

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.690 OF 1992

Shri. Abdul Razak Mohammed Ishaque
Adult, Occ.: Business,
Residing at Madar Challa,
Kalyan, Dist. Thane.

..... Appellant
(Ori. Defendant)

Vs.

1 Smt. Hamidabee Sayyed Haroon Attar Respondents
Adult, Occ.: Household,
Residing at : Ishaque Maniar Chawl,
Madar Challa, Kalyan, Dist. Thane
(since deceased) thru' her legal heirs
and representatives.

1/1 Iqbal Syed Haroon Attar
Adult, Occ. : Business

1/2 Mansoor Syed Haroon Attar
Adult, Occ. : Business

1/3 Shamim Farooq Shaikh
Adult, Occ. : Business

1/4 Nasim Banu Syed Haroon Attar
Adult, Occ. : Business

1/5 Gulnaar Syed Haroon Attar
Adult, Occ. : Business

Nos. 1/1 to 1/5 residing at 20/55B,
Madar Challa, Kalyan,
Dist. Thane.

- 2 Shri Abbas Mohammed Ishaque
Maniar,
Age : Adult, Occ.: Business,
Residing at Abdul Razak Attar
Chawl, Madar Mohalla,
Kalyan, Dist. Thane
- 3 Smt. Aminabi Karim Attar
Adult, Occ.: Household,
R/o: Dhasai, Tal. Murbad,
Dist. Thane.
- 4 Smt. Jamilabi Abdul Aziz Maniar S.A. stands
Adult, Occ.: Household, dismissed against
Residing at Sensan No.N/W/HR 81/4, Resp. no.4 as per
Bandra Reclamation Bazar Road, Add. Registrar(J-I)
Old Fish Market, Bandra (West), Order dt.4/2/2004.
Mumbai – 400 050.

**WITH
SECOND APPEAL NO.689 OF 1992**

Shri. Abdul Razak Mohammed Ishaque
Adult, Occ.: Business,
Residing at Madar Ghalla,
Kalyan, Dist. Thane.

..... Appellant
(Ori. Plaintiff)

Vs.

- 1 Smt. Hamidabee Sayyed Haroon Attar Respondents
(since deceased) thru' her legal heirs

- 1/1 Iqbal Syed Haroon Attar
Adult, Occ. : Business
- 1/2 Mansoor Syed Haroon Attar
Adult, Occ. : Business
- 1/3 Shamim Farooq Shaikh
Adult, Occ. : Business
- 1/4 Nasim Banu Syed Haroon Attar
Adult, Occ. : Business
- 1/5 Gulnaar Syed Haroon Attar
Adult, Occ. : Business

Nos. 1/1 to 1/5, all residing at
20/55B, Madar Challa, Kalyan,
Dist. Thane.

- 2 Shri. Sayyed Haroon Ismail Attar
since deceased thru' his LR's.
- 2/1 Iqbal Syed Haroon Attar
Adult, Occ. : Business
- 2/2 Mansoor Syed Haroon Attar
Adult, Occ. : Business
- 2/3 Shamim Farooq Shaikh
Adult, Occ. : Business
- 2/4 Nasim Banu Syed Haroon Attar
Adult, Occ. : Business
- 2/5 Gulnaar Syed Haroon Attar
Adult, Occ. : Business

Nos. 2/1 to 2/5, all residing at
20/55B, Madar Challa, Kalyan, Dist. Thane.

Mr. Faizal N. Kazi alongwith Mr. Uzai Z. Kazi i/by Mr. Nitin Muley,
Advocate for the Appellant.

Mr. K.Y. Mandlik, Advocate for the Respondent No.2 .

Coram : Smt. R.P. SondurBaldota, J.

Date : 28th January, 2015.

JUDGMENT :

1 This is a common order on the above two appeals, that arise out of a common order by the District Court deciding appeals preferred against the common order of the trial Court in Regular Civil Suit No.295 of 1979 (the first suit) and Regular Civil Suit No.372 of 1985 (the second suit). During pendency of the appeals, the original respondents died. Their heirs have been brought on record. The first suit was filed by one Mohammed and his son Abdul. During the pendency of the suit, Mohammed died and Abdul continued with the proceedings. The original respondents, Hamidabee and Sayyed are the defendants to the first suit. Hamidabee is the daughter of Mohammed and Sayyed is her husband. The second suit was filed by Hamidabee against Mohammed, Abdul and her three siblings, i.e. a brother and two sisters. Appeal No.689 of 1992 arises out of the first suit and Appeal No. 690 of 1992 arises out of the second suit. The parties hereinafter will be referred to by their names.

