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**(1969) 12 MAD CK 0020**

**In the Madras High Court**

**Case No :** Letter Patent Appeal No. 46 of 1965

Abdul Kareem and Another

APPELLANT

Vs

Zuleika Bi and Others

RESPONDENT

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**Date of Decision :** 18-12-1969

**Acts Referred:**

Contract Act, 1872 — Section 11

Transfer of Property Act, 1882 — Section 127, 6, 7

**Citation :** AIR 1971 Mad 184 : (1971) ILR (Mad) 558 : (1971) 84 LW 124

**Hon'ble Judges :** Sadasivam, J;K.N. Mudaliyar, J

**Bench :** Division Bench

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## Judgement

Sadasivam, J.—Appellants are the brother's sons and heirs of one Kadir Mohideen, who died on 16-6-1948. They filed the suit to recover

possession of two shops, bearing door Nos. 33 and 34, Main Road in Shalavalli village, as belonging to the estate to Kadir Mohideen. The first

defendant Zuleika Bi is the daughter's daughter of Kadir Mohideen's sister-in-law and she claimed title to the suit shops under a gift deed, Ex. A-

14, dated 27-5-1945 executed by Kadir Mohideen, and also on the basis of adverse possession. There can be no doubt in this case that Kadir

Mohideen executed the gift deed and intended to give the shops to the first defendant, Zulaika Bi. But the trial Court found that the gift was invalid,

as it was not accepted by or on behalf of the donee Zulaika Bi, and the donor Kadir Mohideen did not deliver possession of the suit shops and the

lower appellate court concurred with this finding. The trial court also negated the plea of adverse possession put forward by the first defendant

Zulaika Bi, but the lower appellate court differed from that finding and dismissed the suit, Ramakrishnan, J., who heard the second appeal, has

stated that one of the crucial questions for consideration in this case is whether Hidayatullah, the father of the first defendant, Zulaika Bi, had given his consent to the terms of the gift deed. He has observed that "neither of the lower courts has approached the case from this point of view to find out whether the circumstances relating to the participation of Hidayathullah in the execution of the gift deed would amount to an implied acceptance of the gift on the part of Hidayathullah. "Relying on the powers conferred u/s 103, Civil Procedure Code, the learned Judge considered the evidence in this case and found that in the arrangement made in the gift deed by Kadir Mohideen, he had the full concurrence of Hidayathullah, the natural guardian of the then minor Zulaika Bi, and that this was sufficient to support a finding that there was implied acceptance of the gift by the natural guardian of the minor on her behalf. He found that there were sufficient circumstances to constitute a valid delivery of possession of the suit shops in pursuance of the gift deed and upheld the gift. He also accepted the finding of the lower appellate court that the suit is barred by limitation.

2. Ex. A-14 is the gift deed executed by Kadir Mohideen in favour of the first defendant, Zuleika Bi, who was then 9 years old. It is clear from the recitals in the document that Kadir Mohideen brought up his wife's sister's daughter Fathima Bi, the mother of the first defendant. Even at the time of the marriage of Fathima Bi, to Hidayathullah, Kadir Mohideen had promised to help her to the extent of his means and it was in pursuance of the same, he has purported to execute the gift deed, Ex. A-14. Both the trial court and the appellate court have found the gift to be true and that Kadir Mohideen intended to give the suit shops to the first defendant. Kadir Mohideen was divided from his only brother Abdul Kadir Rowther, the father of the plaintiff-appellants, and there is no dispute that he is the owner of the properties covered by the gift deed. Ramakrishnan, J., has rightly pointed out that there was a certain amount of hard swearing by witnesses on both sides and that a part of their evidence suffered from inconsistencies. Thus the second plaintiff Mohamed Ali (P.W. 1) went to the extent of stating in his chief examination that his father was not divided from the deceased Kadir Mohideen. But he had to admit the fact when he was confronted in cross-examination with the partition deed Ex. A-2 dated 21-10-1927.

