

*HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+C.C.C.A.No.96 of 2006

% Dated 02.12.2016

Between:

G.N.Naidu and another ... Appellants

and

\$ Mohd. Farook Ali Khan ... Respondent

! Counsel for the appellants : Sri K.Sankarayya,

^ Counsel for respondent : Sri Mahmood Ali

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>HEAD NOTE : ---

? Cases referred: :

1. (2014) 6 ALT 40.1 & 2(DNSC)= (2014) 8 SCJ 146
2. (2014) 10 SCC 459
3. AIR 1927 Cal 197
4. AIR 1976 SC 1541
5. AIR 1916 Allahabad 351
6. AIR 1968 Patna 481
7. 1880(3) Allahabad 266
8. AIR 1995 SC 1205=1995(3) SCC-693
9. AIR 2011 SC 1695=2011(5) SCC 654
10. AIR 1972 Kerala 27
11. AIR 1984 Gowhati 41
12. AIR 1973 Gau 105
13. AIR 1922 PC 281
14. AIR 1964 SC 275
15. AIR 1932 PC 13
16. AIR (2009) 6 SCC 160
17. AIR 1962 AP 199
18. AIR 1954 SC 526(1)
19. AIR 1965 SC 1506
20. 2003(8)-Supreme Today-194 at 196
=AIR (2003) SC 4548=2003(8) SCC-752
=2004(1) ALT 21.2641-26.2(DNSC)
21. (2002) 7 SCC 559
22. 2009 (10) SCC 84=AIR 2009 SC (Supp) 2897
23. 2011 (12) SCC 268
24. 2008 (15) SCC 610
25. AIR 2009 SC 1177
26. (2007) 6 SCC 737



IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

C.C.C.A.No.96 of 2006

Between:

G. N.Naidu and another ... Appellants

and

Mohd. Farook Ali Khan ... Respondent

DATE OF JUDGMENT PRONOUNCED: 02.12.2016

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
may be allowed to see the Judgment? Yes/No

2. Whether the copies of judgment may be
marked to Law Reporters/Journals Yes/No

3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes/No

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.No.96 OF 2006

JUDGMENT:

This appeal is preferred by the defendants 1 and 2 by names G.N.Naidu and B.Krishna Murthy Naidu, aggrieved by the decree and judgment dated 28.02.2006, passed by the X Additional Chief Judge(Fast Track Court) City Civil Court, Hyderabad in O.S.No.30 of 2002, in favour of the sole plaintiff by name Mohd. Farooq Ali Khan.

2-i. The suit O.S.30 of 2002 was filed by the plaintiff for the reliefs of recovery of possession of the suit schedule property by evicting the defendants 1 and 2 and for recovery of damages of Rs.3,68,315/- (Rupees three lakh sixty eight thousand three hundred and fifteen only) from 25.09.1998 to 30.06.2001 and further Rs.46,500/-(Rupees forty six thousand and five hundred only) from 01.07.2001 to 25.09.2001 totaling of Rs.3,84,815/-(Rupees three lakh eighty four thousand eight hundred and fifteen only) and also for recovery of future damages at Rs.15,000/- (Rupees fifteen thousand only) p.m. from the date of suit till delivery of possession of suit schedule property with interest at 18%p.a. and for costs and such other just reliefs. The suit was decreed granting the main relief for possession giving time of two months to the defendants to vacate, else the plaintiff to recover through process of Court and by granting damages at Rs.5,000/- p.m. from 25.09.1998 to the date of suit 25.09.2001 for total of Rs.1,70,000/- with interest at 6%p.a. and future damages at the rate of Rs.15,000/- per month from the date of suit till date of delivery of possession of the suit schedule property to the plaintiff with interest at such rate and with suit costs of Rs.1,57,750/-.

2.ii. The plaint schedule property consists of northern cellar portion bearing Municipal Nos.7-1-621-B, 7-1-621-B/1 and 7-1-621-B/A/1

with plinth area of 3200 (sic.3300) sq.feet of Ameer Chambers, along with undivided half share in the land admeasuring 118.66 sq.yards out of 1/3rd area of 356 sq.yards situated at Ameerpet, Hyderabad, bounded by North: Ameer Estate Complex, South: Southern cellar portion belonging to Mahd. Musthafa Ali-(plaintiff`s younger brother), East: Satya Sai Complex and West: 20 feet passage and the complex owned by plaintiff.

2.iii. The factual Matrix of the lis in nutshell is that:

iii-a. As per the plaint, the land in Sy.No.26 admeasuring 6,600 sq.yards originally belongs to late Smt. Rahamat Khatoon, (mother of plaintiff and his brother) who in her lifetime orally gifted said extent by way of Hiba(gift), dt.01.08.1971 in favour of plaintiff and his brother equally to hold each half share and delivered possession to them and consequently the plaintiff became absolute owner of the northern half comprising 3300 sq.yards out of the total 6600 sq.yards in Sy.No.26 of Ameerpet (plaint schedule property) corresponding to TS No.8, ward No.5, Block No.A. It is also the case of plaintiff that their mother later executed memorandum, dt.19.01.1972, to the oral gift, dt.01.08.1971. The plaintiff`s northern half 3300 sq.yards is abutting to Mumbai National Highway and plaintiff constructed on the northern corner of the extent, covering an area of 356 sq.yards consisting of cellar, ground and first floor. However, his brother-Musthafa, to whom their mother though gave southern half 3300 sq.yards out of the total 6600 sq.yards, by misrepresenting, got mutated the cellar portion of the plaintiff in his name while the plaintiff and his family were residing in United States and were visiting once in six months or the like to look after the properties. On coming to know of it by plaintiff, when asked said Mustafa, he submitted an affidavit acknowledging ownership of the