2 Mohammed was the absolute owner of the house property being House No.35-B, situate at Municipal Alley No.20, Mother Challa, Kalyan, District Thane. The marriage of Hamidabee was solemnised with Sayyed in the year 1960. Thereafter she went to Pune to reside with her husband. In the year 1963, Hamidabee returned to Kalyan and started residing with her father. A year thereafter i.e. in the year 1964, Sayyed also shifted to Kalyan. Therefore, Mohammed accommodated them in a room on the Northern side of his chawl, bearing House No.35-B (hereinafter referred to as the “suit premises”).

3 Mohammed alleged that Hamidabee and Sayyed were accommodated in the suit premises only until they could find suitable accommodation for themselves and as such were the gratuitous licensees. When Mohammed desired to dispose off the suit premises, he asked Hamidabee to vacate, but she refused. Thereupon in the year 1979, Mohammed issued notice to her terminating the license and calling upon her to vacate. Hamidabee replied the notice to contend that she was not the licensee, but the owner of the suit premises. She claimed that Mohammed had made oral gift of the suit premises to her. Mohammed then filed Regular Civil Suit No.295 of 1979 against Hamidabee and her husband, Sayyed for possession of the suit premises and mesne profits. About six years thereafter, Hamidabee filed Regular Civil Suit No.372 of 1985 against Mohammed for declaration of her title to the suit premises and for an injunction for protection of her possession of the suit premises.

4 The evidence in both the suits is common. The parties agreed that the evidence in the first suit be treated as the evidence in the second suit. The evidence consisted of depositions of Mohammed and Abdul, the plaintiffs in the first suit, Hamidabee, defendant no.1 in the first suit and her sister Amina. The evidence of Mohammed was completed on 11th April, 1985. He died on 10th October, 1985. Thereafter Abdul has continued the first suit. In the second suit, the heirs of Mohammed have been brought on record. During pendency of the present appeal Hamidabee and Sayyad expired and their heirs have been brought on record.

5 On appreciation of the evidence, the trial court held that Mohammed had failed to establish that Hamidabee was the licensee in respect of the suit premises and that Hamidabee has succeeded in establishing that Mohammed had made an oral gift of the suit property to her. She had thus become owner of the suit premises. The trial court accordingly dismissed the first suit and decreed the second suit. The decree was carried in appeal to the District Court by Abdul. The District Court confirmed the findings of the trial court and dismissed the appeals. Thereupon Abdul filed the present second appeals.

6 The second appeals were admitted on 26th November, 1992 for considerations of grounds 16, 17, 24 and 25 as the substantial questions of law. The same read as follows:

“16 The Lower Courts failed to appreciate that no independent witness has been examined to prove the alleged gift and even the other two ladies Khairunnisa and particularly Vazirbi, who had looked after respondent no.1 for 8 to 12 years and brought her up as her mother died at earlier stages did not come forward to support the false case of gift.

17 The Lower Courts failed to appreciate that in case of oral gift and particularly when alleged donor has on oath denied the alleged gift and there are no other circumstances supporting such gift, the alleged oral gift cannot be said to have been proved.

24 The Lower Courts have not properly appreciate the Law of Gift under Mohamedan Law inasmuch as the donor had not relinquished or divested himself completely of all ownership and dominion over the subject of the gift and was continuing his control over the property and in fact there is no iota of evidence to show that defendant no.1 anytime exercised any power of ownership or dominion over the property.

25 The Lower Courts failed to appreciate that the gift under Mohammedan Law cannot be implied but it must be express an unequivocal and the intention of the donor must be demonstrated by his entire relinquished of the thing given and the gift in null and void when the donor continues to exercise any act of ownership over it.”

