
(1966) 02 MAD CK 0011
In the Madras High Court
Case No : Appeal No. 101 of 1961

Qhamarunnissa Begum

APPELLANT

Vs

Fathima Begum and Others

RESPONDENT

Date of Decision : 25-02-1966

Acts Referred:

Citation : AIR 1968 Mad 367 : (1968) ILR (Mad) 64

Hon'ble Judges : Veeraswami, J;Natesan, J

Bench : Division Bench

Judgement

Natesan, J.

(1) This appeal arises out of a suit for partition of the estate of one Haji Mohamed Asamathulla Badsha Sahib who died on 4-1-1955 at Madras

leaving several heirs and considerable movable and immovable properties at Madras and in Arcot, North Arcot District. The plaintiff is one of the

daughters of the deceased by his second wife, Habeebunnissa Begum, whom he has divorced in 1948. The first defendant is another daughter by

this divorced wife and defendants 2 and 3 are sons of the deceased by her. The fourth defendant in the suit is a daughter of the deceased by his

first wife who died somewhere in 1938 and defendants 9 to 11 are the daughters of the fourth defendant and minors. The fifth defendant is the third

wife of the deceased and the sixth defendant is the minor daughter by the third wife. Defendants 7 and 8 are the 4th and fifth wives of the deceased

and they have no issues. The dispute in the appeal relates to (1) interests shown as owned by the 6th defendant Gullzar in Gulzar & Co., Arcot,

valued at about Rs. 15,000; (2) amounts credited in favour of defendants 9 to 11 in the said firm totalling about Rs. 7,000 and (3) a sum of about

Rs. 16,000 cash, found in the iron-safe at No. 40, Mahmood Shah bazar, Arcot, when an inventory was taken on 11-1-1955. The said house at

Arcot with the movable properties therein valued at Rs. 2,000 had been gifted by the deceased to the minor Gulzar by a registered gift deed Ex.

B-1 on 29-3-1951. It is the contention of the plaintiff that the amount and investment in Gulzar and Co. in the name of the sixth defendant and

minor defendants 9 to 11 really belonged to the estate of the deceased, that there are mere book entries made benami and that the amounts are

available for division among the legal heirs of the deceased. On behalf of the sixth defendant and defendants 9 to 11, contra, it is contended that

these entries represent completed gift duly accepted on behalf of the minor, and that the said amounts belong to the respective parties and cannot

be brought into the general pool for division among the heirs of the deceased. The learned Assistant City Civil Judge rejected the plaintiff's

contentions, holding that there was inherent evidence in the book entries relating to the amounts, that Azamatullah relinquished his control over the

moneys and divested himself completely of his beneficial interest therein and there was evidence of acceptance of the gift on behalf of the donees.

As regards the acceptance of the gift on behalf of the donees, there was no difficulty so far as minor Gulzar was concerned, because the donor

was her father. In regard to minor defendants 9 to 11, they had their father and the learned Judge found the validity of the gift holding that there

was acceptance of the gift by Azamathulla as de facto guardian of the minors without opposition from the father of the minors who was the legal

guardian. The learned City Civil Judge also upheld the contention of the sixth defendant that cash of Rs. 16,000 found in the iron-safe had also

been gifted by the deceased to Gulzar.

(2) We shall first take up for consideration the credits in favour of minor Gulzar and minor defendants 9 to 11 in the firm of Gulzar and Co. The

credits in Gulzar and Co. have come on transfer from the tannery business which Azamatullah had been carrying on. It is seen from the records that

the amounts in favour of his three granddaughters, that is, defendants 9 to 11, and Gulzar on the 31st March 1959, Rs. 2,000 for each of the three

granddaughters and Rs. 5,000 for his minor daughter Gulzar. Ex B-3 is the day-book of the tannery business for the year 1948-49. The entries

have been made by Azamatullah himself, the deceased debiting himself a sum of Rs. 11,000 in all and crediting his daughter and the grand-

daughters as aforesaid. The credits are found carried forward in the accounts of the tannery business in the subsequent years and interests is charge

and credited. The partnership of Gulzar and Co. was started in December 1953 for carrying on handloom cloth and lungi business and is

evidenced by the partnership deed Exhibit B-16. The partners are shown as Azamatullah in the capacity of father and guardian of his minor

daughter Gulzar, and one Mir Mohideen Basha who has figured as P.W. 1. A sum of Rs. 15,000 was shown as capital contribution by