plaintiff and pursuant to which, the municipal authorities mutated said northern cellar portion in the name of plaintiff and plaintiff also paid property tax. However, taking advantage of the plaintiff's absence and without any information to the plaintiff, his brother Musthafa in collusion with and by extracting amounts from 1st defendant set up the 1st defendant, who claims to be the Managing Partner of M/s Regency Tiles, to establish the stockiest point of Regency tiles and also retail business in the suit premises of plaintiff by unauthorized occupation. Later, inspite of demands by the plaintiff to vacate the premises from their unauthorized occupation, they went on dodging the matter without vacating which made the plaintiff to issue legal notice, dt.10.04.2001 demanding the defendants to vacate by end of June, 2001 and to pay damages for unlawful occupation for the past three years at Rs.10,000/- per month and future damages from 01.07.2001 at Rs.15,000/- p.m. till date of delivery of possession. The defendants in their reply notice, dt.28.06.2001 set up a false claim of ownership without any right with active collusion of plaintiff's brother and also one K.Sheshagiri Rao, though the plaintiff never transferred the suit property to anybody including to the defendants and the plea set up by the defendants over the suit schedule property is false and with no sort of right and thus they are liable for the suit reliefs.

iii-b. The written statement of 2nd defendant adopted by 1st defendant is while denying the plaintiff's suit claim and its entitlement; with the contest that plaintiff through his G.P.A. Muhammad Ali and the Plaintiff's brother Musthafa (with a claim that their mother conveyed the land to the extent of 6600 sq.yards by Hiba to them), entered into a partnership agreement, dated 09.12.1981 with the defendants and one K.Sheshagiri Rao and Y.Sridevi. Clause 9 of said partnership agreement

speaks that entire property of 6600 sq.yards becomes the firm's
property and plaintiff and his brother Mustafa will get 11,500 sq.feet
in the ground and first floors of the commercial complex that was to
be constructed by Prabhu builders. As there was some delay in
completing the constructions and delivering possession to the plaintiff
and his brother of their respective extents, said builder paid at
Rs.10,500/-per month to the plaintiff and his brother and they have
received said amount and passed receipts. Same is very clear that
plaintiff and his brother Mustafa thrown joint immovable property given
by their mother by gift into the partnership firm's property by agreeing
to take part of the constructed area and to retire from the firm. Since
the possession of part of constructed area was delivered to the plaintiff
and his brother by the continuing partners, the plaintiff and his brother
who came in to possession and enjoyment of their share, ceased to be
the owners of remaining property, which is that of the partnership firm
in which the suit property forms part. It is further contended that in the
cellar, there is a restaurant by name "Golden Cave Bar and Restaurant"
which is in the exclusive possession of K.Sheshagiri Rao and also Rainbow
stockiest point of Regency Tiles which is in the exclusive possession of 1st
defendant and the vacant land located on eastern side of the complex
which is also the exclusive property of the firm, after dissolving the firm
devolved exclusively upon 1st defendant. Out of said vacant land, after
leaving road widening and other encroachments comes to 3160 sq.yards,
K.Sheshagiri Rao agreed to give an extent of 750 sq.yards which is the
southern side portion of the vacant land to one Dr.Suresh, pursuant to a
compromise decree in O.S.No.1561 of 1995 on the file of the Court of IV
Senior Civil judge, City Civil court, Hyderabad. In said suit, plaintiff
herein was 3rd defendant and he did not even oppose the compromise

decree between K. Sheshagiri Rao and Suresh supra in respect of the 750 sq.yards and thereby the plaintiff lost his right to claim any ownership in the suit property and the plaintiff is also estopped by conduct to claim ownership and to dispute the 1st defendant's ownership and title to the suit property on the basis of partnership and deed of dissolution. The further contest is that, plaintiff's brother Mustafa so far as his interest concerned, executed document in favour of 1st defendant withdrawing his claim over the property, whereas plaintiff wants to build up in the remaining vacant land in lieu of compensation for which 1st defendant did not agree. It is further averred that plaintiff and K. Sheshagiri Rao mutually agreed by compromise to construct complex with MCH sanction and pursuant to which, there was a development agreement between K. Sheshagiri Rao and plaintiff, however the plaintiff, by suppressing all the true facts of earlier partnership deed and its dissolution, wants to rely on so called development agreement. Thus plaintiff has no right, title and possession over the suit schedule property and he is not entitled to the suit reliefs and suit is liable to be dismissed.

3. From above pleadings, the following 4 issues and an additional issue were settled Viz.,-

- 1) Whether the plaintiff is entitled to recover possession of the suit property?
- 2) Whether the plaintiff is entitled to Rs.3,84,815/- towards damages together with interest as claimed?
- 3) Whether the plaintiff is entitled to mesne profits and if so at what rate?
- 4) To what relief? and

Additional issue

Whether the suit is barred by limitation?

