plaintiffs to answer any such allegation.
- 30 8. The Judgments of the Supreme Court and the East African Court of Appeal were wrong in law and the Appellants are entitled to the relief against the first Respondent as claimed in the prayer of the Plaint filed in the action.

JOHN A. BAKER



IN THE PRIVY COUNCIL

No. 17 of 1962

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FROM HER MAJESTY'S COURT OF APPEAL  
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- (2) MOHAMED ISHACK GULAB

- and -

- (1) KULSUM BINT ABDUL KHALEQ
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CASE FOR THE APPELLANTS

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