Azamatullah as father and guardian of Gulzar. The credits in the names of defendants 9 to 11 and Gulzar in the tannery business with the interest

accrued were transferred from the tannery business to the lungi trade. This way an amount of Rs. 2,609-1-0 was transferred from the closed

tannery business to the credit of each of the grand daughters in the lungi partnership of Gulzar and Co. The amount in the name of Gulzar in the

tannery business was similarly transferred to the lungi partnership in her name. A further credit of Rs. 9,000 is found in the name of Gulzar as

capital amount brought in through her father. The account books show proper and due adjustments of credits and debits and the credits in the

names of the three grand-daughters thereafter continued in Gulzar and Co. In transferring these amounts the transfer is directly in the names of

minor defendants 9 to 11 and minor Gulzar. The relative books of account of the tannery business is Ex. B-9. The first ledger of Gulzar and Co.

Ex. B-11, is for the period from 9-11-1953 to 31-3-1954. As the account books stand, they clearly show that the moneys were treated as

belonging absolutely to the persons in whose names they are found credited. Azamatullah, the deceased, had his own ledger page in the books of

account.

Mr. Mohideen Basha, a partner in Gulzar and Co., giving evidence for the plaintiffs as P.W. 1, admits that in the accounts Gulzar was shown as a

capital contributing partner and the grand-daughters were shown as creditors. So far Gulzar is concerned, P.W. 1 admits that Azamatullah was

looking after the minor daughter in respect of the business. One of the reasons suggested by P.W. 1 for having these moneys benami is that

Azamatullah wanted to deprive his divorced wife and her children of any property. If that be the reason, the reason given itself, negates the theory of benami. If the intention was to deprive some of the heirs of their lawful shares, it could be successfully achieved only by a real gift and not by nominal entries. If he was spiting his divorced wife by depriving her children of shares in his estate, he could not secure it better than by gifts in favour of his children by his other wives. The unequivocal and unqualified intention of Azamatullah to immediately benefit his daughter, Gulzar, and his grand-daughters, defendants 9 to 12 is brought in certain declarations of the deceased himself. Exhibit B-13 is a copy of the plaint in C.S. No. 237 of 1954 on the original side of this Court, a suit instituted for dissolution of the partnership of Gulzar and Co. Azamatullah, as the father and next friend of his minor daughter Gulzar, filed the suit against the partner, P.W. 1, in the present suit. The plaint refers to the investment by the plaintiff, that is, Gulzar of Rs. 15,000 as capital and para 19 of the plaint gives a list of the persons who had invested their moneys in the firm. It is pointed out that these persons have to be paid back their moneys. In the list are shown defendants 9 to 11, the amount due to each of them being given as Rs. 2,350. Azamatullah has verified the said averments in the plaint as true to his knowledge. In the said suit, Azamatullah had also sworn to an affidavit where it is stated in specific terms that the plaintiff, that is, Gulzar, as financing partner, had invested Rs. 15,000. The declarations of the deceased Azamatullah in these proceedings are statements against his interest and clearly establish that the deceased regarded these amounts as belonging absolutely to the person in whose names they stood. They establish that so far as Azamatullah was concerned, he had completely divested himself of all his interest in the funds and had given them to his minor daughter and minor grand-daughters. The only question for consideration is whether they are valid gifts and had been completed according to the principles of Mahomedan Law so as to pass title to the donees.