4. In the course of trial, the plaintiff was examined as P.W.1 and placed reliance upon Exs.A.1 to A.29 viz; certified copy of Gift

confirmation Deed, dt.19.01.1972, certified copies of *affidavits*, true extracts of Assessment Register, Tax Passbooks issued by MCH, Municipal Tax receipts, Proceedings of MCH mutating the property, office copy of notice and acknowledgments and reply notice. On the defendants' side, both were examined as D.Ws.1 and 2 and placed reliance upon Exs.B.1 to B.49 viz; certified copy of GPA, dt.07.02.1975, receipts commencing from 15.03.1985 to 29.11.1991, certified copy of decree and judgment in O.S.No.1561 of 95, compromise memo in O.S.No.1561 of 95, letters addressed to Assistant Commissioner, proceedings of MCH, receipts issued by MCH, certified copy of plan, electricity bills, original copy of reconnection of electricity, original application submitted to Telephone Department, acknowledgment, certificate of registration in favour of M/s Rainbow Agencies, original certificate of registration, property tax receipts, *certified copy of deposition of plaintiff in O.S.No.4717 of 2000*, possession delivery receipts, plans showing the 'A' and 'B' schedule property.

5. After recording of evidence pursuant to the pleadings and issues supra to answer lis from hearing both sides, the trial Court decreed the suit claim of plaintiff to the extent indicated supra holding that, plaintiff is entitled to recover possession of the suit property to which the defendants have no right to resist and the documents including of O.S.No.4717 of 2000 filed by K.Sheshagiri Rao no way proved the contention of defendants.

6. It is impugning the same, present appeal is maintained by the defendants 1 and 2.

6.a). The contentions in the grounds of appeal impugning the trial Court's decree and judgment are that, the trial Court should have

dismissed the suit claim for ejectment without seeking relief of declaration from the defendants denied title of plaintiff to enable to recover possession of the suit property, that the findings of trial Court without proof of title over the suit property by the plaintiff are unsustainable even from the claim of himself and his brother got from their mother under oral gift that was not proved, particularly the memorandum Ex.A.1 of the alleged oral gift no where even mentioned the land covered by the suit properties to such a claim, that too, once the defendants pleaded arrangement for the construction entered with plaintiff and his brother and given part of built up area to them. It is also contended that, trial Court should have dismissed the suit claim, for plaintiff failed to prove what he alleged from Ex.A.17 notice of the specific property was fallen to his share in the partition with other donees of his mother's oral gift to the claim as absolute owner of the northern portion of land in Sy.No.26.

6.b). The further contest is that trial Court should have seen that plaintiff lost his exclusive title to the land in Sy.No.26 for said property belongs to the firm in which the plaintiff became one of partners as per the partnership agreement and the shopping complex constructed was thus part of the firm's property and in which the plaintiff received towards his share a part of the built up area and thereby cannot set up any exclusive title to or possession of the northern side cellar and therefrom defendants when set up exclusive right and possession by denial of plaintiff's right and title for the suit property. It is further contended that the trial Court from clear denial of title of plaintiff by defendants, committed a grievous error in not framing an issue as to the title of plaintiff and proceeded as if plaintiff is owner of the property and entitled to possession of the built up area since forming part of the

suit schedule property, without even considering whether he is entitled to recover possession without proof of his title and when he did not even construct the same. It is further contended that the trial court has been misguided itself in appreciation of evidence and in decreeing the suit claim of plaintiff, instead of holding that plaintiff and his brother who owned a total area of 6,600 sq.yards of land entered into a partnership with 2nd defendant and others for development of the area and for said purpose plaintiff executed power of attorney and as per the agreement between the parties, the partnership firm known as Prabhu builders constructed in the area and after completion of the complex, the plaintiff's share was given to him in addition to the periodical payments made for delay in completion of the built up area and plaintiff cannot take advantage of the non-availability of the original agreement, when plaintiff clearly accepted that he entered into agreement for development of the area with K.Sheshagiri Rao and in those circumstances the suit for recovery of possession is not maintainable unless it was established by the plaintiff that the suit schedule built up area fell to his share or that he was otherwise dispossessed unlawfully and for which even there is no pleading or proof.

The other contest is that the trial Court should have seen that another suit filed by the plaintiff in O.S.No.4717 of 2000, on the file of the IX Junior Civil Judge, for permanent injunction against K.Sheshagiri Rao and others is still pending and therefore, the suit filed seeking possession of the suit property simplicitor without declaration of title is not maintainable and also that in case of immovable property all claims regarding said property should be advanced in the same suit and it was not open to the plaintiff to file suits piecemeal with a view to get decrees in different suits in respect of same property, that in any event,

the trial Court should have seen that possession of the constructed area falling to their shares were delivered to the plaintiff and his brother Musthafa Ali Khan by the 2nd defendant and others who undertook to develop the area and thus plaintiff and his brother became the exclusive owners only for the constructed area delivered to them and thereby ceased to have any right, title or interest in the other area. The other contest is that the trial Court should have seen that there are claims of other persons who are not before the Court that have to be adjudged and they are even necessary parties, deliberately omitted to be added as parties with a view to enable the plaintiff to present a false picture and the suit is thereby liable to be dismissed on the ground alone.