3. The appellants put forward a fantastic and unacceptable case that after registering the gift deed, Kadir Mohideen gave it to his sister. The

contrary version of the first defendant that the gift deed was handed over to her father Hidayathullah (D.W. 2) and that he kept it in the box of

Kadir Mohideen did not also favourably impress the trial court, or the appellate court. It is clear from the scored out portion of Ex. A-14 that

Kadir Mohideen originally intended to execute the gift deed in favour of the first defendant Zulaika Bi, represented by her father and guardian

Hidayatullah. But he has subsequently scored out the aid recitals and constituted himself as the guardian of Zulaika Bi. It is true that the evidence

does not make it clear why he did so and it is not possible to speculate about it. It may be that as Fathima Bi was dead and Hidayathullah had

married another wife and was living separately, Kadir Mohideen changed his mind at the time of the execution of the gift deed. Having regard to

the terms of the gift deed there is nothing unnatural in Kadir Mohideen keeping the gift deed in his custody, D.W. 2, Hidayathullah attempted to

prove that he was collecting rents from the suit shops even during the lifetime of Kadir Mohideen. But this was also not accepted by the trial Court,

or the appellate court, having regard to the entries in the account book kept by Kadir Mohideen. The collection of rent by Kadir Mohideen is

consistent also with the recitals in Ex. A.14 that Kadir Mohideen had constituted himself as the guardian of the first defendant Zuleika Bi and

delivered possession to the first defendant Zuleika Bi represented by himself as guardian. Both the trial Court and the appellate Court found that it

was only Kadir Mohideen who collected rents from the two tenants of the two suits shops so long as he was alive and not D.W. 2 Hidayatullah.

But the trial Court and the appellate Court have erred in throwing the burden on the first defendant to prove that the income from the shops was

spent by Kadir Mohideen for her maintenance. Thus the Appellate Court has observed in paragraph 19 of its judgment that there is no evidence at

all to show that the income was spent for the maintenance of the minor and that on the other hand, the case of the defendants ""is that she was

throughout being maintained by Kadir Mohideen"". The suit is for declaration of the plaintiffs' title to the suit properties and for recovery of

possession of the same from the defendants with future mesne profits. It is clear from the evidence in this case that within a few days after the death

of Kadir Mohideen, D.W. 2 Hidayatullah took possession of the suit shops as the guardian of the first defendant, who was then a minor. The first

defendant is now in possession of the suit shops by virtue of the gift in her favour. The donor Kadir Mohideen has described himself in the gift deed

as the grandfather and guardian of the first defendant and he has stated that possession of the suit shops has been delivered to the donee. Hence it

is not reasonable to presume that Kadir Mohideen who was in a fiduciary capacity as de facto guardian of the first defendant, Zulaika Bi,

committed breach of trust by utilising the income from the shops for his own purposes. It is more reasonable to presume that he spent the income

from the shops for the maintenance of the first defendant Zuleika Bi. It is true the registry of the shops in the Municipal records continued in the

name of Kadir Mohideen. It is true as found by Ramakrishnan, J., and the lower Courts that a clumsy attempt was made by the defendants to

tamper with the Municipal registry for these shops and to make out that even in 1947, before Kadir Mohideen's death the registry was changed to

the minor's name. There can be no doubt that the registry has been changed only on 10th July, 1948, that is within a month after Kadir

Mohideen's death. It is on account of the above circumstances and the Privy Council decision in *Musa Miya v. Kadar Bux*, 55 Ind App 171 =

AIR 1928 PC 108 that the trial Court as well as the Appellate Court found that the gift deed Ex. A-14 though true, was not valid.

4. Ramakrishnan, J., as rightly pointed out that the lower Courts have failed to find out whether the circumstances relating to the participation of