(3) The three essential requisites that have to be complied with for a valid gift under the Mahomedan Law are (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 such possession of the subject of the gift by the

donor to the donees as the subject of the gift if susceptible of. Learned counsel for the appellant draws our attention to a decision in Mahomed

Hussein Haji Gulam Mahomed Ajam Vs. Aishabai, , and submits on the authority of the decision that mere book entries in respect of money which

is the subject-matter of a gift is not sufficient to support the gift. It is contended that there must be evidence to show that the donor relinquished his

control over the money and divested himself completely of his beneficial interest therein so that he could not have operated on the sum if he wanted

to do so. Learned counsel points out that for a valid gift under Mahomedan Law there must not only be a declaration by the donor of his intention

to make the gift, but the subject of the gift must be accepted on behalf of the donee. From the resume of facts stated above, it is clear that this is

not a case of gift by mere book entries only. There are clear and unequivocal declarations by the deceased of his having divested himself of all

interest in the funds and of his intention of vesting of the funds in the donees. There can be no doubt that there has been a clear declaration by the

donor of his intention to make the gift and we shall presently consider whether there has been such delivery of possession as the subject of the gift

is capable of and whether there has been valid acceptance of the gift by or on behalf of the donees.

(4) There can be no doubt that taking of possession of the subject of a gift may be either actual or constructive and constructive possession is a

question of fact depending on the circumstances. In Principles of Muhammadan Law by Mullah, 15th Edn., p. 136, it is stated thus:

When the subject of the gift is incorporated property or an actionable claim, the gift may be completed by any act on the part of the donor

showing a clear intention on his part to divest himself in praesenti of the property, and to confer it upon the donee.

At p. 157, the learned author points out that there is nothing in Mahomedan Law to prevent a gift of right to property. In such a case the donor

must, so far as it is possible for him, transfer to the donee that which he gives, namely, such right he himself has, but this does not imply that where

a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, corpus of

the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives. In E.S. Hajee Abdul

Kareem and Son Vs. Commissioner of Income Tax, , this Court, referring to the above passage in Mullah's Principles of Mahomedan Law, held

that where the subject-matter of a gift consisted of the assets of the firm, the entries in the accounts followed by such acts as would effectuate a

divestment on the part of the donor would be sufficient. In that case a Mahomedan partner of a firm desired to make gifts to his wife and children.

There was no sufficient cash balance available so that entries were made in the books of the partnership making appropriate debits and credits.

From that day onwards the wife and the children figured as creditors of the firm and interest was paid by the firm to those persons. learned counsel

appearing for the sixth defendant drew our attention to another decision of this Court in A.M. Abdul Rahman Rowther and Co. Vs. The

Commissioner of Income Tax, Madras, . In that case a Muslim assessee to Income Tax who was the sole proprietor of a business purported to

make certain gifts to his two married daughters by incorporating certain entries in his accounts. He debited himself to the extent of Rs. 50,000 and

his two daughters with Rs. 25,000 each. Subsequently a partnership deed was executed, with the assessee and his two daughters as partners.

There was evidence of distribution of the profits of the partnership in accordance with the terms of the partnership. On the question whether the gift

was valid and the firm was entitled to registration under the Income Tax Act, it is observed as follows:--

It must, however, necessarily depend upon the circumstances of the case whether the actual subject-matter of the gift should be so handed over

or anything equivalent thereto or whether an acknowledgment by the donee that the gift had been received would not suffice to meet the

requirements of the law. We are not very much impressed by the argument that here were only book entries.

The learned Judges, after referring to E.S. Hajee Abdul Kareem and Son Vs. Commissioner of Income Tax, and the passage from Mullah's

Principles of Mohamedan Law above cited, proceeded to observe:

In the present case, also, we have noticed that after making the necessary entries, a partnership document was executed. In that document, the

assessee expressly admitted that of the capital of the partnership, the two daughters were entitled to Rs. 25,000 each. Here was accordingly a

statement made by the assessee against his own interest, which is entitled in our opinion, to more weight than what the department has chosen to give to it".