6.c). The other contest is that the trial Court ought to have dismissed the suit claim on the face of an evasive reply by the plaintiff in his cross-examination that he had not filed the document revoking the power of attorney in his brother-in-law's favour and that he does not know whether his GPA holder entered into a deed of agreement on 09.12.1981 and further in his admission that he did enter into an agreement for the development of the property with K.Sheshagiri Rao. The other contest is that the trial Court should have seen that none of the documents filed by plaintiff would establish his title over suit schedule property or even that suit schedule property fell to his share after the property under Hiba was partitioned if any, for no pleading or proof if there was any partition, that too while holding no written document between the plaintiff and his brother showing partition and if so of any understanding of northern portion of 3,300 sq.yards fell to his share and the other to his brother's share. It is also the contention that Ex. Nos.A.1 to A.3 require stamp duty and registration and without which the marking of and relying upon those are inadmissible and

those cannot be looked into. It is also the contention that Exs.A.2 to A.16 are manipulated documents that was not properly appreciated. It is also the contention that mutation in municipal records does not confer any right to refer or rely in favour of plaintiff to claim title over the suit property or to hold in favour of plaintiff therefrom as owner, particularly when a look at the Exs.A. 14 to A. 16 letters addressed to MCH by plaintiff would clearly show that they are typed on 24.01.1997 in printed forms which were printed for the year 1980 onwards and therefore this suspicious circumstance would clearly establish that no legal rights can be conferred therefrom. The other contention is that the trial Court should have seen that Ex.B.1 establishes the fact of plaintiff appointed his brother as his agent and in that capacity the agreement was entered into and acted upon as is clear from the receipts Ex.B.2 onwards where payments were made in terms of clause of 9 of Agreement dated 09.12.1981 for specific periods as mentioned therein.

6.d). The learned counsel for the defendants/ appellants in the course of hearing, while reiterating the above sought for allowing the appeal by setting aside the trial Court's decree and judgment and by dismissing the suit claim in toto.

7. Whereas, it is the contention of the learned counsel for the plaintiff/ respondent in support of the trial Court's decree and judgment including in the appeal written submissions in this regard that when mother of plaintiff is absolute owner who made oral gift of various parcels of land in favour of plaintiff, his other brothers and sisters and executed Ex.A.1 as evidencing past transaction of said oral gift and the same is valid for no written gift is required much less any such written document requiring registration, and once recitals in the document also

conferring the entitlement of the suit premises by the plaintiff to
substantiate his claim for the northern portion of 3300 sq.yards site,
which the plaintiff is entitled under the oral gift and for part of which is
the suit claim; thus the appeal contentions as well as the defence in the
trial Court of the defendants are untenable and Ex.A.17 notice of
plaintiff dt.10.04.2001, mentions that the defendants are encroachers in
his property as owner by referring to the oral gift that was later
acknowledged under Ex.A.1, and what they replied under Ex.A.21 while
not disputing the plaintiff's mother is owner of the property is by setting
up a deed of partnership with plaintiff and his brother to give 11500
sq.feet built up area to the plaintiff and his brother respectively after
the construction and by virtue of which plaintiff was allegedly delivered
the respective extents to say the defendants are owners for the
remaining. It is also the contention of respondent/ plaintiff that the so
called compromise between K.Sheshagiri Rao and Suresh in O.S.No.1561
of 1995 under Ex.B.25 for 750 sq.yards on southern side of vacant land is
false, the plaintiff was even impleaded therein as 3rd defendant and
Mustafa as 2nd defendant, the suit against 3rd defendant-(plaintiff herein)
once ended in dismissal and Mustafa even remained exparte, without
regular trial and when the suit was practically withdrawn and from
which the suit was dismissed against him with costs and thereby said
compromise decree has no bearing on the so called partnership between
2nd defendant, Sridevi and K.Sheshagiri Rao and the approved plan from
MCH if any obtained pursuant to which in the name of Prabhu Builders,
cannot be given credence as the firm shown floated for the purpose of
development of the property and there is no proof regarding any extent
delivered to the plaintiff and his brother or they acknowledged any such
extents and walked out from alleged partnership, much less any proof of

entering of partnership, for the alleged document is not before the Court and there is no even any firm registered. It is also the contention that the so called payment receipts are false and forged and the defendants not even sought for any expert opinion for comparison of the alleged signatures and the Exs. B.1 to B.22 are only Photostat copies and which do not make them as partners even under Section 6 of the Act and the so called power of attorney is untrue for plaintiff never executed any G.P.A. and thereby sought for dismissal of the appeal.

8. Heard both sides at length as referred supra and perused the material on record including the written arguments of the Respondent-Plaintiff and the decisions placed reliance by both sides.

9. Now the points that arise for consideration in determining the appeal are formulated as follows:-

1. Whether the plaintiff's mother by name Smt. Rahamath Khatoon was owner and therefrom made any Hiba(oral gift) in favour of the plaintiff and his brother Musthafa and other issues of her if any and whether there is any acknowledgment of said oral gift by her later under Ex.A.1 and if so whether it is requiring registration and otherwise duly proved?
2. Whether the plaintiff and his brother got the property of 6600 sq.yards that belongs to the mother by virtue of the Hiba(oral gift) or otherwise, and if so whether jointly or for specific extents and if jointly, whether there was any subsequent partition and division between them to claim the northern half by the plaintiff towards his share in claiming the same or otherwise same gifted specifically to the plaintiff to claim exclusive right therein showing the plaint schedule property as part of it for seeking relief of possession with other reliefs?
3. If so, whether there is any G.P.A. executed by the plaintiff in favour of his brother-in-law under Ex.B.1 and if so in respect of what property and whether it is specifically for the plaint schedule property or undivided interest if any?
4. Whether there is any agreement for development by plaintiff through the G.P.A. and plaintiff's brother with defendants and two more non-parties to the suit by names- K. Sheshagiri Rao and Sridevi and if so with what proof for construction in said land by the firm and with what terms and at what share to the plaintiff, leave about of his brother and if so with what consequences to the suit claim including on non-impleadment

of the two more non-parties to the same by names-K. Sheshagiri Rao and Sidevi and the consequence of the compromise decree and judgement from compromise memo in the suit O.S.No.1561 of 1995 on the file of the Court of IV Senior Civil judge, City Civil court, Hyderabad between K.Sheshagiri Rao and Suresh supra in respect of the 750 sq.yards and to which the plaintiff herein was party-3rd defendant having not opposed the compromise and not disputed the compromise decree; so also from the plaintiff's brother Musthafa so far as his interest concerned, executed document in favour of 1st defendant withdrawing his claim over the property covered by the suit, leave apart another suit filed by the plaintiff in O.S.No.4717 of 2000, on the file of the IX Junior Civil Judge, for permanent injunction against K.Sheshagiri Rao and others?