Hidayatullah in the execution of the gift deed would amount to an implied acceptance of the gift deed on his part. Hidayatullah was on good terms

with Kadir Mohideen. There is nothing in the evidence to show that they fell out all any time. On 26-5-1945 the stamp papers have been

purchased in the name of Hidayatullah. On 27-5-1945 the gift deed has been drafted in favour of the first defendant Zuleika Bi, then a minor

represented by her father Hidayatullah as guardian. But before the execution of the document, Kadir Mohideen for some reason or other,

substituted himself as the guardian of the then minor Zuleika Bi. Though D.W. 2 Hidayatullah has made attempts to strongly support the gift in

favour of his daughter Zulaika Bi by falsely stating that the gift deed was handed over to him, that he collected rents for the shops and that even

during the lifetime of Kadir Mohideen the registry of the shops was changed in the name of Zuleika Bi, there can be no doubt that he was present

at the time of the gift of the suit shops and other properties was made by Kadir Mohideen to his knowledge and with his consent. We have,

therefore, no hesitation in accepting the conclusion of Ramakrishnan J, that in the arrangement made in the gift deed by Kadir Mohideen, he had

the full concurrence of Hidayathullah, the natural guardian of the minor. In fact, no attempt was made by the learned advocate for the appellants to

challenge this finding.

5. Sri R. Gopalaswami Iyengar for the appellants urged that such a gift as the one evidenced by Ex. A-14 is invalid under Mohamedan Law, and

that the suit is in time as it has been filed within 12 years after the death of Kadir Mohideen though more than 12 years after the date of the gift.

The three essentials of a gift (hiba) are mentioned in Mullah's Principles of Mohamedan Law, 16th Edn, in Section 149 at page 141 in the

following terms:-

It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) acceptance of the gift, express or implied, by or

on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these

conditions are complied with, the gift is complete.

It is clear from Section 150 at page 142 of the same book that it is essential to the validity of a gift that there should be a delivery of such

possession as the `subject of the gift is susceptible of; but there are several exceptions to this rule. It is stated in Section 156 at page 149 of the

book that a gift to a minor by a person other than his father or guardian may be completed by delivery of possession to the father or guardian and

that a gift will also be complete when a minor, who has attained discretion, himself takes possession. According to this principle, when the donee is

a minor, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor then his grandfather, then his

executors, as they are the only legal guardians of property of Mohamedan minor. It is, however, clear from the commentary to Section 156 of

Mullah's Principles of Muhammadan Law 16th Edn, that there are instances of cases where the strict rule requiring the giving of possession to one

of the stated guardians of the minor was not regarded as a condition of the validity of the gift. The same principles are found in Sections 413 and

417 of Tyabji's Muslim Law, 4th Edn. It is clear from Section 417 at page 389 of the said book that neither express acceptance nor transfer of

possession is necessary for the completion of the gift, where all the conditions and requirements mentioned in that section are complied with, viz.,

where (1) the donee is a minor or person of unsound mind; (2) the donor is (a) the donee's father, or (b) the donee's father being absent, the donor

is the donee's grandfather, or any other person entitled (in the father's absence) to be the guardian of the donee's property, or (c) the father and

grandfather being absent, and no guardian having been appointed the donor is the mother or other person who is maintaining the donee; (3) the

subject of gift is in the possession of the donor, or of some person holding it on the donor's behalf; and (4) there is a real and bona fide intention

on the donor's part to transfer without consideration the ownership of the subject of gift to the donee; a change in the mode of enjoyment or a

declaration of the donor that he retains possession on behalf of and as guardian of the minor, may be evidence of such intention; the absence of a

change in the mode of enjoyment is evidence of a want of such intention. The trend of the recent decisions is to liberally construe a gift so as to

carry out the intention of the donor and as far as possible, to avoid invalidating a gift either by putting a narrow construction on the terms of the gift

deed or by invoking doubtful principles of Mohammadan law.

6. It is clear from 55 Ind App 171 = AIR 1928 PC 108, that the general rule of Mohamedan Law that a gift is invalid in the absence of delivery of

possession is subject to an exception in the case of a gift to a minor by his father or other guardian. But it has been held in that decision that this

exception should be strictly construed and that it does not extend to a gift by a grandfather to his minor grandsons if their father is alive and has not

been deprived of his rights and powers as guardian, even though the minors have always lived with the grandfather and have been brought up and

maintained by him. This decision has been followed in several decisions and it is sufficient to refer to the decisions in *Mt Saidunnissa v. Inam Ilahi*,

AIR 1932 Lah 316; *Suna Meah v. A. S. Pillai*, ILR 11 Rang 109 = AIR 1933 Rang 155, and *Abdul Raheman Mahammud and Others Vs.*