In the instant case, as already pointed out, not only are there book entries but we have subsequent declarations by the deceased in Court

proceedings clearly and categorically acknowledging the interest of the donees in the funds. It must be noted that the book entries are not in the

account books of the donor himself. So far as the minor Gulzar is concerned, the partnership is formed with a stranger, the minor being shown as

the partner advancing capital. All accounts are in her name and the acts of Azamatullah are as guardian and protector. As regards the moneys of

defendants 9 to 11, the moneys are transferred from his own books of account relating to his personal business to the partnership business. The

partnership business is in law a different entity, different from the donor Azamatullah, and defendants 9 to 11 got credit for the amounts due to

them in this partnership. The donor in the plaint which he verified specifies them as creditors of the partnership firm. More moneys have been

drawn on behalf of the minors and spent by their mother, and the drawings of interest have been debited in the accounts. Clearly there is such

relinquishment of ownership and dominion by the donor and such transference of possession as is possible in the circumstances.

(5) The next question for consideration is whether there has been compliance with the requisites of Mahomedan Law of acceptance of the gift,

express or implied, by or on behalf of the donees. All the donees in this case are minors. So far as Gulzar is concerned, as pointed out at the

beginning itself, there can be no difficulty. It is well established that in the case of a gift by a father to his minor child or by a legal guardian to his

ward, all that is necessary is to establish a bona fide intention to give. No change or transference of possession is necessary. The person entitled in

order to the guardianship of the property of a minor are (1) father; (2) his executor; (3) father's father; and (4) his executor. If none of them is

alive, the Court may appoint any other person as guardian of the property of the minor. We have, therefore, no difficulty in upholding the validity of

the claim of Gulzar, the sixth defendant, to her interest in the firm of Gulzar and Co.

(6) But as regards the defendants 9 to 11, Azamatullah, the donor, was not the guardian. The father of the minors was alive and learned counsel

for the appellant relies on a decision of the Privy Council in *Musa Miya v. Kadar Bax*, ILR (1928) 52 Bom 316 = AIR 1928 PC 108, for

invalidating the gift. In the case before the Judicial Committee, the gift was by the grandfather to his minor grandsons by his daughter. There was

not transference of possession or relinquishment of possession by the donor and the father of the minors was alive. No doubt the minors were

living with their grandfather. Their Lordships held that the recognised exception in the case of a gift to a minor by his father or other guardian from

the general rule of Mahomedan Law that a gift is invalid in the absence of delivery of possession could not be extended to the case where the

father of the minor was alive and was actually living with his wife and children and was in a position to exercise his rights and powers as parent and

guardian and to take possession of the property on behalf of his children. It must be pointed out, that in that case though the donor publicly

announced to his assembled friends that he had made a gift of his property to his minor grandsons, there was no delivery of possession nor any

relinquishment or control and their Lordships posed for consideration the question whether in the absence of delivery of possession or any

relinquishment of control the announcement was sufficient to constitute a completed gift according to Mahomedan Law.

(7) The transference of possession or delivery of the subject-matter of the gift in the present case, as already noticed, can be and as pleaded is,

only constructive. The law as to the requirement of a valid gift in a case of the present kind is clear and of the there can be no doubt. There must be

acceptance of the gift by the legal guardian and as delivery can be constructive, the acceptance also may be so. But the question is whether on the

evidence it could be inferred in this case that there has been such acceptance of the gift on behalf of the minor donees by their father as is possible

and may be expected in the circumstances. The father of the minors, the legal guardian, has given evidence as D.W. 1. He deposes that

Azamatullah told him about the gift when originally he gifted the amount by crediting in the tannery accounts. He also told the witness when he was

transferring the amounts to Gulzar and Co. Interest accrued on the credits had been drawn and debited against the respective minors. D.W. 1 also

speaks to drawing of the interest from the account of each child to the tune of Rs. 300 and his wife making jewels for the children from these moneys. No doubt the requirement of moneys for making jewels for the children was conveyed to Azamatullah not directly by D.W. 1 but through his wife, the daughter of Azamatullah, and he had seen the money being paid in the hands of his wife.