5. If not, whether the defendants got any sort of right over the suit property to oppose the suit claim of plaintiff, if so, on what basis, so also in impugning the trial Court's decree and judgment to interfere by this Court while sitting in appeal and to what extent?

6. To what result?

10. Before coming to the facts, so far as the legal position regarding the oral gift concerned:-

11. In *V.Sreeramachandra Avadhani died by L.Rs. Vs. Shaik Abdul Rahaman*¹, it was held in relation to the Hiba(gift) in Muslim law that gift be unconditional and any conditions imposed or expressed are void to say the gift is however valid but conditions only void, for gift of the corpus has to be unconditional. It is observed that transfer of corpus refers to change in ownership, whereas, the transfer of usufruct refers to change in right of use and enjoyment, else effect by donee in favour of appellant by transfer of the corpus is thereby valid.

12. In the latest expression of the Apex Court in *Resheeda Khatoon Vs. Ashiq Ali*², it was held referring to Section 123 and 129 of the T.P.Act and Sec.17 of the Registration Act to the *donations mortis cause* in Mahomedan Law claimed the gift is made orally that was later reduced to writing, same no way requires registration by referring to some of the expressions supra, particularly of Calcutta High Court in

¹ (2014) 6 ALT 40.1 & 2(DNSC)= (2014) 8 SCJ 146

² (2014) 10 SCC 459

Nasib Ali Vs. Wajed Ali³, of the Apex Court in Boya Ganganna Vs. State of A.P.⁴, the Allahabad High Court in Kesam Ilahi Vs. Sharfuddin⁵, of the Patna High Court in Bishwanadh Gosain Vs. Dulhin Lambhani⁶ and Kamarunnisa Bibi Vs. Hussaini Bibi⁷ and also the earlier expressions of the Apex Court in Mahaboob Sahab Sultan Vs. Syed Ismail⁸ and Hafeeza Bibi Vs. Shaikh Farid (dead) by LRs⁹ and of the Kerala High Court in Makku Rawther's Children: Assan Ravther Vs. Manahapara Charayil¹⁰, of the Guwahati High Court in Hesabuddin Vs. Md. Hesaruddin¹¹ referring to earlier expression in Jubeda Khatoon Vs. Moksed Ali¹², and of the Privy Council in the case of Mohammad Abdul Ghani Khan vs Fakhr Jahan Begam¹³ referring to *Syed Ameer Ali's Mahomedan Law supra* by approving the statement made therein, held the three conditions necessary for a valid gift under the Mahomedan law are (a) *Manifestation of the wish to give on the part of the donor*; (b) *the acceptance of the donee, either impliedly or expressly* ; and (c) *the taking of possession of the subject-matter of the gift by the donee, either actually or constructively*. If the three conditions are essentially there, the oral gift is complete and irrevocable and for that the donor may record transaction of the oral gift later by reducing in writing as an acknowledgment of prior oral gift. It is to say in case of contemporaneous transaction even registered if not satisfied the three pre-requisites does not take shape of a valid gift. Thus the three essentials of gift under Mahomedan law are declaration of the gift by the donor openly, acceptance of the gift by the donee and delivery of

³ AIR 1927 Cal 197

⁴ AIR 1976 SC 1541

⁵ AIR 1916 Allahabad 351

⁶ AIR 1968 Patna 481

⁷ 1880(3) Allahabad 266

⁸ AIR 1995 SC 1205=1995(3) SCC-693

⁹ AIR 2011 SC 1695=2011(5) SCC 654

¹⁰ AIR 1972 Kerala 27

¹¹ AIR 1984 Guwahati 41

¹² AIR 1973 Gau 105

¹³ AIR 1922 PC 281

possession, for nothing mandates in writing to validate the same; thus every gift fulfilling the three essentials makes the gift complete and irrevocable as also stated by the author Mullah in principles of law, 19th Edition page 120, Asafaafizee in outlines of Mahomedan Law, 5th Edition(revised) at page 182 and the passage from Mullah as also quoted with approval in the previous expression of the Apex Court in Hafeeza Bi supra. The Apex Court in the recent expression in Rasheeda Khatoon supra observed further that all the three Judge Bench expressions of the Apex Court in Valia peedi Kakkandi, Katheessa, Umma and others Vs. Pathakkallar Narayanath Kunhamu died by L.Rs.¹⁴ observed on the question whether the gift by husband to his minor wife accepted by mother of the minor on behalf of minor as valid, referring to Hedaya(DIG)P-508 quoting from Inayaha of Prophet, a gift is not valid unless possessed, that gift referred valid on tendering acceptance and seisin. In this regard, it is observed that possession is either actual or constructive and with which unless a minor shows attained discretion to accept as donee, in the absence of showing representing by guardian to accept, even registration of document, in the absence of required acceptance, it is not a valid gift. For that conclusion also referred to the expression of the Privy Council in Sidiq Ali Khan Vs. F.J.Begum¹⁵ where it was held even mutation of name not necessary, but for acceptance and delivery of possession. It was concluded therefrom in Rasheeda Khatoon supra of 2014 by the Apex Court on facts that no physical possession or formal entry even necessary in the Mahomedan law for gift of immovable property, where donor and donee both residing in the premises at the time of gift; however in such a case, the gift may be completed by some overt act by donor indicating clear