Mishrimal Shrimal Picha, , by way of illustration. It is on the strength of these decisions it has been vehemently argued that the rule of Mohamedan

Law that a gift is invalid in the absence of delivery of possession of the property to the legal guardian applies to this case because D.W. 2

Hidayathullah, the father of the then minor Zuleika Bi, was in a position to exercise his rights and powers as father and guardian and to take

possession of the suit shops on her behalf but did not do so. Sri M. S. Venkatarama Iyer contended that the relevant texts of Mohammadan Law

were not considered in the above Privy council decision as the respondents in that case did not appear to contest the appeal and that though the

appeal was ultimately dismissed, the principles stated therein were not actually necessary for the decision of the facts of that case. There is some

force in this criticism. The Privy council decision related to an oral gift by a maternal grandfather to his grandsons who were minors, but whose

parents lived with him. There was no mutation of names and no deed was executed, and the maternal grandfather continued to be in possession of

the property. There was no evidence to show that the donor in anyway regarded himself as trustee for his grandsons, or that he was in possession

of the property on their behalf. It appears from the decisions that the donor decided to make a pilgrimage to Mecca and on the eve of his

departure he invited several persons to dinner and that after the dinner, he announced to the persons then assembled that as he was going to

Mecca, he had made a gift of his properties to his two grandsons, and made them owners thereof. It is necessary to consider the criticism of Sri

M. S. Venkatarama Iyer that the texts on Mohamedan Law and earlier decisions have not been fully considered in the Privy Council decisions,

though the actual decisions may be correct on the facts of that case.

7. In Wilson's Anglo-Muhammadan Law", 5th Edn. at page 323, it is stated in Section 303 as follows:--

No transfer is necessary in the case of a gift by a father to his infant son, the declaration of gift being considered to change the possession by the

father on his own account into possession as guardian on his son's account. And the law is the same in every other case where the donee is a

minor in lawful custody of the donor.

In Nawab Jan v. Safiur Rahman AIR 1918 Cal 786 a gift was made by a

Mohammedan father in favour of his two sons, one of whom was an adult and the other a minor represented by the adult. The gift was made by a formal document duly executed and registered in which it was stated that the adult son Safiur Rahman was the guardian of the minor Abdul Rahman. The intention of the donor was that the adult son should act in respect of the gifted properties for the minor son. It has been held in the above Bench decision that under the Mohammedan Law, it is competent for the father, who is the natural guardian of his minor children, to divest himself of the guardianship by delegating it to a fit and proper person.

There appears to be no difference in this respect between the Mahomedan Law and the Hindu Law or even English Law. The following passage in the Privy Council decision in *Annie Besant v. Narayaniah*, ILR 38 Mad 807 = AIR 1914 PC 41 deals with the power of a father to entrust the custody of his son to another;

As in this country so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the court exercising the jurisdiction of the Crown over infants to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation: *Lyons v. Blenkin*, 1821 Jac 245".

The following passage at page 790 of the decision in AIR 1918 Cal 786 is relevant for the present case:

It is indisputable that where a gift is made by a father to his infant son, no change of possession is necessary, the principle is that the declaration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account and the law is the same in every other case where the donee is a minor in lawful custody of the donor".



In support of this view, several texts mentioned by Dr. Abdullah-a-Mamun Suhrawardy in his learned lectures on Moslem Legal Institutions are

quoted in the above decision. The fourth text mentioned therein is worth quoting in this connection-

If the infant is in the custody of the grandfather or the brother or the mother or the paternal uncle and a gift is made in favour of the infant and

taken possession of by the person in charge of the infant while the father is present, there is difference of opinion among the Jurists with respect to

it; some Jurists are of opinion that it is not valid and the correct view is that it is valid (Fatawa-i-Quazikhan, Vol. 4, page 389 Edn. Lucknow).

Thus, according to the correct view referred to in the above text, the gift made by Kadir Mohideen to the first defendant Zulaika Bi, in the

presence of Hidayatullah is perfectly valid. Unfortunately, the above texts and the decision in AIR 1918 Cal 786 have not been cited, or referred

to in the subsequent Privy Council decision in 55 Ind App 171 = AIR 1928 PC 108.