(8) In Valia Peedikakkandi Kutheessa Umma and Others Vs. Pathakkalan Naravanath Kumhamu and Others, , the question of the validity of the

gift by a husband to his minor wife when the gift was accepted on behalf of the minor wife by the mother arose for consideration before the

Supreme Court. Neither the father nor the grandfather was alive. it would have been legal for the donor husband himself to have accepted the gift

on behalf of the minor wife. Upholding the validity of the gift, Hidayatullah J., who delivered the judgment on behalf of the Court observed:

In our judgment the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the 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 Mahomedan Law to accept

the gift, was living at her mother's house and in her care 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 Mammotty 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 Mammotty and to transfer the property to

the donee. If Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been

completed under Mahomedan 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 afterwards Mamootty did not complete the gift. In our opinion, both on texts and authorities such a gift must be accepted

as valid and complete.

In the course of the judgment reference is made to the observations of the Judicial Committee in Md. Abdul Ghani Khan v. Mt. Fakhr Jhan

Begam, (1922) 49 Ind App 195 = AIR 1922 PC 281, where it is observed:

In considering what is the Mahomedan law on the subject of gift inter vivos, their

Lordships have to bear in mind that when the old and admittedly authoritative texts of Mahomedan Law were promulgated, there were not in the contemplation of any one any Transfer of Property Act, any Registration Act, any Revenue Courts to record transfers of the possession of land or any Zamindari estate, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to land had passed. The object of the Mahomedan 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 and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

Hidayatullah J., further refers to a decision of this Court in *Alamanayakunigari Nabi Sab by next friend and mother Fakir Bee Vs. Murukuti Papiah*

and Others, , as pointing out that the Mahomedan Law of gifts, though strict, could not be taken to be made up of unmeaning technicalities.

Referring to the principles of Mohamedan Law regarding the completion of the gift, it is observed in *Alamanayakunigari Nabi Sab by next friend*

and mother Fakir Bee Vs. Murukuti Papiah and Others, :

The rule 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 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.

It was held in that case that where a Mohamedan made a gift a field to his minor grandson during the lifetime of his son and at a time when all the

three lived together in the same house, the circumstance that possession of the field was not fatal to the validity of the gift. In such a case, the gift

would be valid, if after it was made, 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.

(9) In our view it is a fair deduction in consonance with the common course of

events and human conduct that the legal guardian accepted the gift.

The donor had, in clear and unambiguous terms, declared the ownership of the minors in the funds in question. The original investment was in his

own business in the names of the minors and communicated to the father of the minors who was his son-in-law. The father has stated that he

looked into the books and saw the entries therein. The donor had informed him of the proposed gift even before making the gifts. The gifts in this

case is money with no onerous obligation attached. It is a benefit conferred by the grandfather who may properly be expected to make such gifts

of affection. The interest accrued on the moneys had been drawn and used for the minors. In such circumstances we may fairly and properly

conclude in the light of the observations in the judgment cited above, due acceptance of the gift by the legal guardian of the minors. Assent of the

guardian in such circumstances is a legitimate inference. As pointed out in Mullah's Principles of Mahomedan Law, the acceptance of a gift by or

on behalf of a donee may be express or implied. Even taking, that from the evidence it appeared that the subsequent investment of the funds for

augmentation and earning of interest was by the donor himself, such conduct may only be as and on behalf of the legal guardian and cannot affect

the validity and completeness of the gift. Effect must be given to the investment being in the names of the minors themselves. There is nothing

unusual in funds in such circumstances being left with the senior member of the family who is a successful businessman and particularly when he

himself happens to be the donor and interested in the welfare and prosperity of the donees. It may be that the legal guardian would be liable to the

minor donees if the funds are not properly secured. But that cannot affect the original factum or validity of the gift. We, therefore, hold on the facts

that the amounts standing to the credit of defendants 9 to 11 in Gulzar and Co., are the subject of completed gifts in favour of the minors and are

not available for partition as part of assets of the estate of the deceased.