7 The undisputed facts of the case are that Mohammed was the owner of the suit premises as also the building in which the suit premises are situate. Hamidabee returned to Kalyan in the year 1963 and started residing with her father. A year thereafter i.e. in the year

1964, Sayyed also shifted to Kalyan, after which Mohammed had accommodated both in the suit premises. In the year 1979, Mohammed had served notice upon Hamidabee calling upon her to vacate the suit premises. In her reply to the notice, Hamidabee claimed that Mohammed had made an oral gift of the suit premises to her. Later Mohammed by the registered gift-deed, gifted the suit premises to Abdul.

8 The only disputed fact of the case is of oral gift (Hiba) of the suit premises by Mohammed to Hamidabee. If the fact of oral gift stands established by the evidence on record, the first suit would be liable to be dismissed and the second suit liable to be decreed. Needless to state, otherwise the first suit would be liable to be decreed and the second suit liable to be dismissed. As has been noted by the trial court, the three essentials of the valid Hiba are : i) A declaration of gift by the donor, ii) acceptance of the gift, express or implied by or on behalf of the donees and iii) delivery of possession of the subject of gift by the donor to the donee. The transfer by Hiba can be said to be established only on establishment of all the three essentials. The onus of establishing the facts relating to the three essentials of Hiba is entirely upon Hamidabee, who has alleged it. In the circumstances, the pleadings and evidence by Hamidabee on the questions of oral gift assume importance.

9 The pleadings of Hamidabee as regards Hiba are at two places i) in her written statement filed in December, 1980 to the first suit and ii) in the plaint in the second suit filed six years thereafter. The pleadings in the written statement read as follows :

“After defendant no.2 came to reside in Kalyan, the plaintiff gave to the defendants room no.1 on the northern side of the suit premises along with the adjacent place having toilet and reside independently and at that time the suit premises is gifted to defendant no.1 by the plaintiff. The said information was given to the relatives and the neighbours. With the said right, the property is given to the defendant and the defendant has accepted the same. The said transaction was done orally and the defendant became the owner of the same as per the provisions of Mohammedan Law.”

The above case is seen to have been improved in the plaint in the second suit. The improved pleadings read as follows :

“The plaintiff being daughter of the defendant, the defendant had declared in front of the plaintiff, her husband and other relatives of the defendant and neighbours that he gifted the said property to the plaintiff and with same right he has given the possession to the plaintiff and as such as per Mohammedan Law, the plaintiff has become the owner of the suit property.”

10 The pleadings of Hamidabee quoted above show that in the written statement to the first suit, Hamidabee had made absolutely bald statements that after Sayyed came to reside at Kalyan,

Mohammed gifted the suit premises to her. The transaction was done orally and information of the transaction was given to the relatives and neighbours. The names of the persons present at the time of announcement of gift were not mentioned. This version is improved in the plaint in the second suit to say that there was post-gift declaration made by Mohammed in the presence of Hamidabee, Sayyed and “other relatives” of Hamidabee and the neighbours.

11 When it comes to her evidence, Hamidabee has not only made further improvements to her case but has also departed to an extent from the pleadings. From the post-gift announcement of the gift, she moves on to witnesses to the gift. In her examination-in-chief, she stated for the first time that some persons were present at the time of gift and names them. Her evidence is :

“My father told me that he would gift away the property and I with my husband should reside there in. My father accordingly gifted to me the tenement no.1 with open ground of the suit chawl. That gift was oral and it was declared in the presence of my aunt Smt.Khairunissa (father's sister), my sister Amina and one Smt. Vazir Bi. The said Vazir Bi maintained me after the death of my mother. The neighbours also knew this fact of gift.”

Her Cross-examination adds names of some more persons as witnesses of the oral gift. The relevant evidence in cross-examination reads as under:

“In 1964, my father told me that he gifted away the suit premises to me. I do not know the day and month when he disclosed his intention”.

“Abdul Cyclewalla, Hamid Cyclewalla and Abdul Rehman were present when my father told me his intention of gift. They all are dead. They were not the neighbours. I do not know the name of the neighbour who were called by my father at the time of gift.”

“At the time of gift, my both sisters were present. I will examine both of them in this suit. I do not wish to examine the neighbours who were present at the time of gift.”