8. In Mohammad Yusuf Vs. Mohammad Ismail and Others, it has been held by a Bench of the Allahabad High Court that no transfer of

possession is necessary in the case of a gift where a donee is a minor in lawful custody of the donor as mentioned in the passage in Wilson's

Anglo-Muhammadan Law referred to above. It has been held in the decision that the words "lawful custody" are not limited to the custody of only

such persons as those who come first in the line of succession of those entitled to claim guardianship but include the custody of person in actual

custody of the minor with the express consent of the legal guardian or, at any rate, with a consent to be implied from the absence of any

opposition. This case related to a gift by one Kallu in favour of his brother-in-law's daughter Fatima, an orphan whom he brought up and got her

married to his own son Muhammad Ismail. Kallu made a gift of a shop to Fatima and this gift was challenged after the death of Fatima by her

brother. The gift was upheld on the ground that no transfer of possession was necessary in the case of a gift by a guardian to the ward. It is true

there was no legal guardian for Fatima such as the father, or paternal grandfather, or a person appointed by them as guardian. But it is clear from the

decision that the whole spirit underlying the authorities is clearly that full effect may be given to the fact that when the donee is a minor and in lawful

custody of the donor no transfer of possession is necessary.

9. In *Alamanayakunigari Nabi Sab by next friend and mother Fakir Bee Vs. Murukuti Papiiah and Others*, a Bench of this Court has upheld a gift

of a field made by a Mohamedan father to his minor grandson during the lifetime of his son and at a time when all the three lived together in the

same house in spite of the circumstances that possession of the field was not delivered to the minor's father. It was held in the decision that it was

sufficient if the income or other benefit derived from the field was applied to the use of the minor so as to show that a transfer of ownership had

been made and that the circumstance that possession of the field was not delivered to the minor's father was not fatal to the validity of the gift. the

following passage at pages 742 and 743 in the decision is worth quoting here:

The question is always whether the requirement of the law that the donor shall do everything to transfer all the rights making up ownership

(including transfer of possession) has been complied with either by placing the subject of gift in the immediate personal control of the donee or by

some act which operates to bring about the same result. The rules of law relating to possession appear abstruse and complex owing to the failure

to direct the enquiry to the ultimate use to which the subject of gift has been put and to determine whether or not it was the donee who has derived

benefit from the property after the gift. The law is not made up of unmeaning technicalities. It is not abstruse and removed, from the common

course of events and human conduct. The third defendant has failed to come within one particular rule (that gifts to minors shall be transferred to

their guardians). His failure arises from the fact that that rule is not applicable to the circumstances of this case. But a gift to a minor which in all

essentials has been completed, cannot fail merely because the person who has taken charge of the subject of gift on behalf of the minor is not his

father. This would be contrary to all principle and authority. The donee can authorise a third person to take possession of the gift on his behalf.

Conversely the donor can give possession to a third person on behalf of any donee. If any authority were needed for these propositions it may be

found in the 11th chapter on the book on Hiba in the *Fatawa Alamgiri*. a person accepting possession in such circumstances would in the majority

of cases occupy a position not distinguishable from that of a trustee on behalf of

the donee.

10. In *Munni Bai and Another Vs. Abdul Gani*, , it has been held by a Bench of the Madhya Pradesh High Court to which Hidayatullah, C. J., of

that court (as he then was) was a party, that where there is on the part of a father or other guardian a real and bona fide intention to make a gift,

the law will be satisfied without change of possession and will presume the subsequent holding of the property by the father or other guardian to be

on behalf of the minor donee and that this principle applies to a gift of her property made by a Mohammadan lady to a minor who is practically

adopted by her and is living with her under her guardianship.