(10) The next disputed item is a sum of about Rs. 16,000 found in the iron-safe at No. 40, Mahmood Sah Bazar, Arcot. The minor daughter

Gulzar claims this amount as belonging to her absolutely a gift in her favour by her father, while it is contended for the plaintiff that it is an asset of

the estate and divisible among all the legal heirs. The pleadings of the sixth

defendant in regard to this claim are not precise. On the 29th March

1951, Azamatullah had executed a gift deed Ex. B-1 in favour of his minor daughter Gulzar, the validity and completeness of which is not disputed.

Thereunder the donor gifted the properties then stated to be in his possession, immovable properties bearing door Nos. 37 to 40 in Arcot and

movable properties in the buildings bearing the said door numbers. There is specific reference in the gift deed to immovable properties in door No.

40, Mohamed Sah Bazar, Arcot, and mention is made of an iron-safe with cash, gold, jewels, vagaira. Other furniture and fixture are detailed and

at Rs. 2,000. The gift deed stated that the donor was bound to protect the house site and movable properties gifted, conduct repairs, pay taxes,

etc., with the help of the properties or with the help of the cash or with the help of income derived from them. It is also stated therein that the donee

had right as per Mahomedan Law to inherit future properties other than the properties and cash specified in the deed. The cash of Rs. 16,000

found in the iron-safe which had been gifted along with the house to the sixth defendant that this cash Rs. 16,000 was in the iron-safe at the time of

the gift. It is admitted that this cash had been placed in the iron-safe subsequently by the deceased. Claim to this amount of Rs. 16,000 is not made

as comprised and covered by the gift deed Ex. B-1. To a specific question from this Court, learned counsel Shri N.C. Raghavachari appearing for

the sixth defendant, stated that his client does not rely on Ex. B-1, for this claim but her case is that as the safe was gifted to her, whatever cash

was deposited in it became gift in her favour pro tanto. In the written statement the claim is rested thus:

The late Azamatullah Badsha has categorically gifted by a registered document not only the house and ground No. 40, Mohamed Sha Bazar, but

also the cash and jewels in the iron-safe as well as the movables in the premises and whatever things that were subsequently kept in the said

premises were given to the sixth defendant.

The claim as pleaded reads as if the document itself provided for the subsequent things kept in the premises to follow the original gift. But it is well

established and is not disputed that a gift cannot be made of anything to be performed in futuro or of future property. A gift has to take effect in

praesenti. The trial Court which found in favour of the sixth defendant got over

this hurdle with the following observations:--

The case of Gulzar is not based on Exhibit B-1. Exhibit B-1 has been relied on to show the intention of late Azamatullah on its date to give the

iron-safe and its contents to minor Gulzar. Azamatullah put moneys in the safe subsequently. Subsequent deposits are quite consistent with his

intention to give these moneys to Gulzar. Clearly, the intention evidenced by Ex. B-1 affords sufficient proof of the subsequent deposit of moneys

amounting to gifts.

Apart from its tenability this approach completely overlooks the recital in the gift deed that by the gift the donee had not lost her rights to inherit the

future properties of the donor. This statement improbabilities, assuming that such plea is legally tenable, any intention of making gifts of the money

that may be put into the iron-safe in the future. An argument is developed that the iron-safe is analogous to a savings bank account for Gulzar with

a pass-book and moneys put into it are gifts to her as a deposit in the bank. We are unable to follow this reasoning. For, a gift under Mahomedan

Law to be valid, there must be clear intention on the part of the donor to divest himself in praesenti of the subject-matter of the gift. It may be that

where the donor is the father, there need not be any transference of possession. But there must be the unequivocal declaration of intention to divest

himself of the ownership of the subject-matter of the gift. We are unable to read in the written statement a plea that this amount of Rs. 16,000 has

been the subject-matter of any specific gift by the donor. Excepting the fact that it is found in the iron-safe which had been gifted by the donor to

the donee, there is nothing else to evidence his intention to make a gift of the money. There is evidence that the deceased had use of the iron-sale.

When the iron-safe was opened, moneys belonging to a mosque of which he was the Mutavalli were also found there. There is some evidence that

jewellery belonging to the jewellery business were also found in the safe. Admittedly, the fifth defendant's jewels were kept in the iron-safe.