12 The above evidence of Hamidabee being beyond her pleadings cannot be accepted. Her case in the pleadings was that after the gift of the suit premises, Mohammed had made announcement of it to the neighbours and relatives. But her evidence is that the gift was made in the presence of some relatives. Further Hamidabee is clearly not a truthful witness and her evidence cannot be accepted without corroboration.

13 There is one more reason why the improved version in the evidence of Hamidabee needs to be discarded. Perusal of the cross-examination of Mohammed, the key witness shows that this case in evidence was not entirely put to him by way of affording him an opportunity of explaining the same or give evidence in rebuttal. The

suggestions given to Mohammed on the case of Hamidabee as reflected from his cross-examination are as follows:

“It is not true that I have gifted third room in suit property to Jamila. It is not true to say that I had admitted before a members of our communities that I have gifted suit premises to Hamida”

“It is not true to say that this gift was made in the presence of Vajirbi and other sisters, and in presence of Khairunissa. It is not true to say that in their presence, the possession of this room was given to her. It is not true to say that this gift was made in the year 1963. It is not true true to say that due to this reason, she told defendant no.2 to come to Kalyan for permanent residence.”

14 It is well established position in law that putting one's essential and material case in cross-examination of the other side is neither an empty formality nor a mere technical rule of evidence. It is the rule of essential justice. It prevents surprise at trial and miscarriage of justice. The Division Bench of Calcutta High Court in it's decision in A.E.G. Carapiet vs. A.Y. Derderian, reported in A.I.R., 1961, Calcutta, page 359 holds so at paragraph 10 in following words:

“10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of

essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf, the cross-examination is being made comes to give and lead evidence by producing witnesses, it has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regards to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.”

The further elaboration at paragraphs 11 and 12 reads as under :

“11. On this point, the most important and decisive authority is Browne v. Dunn, reported in (1893) 6R 67. It is a decision of the House of Lords where Lord Herschell, L.C., Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report observed : “Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that

imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses”.

12. Lord Halsbury, the other member of the House of Lords, at page 76 of the same report: “My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind, nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

15 Identical view was taken by the Apex Court in Sarwan Singh vs. State of Punjab, reported in 2003 Criminal L.J., page 21. by

quoting with approval the above decision of Calcutta High Court. The relevant observations at para 8 are :

“8. Incidentally, in early nineties, terrorist activities were on peak in the border districts of Punjab and it has practically been axiomatic truth in the area in question that no-one would in fact come out of the residential houses after dusk unless performed at 3' O clock in the morning. There exists no other evidence nor even there being any suggestion of existence of any other factor for such per-forced outing at 3 am. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. A decision of the Calcutta High Court lends support to the observation as above. (See in this context AEG Carapiet vs. A.Y. Derderian, AIR 1961, Calcutta 359 (P.B. Mukherjee, J. as he then was)]”

16 The Division Bench of our High Court has also taken the same view in Hindustan Spinning and Weaving Mills Limited, Mumbai vs. Hindustan Crown Mills Siddhivinayak Kamgar Karmachari Sangharsha Sanghatana and others, reported in 2007(5) Maharashtra Law Journal, page no.801.

“84. The law in this behalf is clear. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in the cross-examination, it must follow that he believed that the testimony could

not be disputed at all. It is wrong to think that this is essentially a technical rule of evidence. It is rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice because it gives notice to the other side of actual case that is going to be made out when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do while cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness has any share. It he asks no question with regard to this, then he must be taken to have accepted the opponents case in its entirety. (See A.E.G. Carapiet vs. A.Y. Derderian, AIR 1961 Cal. 539; Sarwansing vs. State of Punjab, 2003 (1) SCC, 240)”

17 Applying the above principle to the facts of the case, it must be held that the evidence of Hamidabee on the oral gift being witnessed by Abdul Cyclewala, Hamid Cyclewala and Abdul Rehman and some neighbours deserves to be discarded for not putting that to Mohammed.

18 Hamidabee has examined her sister, Amina to support her evidence, but the evidence of Amina suffers from the same infirmity i.e. of vagueness. The relevant portion of her evidence reads as under:

“My aunt Vazirabi and Abdul Cyclewala were present at the time of pronouncement of gift. My

aunt Khairunisa and her husband, Abdul Rehman were also present at the time of gift. My father had expressed his intention to gift away one tenement to me and another one to my younger sister, Jamila after the decision of a suit against tenants. The neighbours were knowing the fact of gift.”