¹⁴ AIR 1964 SC 275

¹⁵ AIR 1932 PC 13

intention on his part to transfer and to divest himself of all control over the subject matter of the gift and its possession as defined in Section 394 of the Muslim law by the author Tyabji, that a person is said to be in possession of a thing or of immovable property, when he is so placed with reference to it that he can exercise exclusive control over it, for the purpose of deriving from it such benefit, as it is capable of rendering and/or as jointly derived from it. From the aforesaid, it is vivid that possession can be shown not only by enjoyment of the land or premises in question but also by asserting by the one who has the actual control over the property. Ultimately it was held on the facts that, plaintiff could not prove either actual or constructive possession and thereby the gift is not complete and once such is the case, the issue of registration does not arise.

13. In fact, the Apex Court in the earlier expression in *Abdul Raheem Vs. Sk. Abdul Zabaar*¹⁶ held that under Mahomedan Law, gift of the property in possession of tenants of the donor(father) by registered document to the donee(son) where mutation in revenue record also complied and effectively made and it is also shown no doubt even earlier the son on behalf of the father as agent(which is prior to the gift deed in question) was collecting rents from the tenants, the subsequent collecting rents by the donee when shown in his own right for all practical purposes, it can be said there is a delivery of constructive possession to the donee, besides the registered gift recitals of delivery presumes genuineness to shift the burden on tenants to disprove same.

14. The sum and substance of all the expressions are that oral gift is valid, provided there is the open declaration by donor of the intention to gift and its acceptance by donee and delivery of possession (physical

¹⁶ AIR (2009) 6 SCC 160

or constructive), as the case may be, and once there is a document even subsequent to it merely acknowledging the same, it no way requires registration for mere acknowledgment of past transaction, however, from the latest expression in Rasheeda Khatoon supra of 2014, there is an observation of a contemporaneous one requires registration, though, from the earlier expression in Hafeeza Bibi supra of 2011, the contemporaneous gift also no way requires registration. The latest expression of the Apex Court in Rasheeda Khatoon supra of 2014, supports the Full Bench expression of this A.P. High Court in Inspector of General of Registration and Stamps, Govt. of Hyderabad Vs. Smt. Tayyaba Begum¹⁷ that once it is reduced to writing though orally valid otherwise, it requires registration u/ sec.17(1) of the Registration Act, of gift related to immovable property. Same can be taken as a law of land and as a binding precedent, also for the reason under Article 366(10) of the Constitution of India, a custom is not recognized as part of the existing law for the same to prevail over such a personal law practice and custom to nullify or override the statutory provision in Section 17 of the Registration Act, which mandatorily requires registration of a transfer of immovable property once by virtue of the terms of the document, the transfer is affected, as held very recently by this Court in C.C.C.A.No.269 of 2004, dated 22.04.2016, in Hifazath Hussain and others Vs. Sadiq Hussain@Mushraf.

15. From the above position of law on validity of an oral gift known as Hiba by a Muslim, coming to the suit relief, the prayer of the plaintiff who is one of the issues of the so called donor their mother and his brother not even made party to the suit main relief of ejectment of the defendants by seeking possession of the plaint schedule property, with a

¹⁷ AIR 1962 AP 199

claim that as there is oral gift by Hiba valid later reduced to writing and thereby plaintiff is the absolute owner so also his brother Musthafa. No doubt as per the existing law, in a suit for ejectment and possession based on title, the plaintiff has to establish his entitlement. The principle is commonly known as plaintiff has to win or lose his case on his own strength and not on any weakness of defence. The propositions placed reliance in this regard are Moran Mar Basselios Chatholicos Vs. Most Rev. Mar Poulouse Athanasius¹⁸ 3JB, and the other expression of 3JB in Brahma Nand Puri Vs. Nelci Puri(died)¹⁹ where it was held that in a suit for ejectment, plaintiff has to succeed or fail on the title that he establishes and if he cannot succeed on strength of his title, his suit must fail, notwithstanding that the defendant in possession has no title to the property. The fact that the defendant is a trespasser would not entitle the plaintiff to succeed. No doubt, as per the subsequent expression of the Apex Court in RVEE Gounder Vs RVS Temple²⁰ even in a suit for declaration or possession based on title, what the plaintiff has to prove in the case is by preponderance of probabilities and once that could be proved, the burden shifts on the defendant to rebut in explaining the earlier position of law of plaintiff has to win or lose his case on own strength does not mean, burden always a static of plaintiff.

16. From the above legal position, now it is to consider whether the Ex.A.1 so called gift deed, dt.19.01.1972, requires registration or not to determine from the terms concerned, the very contents of document, leave about proof to consider later, the executant's name is referred as Smt. Rahamath Khatoon W/ o Nawab Mahd. Ameer Ali Khan r/ o. H.No.16-4-777 of new Malakpet, executes the memorandum of oral

¹⁸ AIR 1954 SC 526(1)