11. In *G. Abdul Rahim Sahib Vs. Zeenath Bi (died) and Others*, , it has been held that a joint gift by a Mohammadan to A and his minor daughter

is not invalid because the minor is represented not by her father, but by a relative of hers, for taking possession of the gifted property. It is pointed

out in the decision that there is no legal impediment preventing a person other than a legal guardian, for example, a trustee or a person acting as

such trustee, from accepting a gift on behalf of a minor and taking possession and that such an acceptance will not make the gift invalid. It has been

held in that decision that since the father of the minor donee is also a joint donee, his consent to the arrangement on behalf of the minor is also

implicit. It was pointed out that the question that fell for decision in that case was something different from what the Privy council had to consider in

55 Ind App 171 = AIR 1928 PC 108.

12. The decision of Alagiriswami, J., in *Ibrahim Bivi and Others Vs. K.M.M. Pakkir Mohideen Rowther*, is also to the same effect, though the

extension of the principle to the peculiar facts of that case is somewhat remarkable. The gift in that case was made by a Muslim lady Kathija Bivi in

favour of her minor grandson in respect of the dwelling house in which they all lived. It is significant to note that the father of the donee filed a suit

attacking the validity of the gift, but subsequently withdrew the suit. After his death, his second wife again attacked the validity of the gift. It has

been held in that decision that in proper circumstances, the donor can either constitute himself as the guardian or indicate some person, other than

the natural guardian of the minor, as the guardian of the minor's property and hand over possession to such guardian if circumstances are such as

to justify such a course of action.

13. Qhamarunnissa Begum Vs. Fathima Begum and Others, related to a gift by one Azamatullah as de facto guardian of the minors without

opposition from the father of the minors who was the legal guardian and the gift was upheld. The donor had in clear and unambiguous terms

declared the ownership of the minors in certain funds evidenced by entries in the account books of the business conducted by him. The father of

the minors gave evidence that he looked into the books and saw the entries therein after Azamathullah told him about the gift. It was held in that

decision that there must be acceptance of gift by the legal guardian, but that such acceptance of the gift on behalf of the minor donees by their

father could be inferred from the evidence in the case.

14. In Valia Peedikakkandi Kutheessa Umma and Others Vs. Pathakkalan Naravanath Kumhamu and Others, , the Supreme Court had to deal

with a gift of immovable property by one Mammoth a Hanafi Muslim in favour of his minor wife. The gift deed was handed over by Mammoth to

his mother-in-law on behalf of his minor wife and the gift was held to be valid. The last paragraph of the judgment of the Supreme Court contains

the reasons for the decision and it is as follows (at page 279):--

In our judgment the gift in the present case was a valid gift. Mammoth was living at the time of the gift in house of his mother-in-law and was

probably a very sick person though not in Marzulmaut. His minor wife, who had attained discretion was capable under Muhammadan Law to

accept the gift, was living at her mother's house and in her care and where the husband was also residing. The intention to make the gift was clear

and manifest because it was made by a deed which was registered and handed over by Mammoth to his mother-in-law and accepted by her on

behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammoth and to transfer the

property to the donee. If Mammoth had handed over the deed to his wife, the gift would have been complete under Muhammadan Law and it

seems impossible to hold that by handing over the deed to his mother-in-law in whose charge his wife was during his illness and after-wards

Mammoth did not complete the gift. In our opinion both on texts and authorities such a gift must be accepted as valid and complete"".

15. It is clear from the above Supreme Court decision that the strict view of the Mohammedan Law as to gift (hiba) has been relaxed by

commentators and Judges. The following observation of the Judicial Committee in *Md. Abdul Ghani Khan v. Mt. Fakhr Jahan Begum*, AIR 1922

PC 281 is quoted with approval in the Supreme Court decision-

In considering what is the Mohammadan Law on the subject of gift inter vivos, their Lordships have to bear in mind that when the old and

admittedly authoritative texts of Mohammedan Law were promulgated there were not in the contemplation of any one any Transfer of Property

Acts, any Registration Acts, any Revenue courts to record transfers of the possession of land, or any zamindari estates large or small, and that it

could not have been intended to lay down for all time what should alone be the evidence that title to lands had passed. The object of the

Mohammadan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the

property should pass from the donor to the donee and that the handing over by the donor to the donee and the acceptance be good evidence that

the property had been given by the donor and had been accepted by the donee as a gift.