“My youngest sister, Namila was present at the time of pronouncement of gift. There were some other persons besides my relatives at the time of gift.”

“That time I was residing at Dasai. My aunt Khairunisa was residing at Bandra. It is not true that I myself and Khairunisa had not come to Kalyan in that period (the period when deft. no.1 was residing with deceased plaintiff). My father was a religious minded and honest man.)”

19 Even if the infirmities in the evidence of Hamidabee are ignored and the evidence is accepted as it is, it would still be difficult to hold that she has established the existence of Hiba. Since the gift is an oral gift, the evidence of Hamidabee ought to have contained particulars of the oral gift i.e. the date, time and place of declaration of the oral gift. Oral gift of immovable property though provided for in the Mohammedan Law, cannot be easily inferred. There ought to be express, clear and unequivocal declaration of gift by the donor and equally express and clear acceptance by the donee. Both are lacking in the case on hand.

20 Mr. Kazi, the learned advocate for the appellant points out that there is not even an iota of evidence that Hamidabee had exercised any right of ownership or dominion over the suit property. There is also nothing to show that Mohammed had at any point of time, divested himself completely of the ownership of the suit property. There is substance in the submission of Mr. Kazi.

21 Mr. Mandlik for Hamidabee draws attention to the statements in deposition of Hamidabee at paragraph 3 of her examination-in-chief to submit that she had in fact exercised right of ownership. The statements referred to by Mr. Mandlik read as follows:

“3. I was giving the tax in respect of tenement no.1 to my father. The suit premises is provided with water and electricity. The electric meter stands in my name since 1980. Before that, it was in the name of my father. For all the three tenements that is the only meter. Now I have not got the separate electric meter for my tenement. I use to maintain and repair the suit premises since 1964. I made the flooring to wada and repaired lavatory. I constructed mori and replaced the original roof made of bamboos. My father never made any protest against this. The lavatory is kept common for myself and the tenements at the say of my father.

The above statements in evidence indicate that the dominion was in fact with Mohammed.

22 Hamidabee thus failed not only to establish the declaration of gift by Mohammed but also its acceptance by her. Since she had already been residing in the suit premises, there was no question of her being put in possession of the premises. But then there had to be some cogent evidence of continuation of that possession in acceptance of the gift. This could be established only by Hamidabee exercising her right as the owner of the suit premises. It is already seen above that there is no such evidence. In fact, the dominion over the suit premises was completely enjoyed by Mohammed and after him by Abdul, in whose name the property stands transferred and who has been paying the taxes in respect of the suit premises.

23 The trial court as well as the District Court are seen to have adopted a strange way of appreciating the pleadings and the evidence led by the parties in support of their pleadings. They have laid emphasis on Mohammed establishing his case of gratuitous licence against Hamidabee. As already seen earlier, in view of the admitted facts that Mohammed is the owner of the suit property and that Hamidabee had returned to him a couple of years after her marriage and had started residing with him, any residence by her and subsequently of her husband of the suit premises would obviously be as gratuitous licensee, unless they established a specific independent right to occupy the suit premises. In the circumstances, there was no need for Mohammed to establish that Hamidabee and Sayyed were gratuitous licensees in respect of the premises. The prime issue in the

two suits was whether Mohammed had made an oral gift (Hiba) of the suit premises to Hamidabee. Both the courts below have found certain discrepancies and inconsistencies in the evidence of Mohammed to opine that he is not a trustworthy witness. The courts below have appreciated the evidence of Hamidabee as against such opinion of the evidence of Mohammed. But at the same time both the courts have noted that several statements in respect of material facts made by Hamidabee in her evidence are neither corroborated by any other witness nor by any other material on record nor supported by any circumstance. These infirmities, however, are seen to have been brushed aside treating them as insignificant. The courts below have also failed to notice that the statement in evidence of Hamidabee as regards the oral gift is absolutely vague and without any particulars whatsoever.