¹⁹ AIR 1965 SC 1506

²⁰ 2003(8)-Supreme Today-194 at 196=AIR (2003) SC 4548=2003(8)SCC-752=2004(1)ALT 2641-26.2(DNSC)

gift, dt. 19.01.1972, that she got 4 sons and 6 daughters and all the daughters and first two sons got married and she disposed of some of her properties from time to time either by sale or oral gift (Hiba) and she retained some land of about 25 acres at Gudmalkapur village and some situate at Ameerpet which was previously used as a tennis court. On account of her desire to benefit her dearer and nearer relatives and due to her old age, on 01.08.1971 she had gifted orally some of her properties at Ameerpet, Gudmalkapur village in favour of her family members i.e. sons, daughters, sisters and brother's children and cousins after dividing the same by metes and bounds and delivered possession to each of the donees, who have been in possession of respective lands and all the donees accepted the gifts made by her and further to avoid any future controversies and to prevent any bickering among the donees, she thought it fit to execute the memorandum of oral gift and record the same for future purposes. It further recites the gifts that were made on 01.08.1971 are mentioned in the annexure attached to the memorandum and Annexure-I relates to the property at Ameerpet and Annexure-II relates to the property at Gudmalkapur village and the donees names and extents gifted by her on 01.08.1971 were shown in the Annexures and the house in Ameerpet occupied by M/s Premier Automobiles along with site that was also orally gifted by her to her 5 daughters named and the same is in the possession of M/s. Premier Automobiles as a lessee and rents are being collected by her daughters. This memorandum does not relate to Ameerpet lands given to her sons Sardar Ali Khan and Hider Ali Khan who were given properties under separate Hibas and have been in possession of the respective properties and enjoying. Though it speaks the memorandum of oral gift and not contemporaneous document of transfer or creating any property by gift in the terms it is confined

other than Ameerpet site allegedly given under separate Hiba to her two of the sons- Sardar Ali Khan and Hider Ali Khan (the other brothers of plaintiff), for the plaintiff herein is Mohd. Farooq Ali Khan and not Sardar Ali Khan undisputedly and further his brother is Mahd. Musthafa Ali Khan and not Hider Ali Khan. No doubt, it refers to the gifts that were made on 01.08.1971 are mentioned in the annexure attached to the memorandum and Annexure-I relates to the property at Ameerpet and Annexure-II at Gudmalkapur village and the donees names and extents gifted by her on 01.08.1971 were shown in the Annexures. A perusal of the enclosure shows there is only one annexure and not two. Said annexure bottom portion shows names of plaintiff- Mohd. Farooq Ali Khan and his brother Mahd. Musthafa Ali Khan were shown opposite to their names the extents of 3300 sq. yards each and two more male persons Dr. Abid Ali Khan and Salaha Khan were shown opposite to their names the extents of 950 and 930 sq. yards respectively and six ladies were shown opposite to their names the extents of 1000 sq. yards each for first three and 950 sq. yards each for next three and five of their names tally with names mentioned in the memorandum.

17. It is the claim therefrom by plaintiff- Mohd. Farooq Ali Khan that he was gifted the northern 3300 sq. yards and his brother Mahd. Musthafa Ali Khan was gifted the southern 3300 sq. yards. In fact there is no such mention in the memorandum or the annexure supra and further the total extent shown is not for total 6600 sq. yards, as it is shown opposite to respective 11 names the different extents of 930 to 3300 sq. yards each and the Donor also retained 3070 sq. yards. Thus from that plaintiff cannot claim that total is 6600 sq. yards or his extent of 3300 sq. yards is northern portion of entire site, muchless to claim northern half of the site.

17. Thus, Ex.A.1 no way correlates to the suit property at all much less speaks what is extent of the property at Ameerpet and how much given to which son and out of which extent and in what direction or with what boundaries of each site. Ex.A.1 no way even speaks as to why it was not reduced to writing the respective extents if given and if so in what direction or with what boundaries of each site and out of what total extent and with what source of title. Thereby this Ex.A.1 document no way helps to say on which side out of the total extent of Ameerpet site, the plaintiff was given under oral gift and which site his brother was given and which site the donor retained and which site the other children of the donor were given. The Exs.A.2 and A.3 are the so called affidavits given to the municipal authorities by the plaintiff's brother Mustafa Ali Khan. Ex.A.2 said to have been executed by him saying the shops bearing Municipal Nos. 7-1-621/ B/ 3, 7-1-621/ B/ 4, 7-1-621/ B/ 5, 7-1-621/ B/ 6 situated at Ameerpet belongs to and owned by his brother Farooq Ali Khan, the plaintiff herein, but the MCH authorities mistakenly assessed the above shops in the name of plaintiff's brother Mustafa and Mustafa has no objection and requested the MCH, to correct or change the assessment register for above shops. On perusal of the document shows stamp papers were purchased in the name of plaintiff's brother Mustafa Ali Khan on 31.08.1996 and even the area not mentioned in the affidavits and there is notary attestation by one K.Ramesh of 16.01.1997 and it is no way a document of title much less to claim right by the plaintiff thereunder to the plaint schedule. Even coming to Ex.A.3 that also executed by the plaintiff's brother Mustafa, the same purchased in his name on 20.01.1997 and there is notary attestation by one K.Ramesh of 21.01.1997 and it is also no way a document of title much less to claim right by the plaintiff thereunder to