There is reference to the following passage in *Redd-ul-Mukhtar* (Vol. 4 page 513 Cairo Edn.) in the Supreme Court decision, which is similar to

the one cited in the decision in AIR 1918 Cal 786-

It is laid down in the *Brajindi*: There is a difference of opinion, where possession has been taken by one, who has it (the child) in his charge when

the father is present. It is said, it is not valid; and the correct opinion is that it is valid."''

16. The observation made in *Alamanayakunigari Nabi Sab* by next friend and mother *Fakir Bee Vs. Murukuti Papiiah and Others*, that the

Mohammadan Law of gifts, though strict could not be taken to be made up of unmeaning technicalities has been quoted with approval in the

Supreme Court decision.

17. In *Azeshabi and Others Vs. Saprakara Kathoonbi and Others*, , *Ramamurti, J.*, had to deal with the validity of a gift made by a Muslim woman

to her son and her minor daughter represented by the donor's son as guardian. The deed of gift contained a recital that possession of the property

had been delivered over to the donees. The learned Judge observed that if the father had been living with the other and the minor children, the acceptance of the gift was implicit in his conduct. He has, however, proceeded to observe that even if the facts are otherwise, the position is the same and that there is nothing in the Mahommedan Law or in the decisions which compels the view that regardless of all considerations and regardless of the father's indifference, his wayward habits and other adverse factors, any person who desire to make a gift to the minor son could do so only by delivering the property to such a father. He forcibly expressed himself by stating that in applying the rules of Mohammadan Law, relating to gifts, the rigour of unmeaning technicalities should not be enforced, divorced for the realities of the particular situation in individual cases and Courts should avoid an impractical approach to the question and that the Court must take note of the evolution of the law on this branch of Mohammadan Law as well as the effect of the several exceptions which from time to time have been recognised by case law, having regard to the changed conditions in life.

18. Thus, applying the principles of the above decisions to the facts of this case, we find no difficulty in upholding the gift evidenced by Ex. A-14 as valid. The donor, Kadir Mohideen, has constituted himself as the guardian of the first defendant Zuleika Bi, who happened to be the daughter of one Fatima Bi, his sister-in-law's daughter whom he brought up as his own adoptive daughter. In doing so, he had the implied consent of D.W. 2 Hidayatullah, the father of the first defendant Zuleika Bi. It is clear from the recitals in the gift deed, Ex. A-14 that Kadir Mohideen has handed over possession of the properties covered by the gift deed to the donee Zuleika Bi represented by himself as guardian.

19. Sri M. S. Venkatarama Iyer urged that the gift deed could also be upheld on the ground that Zuleika Bi, though a minor, was competent to accept the gift. In the law relating to Minors by Trevelyan. 5th Edn., at page 27 it is stated that a minor can accept a gift, but his acceptance is voidable. The legal position under the Mohammadan Law is stated in the following terms in the same page:

Under the Mohammadan Law there can be no valid gift without any actual change of possession; but, in the case of a gift to a minor, possession

by the guardian, or by a trustee on behalf of the minor, or by a person acting as such, is sufficient. Possession by a minor who has arrived at yes of

discretion will also validate the gift. When the guardian is himself the donor no formal delivery or change of possession is necessary, provided that it

appears that there is on his part a real and bona fide intention to make a gift to the minor"".

In *Mt. Fatma v. Mt. Autun* AIR 1944 Sind 195, Tyabji, J., has elaborately dealt with the question and concluded that there is nothing in

Mohammadan Law or outside it which prevents a minor from accepting a gift or taking possession of property. He has pointed out that there is no

warrant for the proposition that it is only the minor's guardian who can validly accept the gift or take possession of the gift properties and that the

minor himself is incompetent to do so. He has pointed out that while the disability u/s 11 of the Contract Act prevents a minor from entering into a

binding contract or to act as transferor, by reason of Section 7 of the Transfer of Property Act he is not legally disqualified to be a transferee within

the meaning of Section 6(h) of that Act and consequently, under the Mohammadan Law a minor is not incompetent to accept a gift or to take

possession of the property gifted whether moveable or immovable. The following extract from the judgment of Abdur Rahim, J., in *Raghavachariar*

*v. Srinivasaraghavachariar*, ILR 40 Mad 308 = AIR 191 Mad 630, was relied on in that case:

It may be that if an infant is of an age when he is unable to understand the meaning of a proposal made to him, the law will not regard his assent to

it as a valid acceptance. But I am not aware of any general proposition that an infant is incapable of performing any juristic act whatever, even if he

is of sufficient age to understand the meaning and scope of the Act. An infant is capable of acquiring property by gift which the law requires must

be accepted. It was indeed contended by Mr. Ganapathi Iyer that acceptance of a gift by a minor is not valid. There is, however, no warrant for

such a proposition. Section 127 Transfer of Property Act, shows that a donee who is not competent to contract--an infant is within that category--

can accept a gift even of property burdened with an obligation though he will not be bound by the acceptances and can repudiate it when he

becomes competent to contract"".

20. On the strength of this decision, Sri. M. S. Venkatarama Iyer, urged that the first defendant, Zuleika Bi, who was nine years at the time of the

gift, was competent to accept the gift. In Ibrahim Bivi and Others Vs. K.M.M. Pakkir Mohideen Rowther, , it was held that the acceptance by a

minor who had attained the age of discretion, namely, 15 years, was valid. In Mullah's Principles of Mohammadan Law, 16th Edn., in Section

156, at page 150, it is stated that a gift will also be complete when a minor, who has attained discretion, himself take possession. But there is no

plea or evidence in this case that the minor, Zuleika Bi, accepted the gift. In view of our finding that Kadir Mohideen validly executed the gift deed

Ex. A-14 by constituting himself as the guardian of the minor Zuleika Bi, with the consent of Hidayatullah, and that the said gift is valid, it is

unnecessary to uphold the gift on the footing that Zuleika Bi, though a minor aged 9 years, was competent to accept it.

21. On the question of title by adverse possession, we see no reason to differ from the finding of Ramakrishnan, J., confirming that of the appellate

court. It is clear from Chitaley's Limitation Act, 4th Edn. paragraph 62, at page 1329, that though normally there cannot be adverse possession

against an owner in possession under certain circumstances, the possession of a person may be adverse to himself. Thus, where A is in possession

of his own land, but under a lease from B under the wrong impression that it belongs to B who asserts a title thereto, A's possession would be B's

possession and consequently adverse to A. The Privy Council decision in Secretary of State v. Krishnamoni Gupta, ILR (1902) Cal 518 is

referred to as the authority for the position. The principle is clearly stated in the following passage at page 534 of the decision:

It may at first sight seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from

disputing the title of the Government. But there is no doubt that the possession of the tenant is in law the possession of the landlord or superior

proprietor, and it can make no difference whether the tenant be one who might claim adversely to his landlord or not.

In Ex. A-14 Kadir Mohideen has clearly stated that he has handed over possession to the donee and towards the end of the document he has

stated that neither he nor his heirs have any right whatsoever in respect of the properties covered by the gift deed. Having regard to these recitals,



Kadir Mohideen could not have set up a claim to the suit properties after the expiry of 12 years, even if there was some defect in the gift. The appellants-plaintiffs who claim only as heirs of Kadir Mohideen, cannot also claim title to the suit properties after the expiry of 12 years from the date of the gift even if the gift is invalid for some reason or other. The learned advocate for the appellants relied on the evidence of P.W. 1 and the entry in the account book to show that the plaintiffs collected rents for the suit shops from the fourth defendant during the short period after the death of Kadir Mohideen and before D.W. 2 Hidayathullah began to collect rent from July 1948. But this evidence was not accepted by the appellate court and by Ramakrishnan J. The plaintiffs have not examined the fourth defendant to prove the truth of the alleged payment. The alleged attempt on the part of the plaintiffs to collect rent from the tenants of the suit shops during the fortnight after the death of Kadir Mohideen cannot amount to interruption of the possession of the first defendant. There is, therefore, no ground to interfere with the finding of Ramakrishnan J. confirming that of the appellate court that the suit is barred by limitation.

22. For the foregoing reasons, the decree and judgment of Ramakrishnan J. in S. A. 302 of 1963 are confirmed and the Letters Patent Appeal is dismissed with costs.

23. Appeal dismissed.