24 The trial court at paragraph 26 of its judgment and decree holds that the evidence produced by Hamidabee shows that the owner of the suit premises i.e. Mohammed had made a pronouncement of gift of the suit premises in favour of Hamidabee and she had immediately taken the possession of the premises and accordingly accepted the gift. Thus, according to the trial court, all the three essential ingredients of Hiba have been established. The appreciations of the evidence of Hamidabee including the deficiencies therein at paragraphs 20 and 22 of the trial court judgment read as follows:

“Her version in this respect has been fully corroborated by D.W.2, Amina. She asserted that the deceased plaintiff, Mohammed Isaq in her presence pronounced that he gifted the suit premises to defendant no.1. No doubt, she could not remember the date, month and year of such pronouncement, but she has stated that about 2-3 years after marriage, defendant no.1 came to Kalyan and resided with the deceased plaintiff for about 1 and ½ months and then went to reside in the suit premises after the alleged gift. It is thus obvious from her statement that the alleged gift was pronounced somewhere around 1964. It may not be disputed that the memory of each person is not so strong and to forget the date or month or year is quite natural. With this presumption, I appreciate her evidence as trustworthy.”

“It is not disputed that the suit property stood in the name of deceased plaintiff in corporation record till it got mutated in favour of plaintiff no.2 after the alleged registered gift deed dated 3rd November, 1979. Hence, it is natural that the taxes were paid in his name. It is also natural that the taxes were paid in his name. It is also not dispute that except bare words, there is no evidence to corroborate the defendant that defendant no.1 paid 1/3 tax amount imposed on the suit property. But at the same time, it may be recalled that she has repaired the house and maintained in accordance to her own volition. Hence, I need not much impart to the absence of corroborative evidence regarding payment of tax.

In the opinion of the trial court, no mutation of name in the various records in respect of the suit property is necessary to complete the transfer of possession in the case of gift.

25 After the above appreciation of the evidence on record, the trial court proceeds to consider “gift of lavatory”, which was not even the case of Hamidabee. At paragraph 28 of its judgment, the trial court holds that the gift of lavatory may be termed as gift of 'Mushan' as defined in Section 158 of Mohammedan Law. It notes admission by Hamidabee in her evidence that the lavatory in question is being used jointly by her along with the tenants of Mohammed, but holds that Mohammed had made gift of the right to use the lavatory and in view of Section 159 (commentary) of Mohammedan Law, this gift is valid.

26 Thus the entire appreciation of pleadings and evidence by the trial court is perverse and not in accordance with law.

27 As regards appreciation of evidence by the District Court, perusal of the impugned judgment and order of the District Court shows that it is in the same lines as that of the trial court. The District Court has also first considered the evidence of Mohammed and his witness and found infirmities therein. Though, it has noted the infirmities in the evidence of Hamidabee, has brushed the same aside. The District Court has not even discussed the evidence of Hamidabee on the oral gift to find out whether the gift has been established by the

evidence. It has merely considered the evidence as regards the incidents of ownership. It noted that Hamidabee baldly deposed that she had carried out necessary repairs to the suit premises at her own expense and holds that circumstance in her favour. As regards the suit premises continuing to be in the name of Mohammed and he paying taxes in respect of the house, the District Court accepted the evidence of Hamidabee and that she was contributing 1/3rd of house tax by making the payment to Mohammed. As regards mutation of the records after the gift, the observations of the District Court read as follows:

“She deposed that there was some dispute between her father and a tenant living in one of the room of that house and therefore, the house was not mutated. It is true that there is no evidence to corroborate the testimony of Hamidabee about the payment of taxes, but it is admitted fact that there was some kind of litigation between Mohammed Ishaque and one of his tenant. Taking into consideration the relationship, it is possible that Hamidabee did not take any step to get the house mutated in her name”.

These observations do not fall in the category of a probable view of the matter on appreciation of evidence. The findings of both the courts below are clearly perverse and cannot be sustained. The appeals are therefore allowed. The impugned orders are set aside. The first suit i.e. Regular Civil Suit No.295 of 1979 is decreed in terms of prayer clauses (a), (b), (c) and (d). As regards the prayer clause (c), the trial

court shall hold the necessary enquiry for determination of the mesne profits. The Second Suit i.e. Regular Civil Suit No.372 of 1985 is dismissed.

(Smt. R.P. SondurBaldota, J.)