Account books belonging to the mosque were found in the iron-safe and the mosque moneys and the account books were afterwards given away

to the mosque. Azamatullah no doubt had an iron-safe in his Triplicane House. But he had business both at Madras and Arcot. Besides the

properties gifted to the sixth defendant, he had other immovable properties at

Arcot and in the neighbourhood, lands, house and mango gardens.

He used to reside also at Arcot. Just prior to his death on 28-12-1954, at Madras, he had a heart attack. It was followed by second attack on 2-

1-1955 when he was removed to the General Hospital. There he died on 4-1-1955. His burial ceremony was at Arcot. It is stated that the key of

the iron-safe was under his pillow. It is admitted that there are no entries in any of his account books crediting Gulzar with any amount to which this

sum of Rs. 16,000 found in the iron-safe could be related.

(11) The lower Court has placed reliance on the deposition of one Syed Basha Mohideen, D.W. 3, a friend of the deceased, for the finding that

there was a gift of the cash in the iron-safe in favour of Gulzar. We have been taken through his evidence and his deposition does not inspire the

least confidence. He is a retired Tahsildar and admittedly he used to purchase properties with his own moneys in the names of Azamatullah for his

own benefit. He admits that Azamatullah subsequently transferred these properties to him. This witness had taken active part against the divorced

wife in her claim for maintenance and had filed an affidavit supporting the cause of Azamatullah. A reading of his deposition shows that full

advantage had been taken of the lack of precision in the pleadings to trim the case in evidence according to what this witness thought was the

requirement of law to sustain the gifts. He speaks to his knowledge of the original gift deed Ex. B-1. The extent to which he was prepared to do is

apparent from his statement that the deceased was saying that he was living in the house of Gulzar as a guest in order to show sincerity of his

purpose in making the gift. This witness states that the deceased told him that everything found in the house and the iron-safe, the moneys he had

kept there and the moneys he was going to keep there were all Gulzar's property and were gifted to her. He deposes that subsequent to the gift

deed the deceased told him that he had kept a few thousands in the iron-safe for the benefit of Gulzar and that he would be depositing more and

more in course of time for her benefit. As pointed out already, no such case has been pleaded and the gift deed does not provide for the making of

future deposits in the iron safe for the benefit of Gulzar. The witness would add that so far as the deceased is concerned he would not keep his

moneys in the iron safe and he would be keeping them in the almirah in the

drawing room. It is in this drawing room this witness stayed whenever he went to meet the deceased. In fact he states that the deceased told him that whatever money he kept for himself he would keep in the almirah and shelf in the drawing room and not in the iron safe. Azamatulla was a prosperous businessman having several lines of business and had lungi trade in Arcot, besides lands and building. He would have been handling large sums at Arcot. It is difficult to believe that the deceased kept his personal moneys in an almirah in the drawing room while there was nothing to prevent his securing the money by keeping them in the iron safe in his custody. Of course the letter Ex. A-1 executed by Rabia Bi, the fifth defendant and mother of Gulzar, when disputes arose can have no bearing on the decision of the question now in issue. Any statement of Rabia Bi at the attempted mediation agreeing to the division of the cash in the iron safe among the heirs of the deceased cannot bind the minors.

(12) In our view, from the mere fact that moneys were placed by the deceased in the iron safe which he had gifted to his daughter, one cannot infer that there was an intention to gift such moneys. The findings of the learned City Civil Judge in regard to this sum of about Rs. 16000 found in the iron safe cannot be sustained and have to be set aside. We therefore hold that Item 5 in Schedule B to the plaint is an asset divisible among the legal heirs of the deceased Azamatulla and not the exclusive properties of the sixth defendant, Gulzar.

(13) The appeal of the plaintiff is allowed to this extent and it is dismissed in other respects. The appellant, and the contesting defendants respondents 9 to 11 one set and sixth defendant-respondent one set will pay and receive proportionate cost throughout to their relative success or failure.

(14) Appeal partly allowed.