the plaint schedule. These affidavits no way contain the date, time and year of execution respectively, but for to cull out from notary attestation date mentioned if at all. Ex.A3 mentions that his brother Farooq (plaintiff) is absolute owner and possessor of the land of 3300 sq.yards in Sy.No.26 Ameerpet described in the schedule-A and said property earlier was part of bigger land 6600 sq.yards jointly owned by him and Mustafa (deponent) whereas Farooq (plaintiff) got constructed a multi-storied commercial complex comprising shops and offices whereas, the MCH assessed the shops and other portions already constructed to property tax and allotted assessment Nos. 7-1-621/ B, 7-1-621/ B/ A, 7-1-621/ B/ A/ 1, and the land on which said complex constructed was part of bigger property jointly owned earlier by Farooq Ali Khan and deponent (Mustafa) and since the complex was got constructed, the name of deponent (Mustafa) was by mistake shown in Assessment Register of Municipal Corporation as a person responsible for payment of taxes for the various portions of complex, the deponent declares and confirms that the land of 3330 sq.yards in Sy.No.26,Ameerpet on multi-storied commercial complex constructed over it and assessment by Corporation are the personal property of plaintiff who got constructed for him and he is the absolute owner of it and the deponent (Mustafa) no way responsible for payment of tax or fees levied by the corporation or local authority or government department on the complex and the plaintiff is free to owe the department concerned for deletion of name of the deponent. These are not merely affidavits and thus could not have been notarized for recitals speak rights of parties requiring registration by execution of stamped documents and thus both the documents are inadmissible directly in evidence for want of stamp duty and registration that too without the originals cannot be impounded though the stage has

crossed regarding stamp duty when original alone to be impounded and not copies and mere marking of document no way amount to admission of the same for otherwise inadmissible for want of originals and also want of stamp and registration and even for impounding only on original marking copy is not a bar to raise the requirement of Section 33 of the Indian Stamp Act, apart from affidavit of living person does not admit in evidence unless he comes to witness box to confront under Sections 145 & 155(3) of the Evidence Act and exhibit from him if at all admitted the contents to decide any rights created or relinquished or conferred etc., and to decide stamp duty and registration before admission of originals. Thereby Ex.A2&3 are totally inadmissible, for mere exhibiting is no admission of document in evidence, for so-called deponent not examined and proved and for originals not produced, not impounded any original even it speaks regarding rights and exchanges and not mere correction or mutation and admission that too does not confer right or title, these are of no use much less to show title of the plaintiff over the property either from Exs.A.1, A.2 or A.3 but for if at all from the Annexure to Ex.A.1 shows the plaintiff got 3300 sq.yards site at best so also his brother Mustafa equally and but for that, the annexure no way shows on which side even that site falls. If at all there is any oral gift in 1971 and memorandum of past transaction, dt.19.01.1972 that could have been acted upon of accepting and taking of possession and assessment of the property taxes of the site at least for mutation. Ex.A.4 true extract of Assessment Register is for the years April, 1996 to 2002 of Municipal Corporation, Hyderabad, shows the name of Mustafa Ali Khan, the plaintiff's brother, as rounded off for Door No.7-1-621/ B equally under Ex.A.5 for 7-1-621/ B/ A equally under Ex.A.6 for 7-1-621/ B/ A/ 1 and equally shown the name of the plaintiff as change was

effected based on the affidavits Exs.A.2 and A.3 of Mustafa i.e. plaintiff's brother. It shows the change effected is only in the year,1996-97 and till then the suit property stands in the name of the plaintiff's brother Mustafa only even therefrom. The Exs.A.14 to A.16 are the proceedings, dt.24.01.1997 of the Assistant Commissioner, MCH, Hyderabad to the plaintiff with reference to the plaintiff's letter, dt.21.01.1997 for change of the names as per the application of plaintiff and that thereby no way improves the case. The Ex.A.10 to Ex.A.13 are the municipal tax payment receipts for suit property, only subsequent to that in the name of plaintiff Mohd.Farooq Ali Khan.

18. Now from the background of the facts, coming to Ex.A.17-21 notice and reply with acknowledgements, Ex.A.17 notice of plaintiff issued was to the defendants 1&2 on dt.10.04.2001 stating that plaintiff is absolute owner of land to the extent of 3300 sq.yards out of Sy.No.26, T.S.No.8, Ward No.5, Block No.A, Ameerpet village and Mandal, Hyderabad, by virtue of Hiba, dt.01.08.1971 which were later put in writing by memorandum, dt.19.01.1972 which is abutting to Mumbai National Highway and complex was constructed on the north-west corner consisting of cellar, ground and first floor and similarly 3300 sq.yards towards south of plaintiff's property was gifted to his brother Mustafa Ali Khan where building was constructed and the plaintiff's brother misrepresenting factum of ownership of plaintiff regarding the cellar portion, got mutated his name in municipal records and on coming to know said mistake, on representation made by the plaintiff and also affidavits of his brother Mustafa acknowledging the plaintiff's ownership over the same, the municipal authorities cause mutation to the cellar portion i.e. northern portion of cellar of the building in the plaintiff's name and plaintiff is visiting India while staying in USA and he is owner,

however, one K.Sheshagiri Rao and others tried to interfere with the plaintiff's possession over the open land of 1725 sq.yards which is on rear side of the present complex for which the plaintiff filed O.S.No.4717 of 2000 for permanent injunction against them not to interfere with the possession which is pending and K.Sheshagiri Rao set up a false plea as if himself(K.Sheshagiri Rao), the plaintiff and his brother Mustafa, 2nd defendant and one Sridevi alleged to have entered into an agreement and at one instance stating it is partnership and alleged that upon dissolution of the alleged agreement or partnership to which the plaintiff is not at all signatory nor got knowledge for so alleging including as to alleged dissolution and cellar portion of the plaintiff fallen to share of 2nd defendant-G.Krishna Murthy Naidu and from the counter affidavit of K.Sheshagiri Rao in that suit O.S.No.4717 of 2000 opposing the injunction petition regarding alleged allotment of cellar to 2nd defendant-G.Krishna Murthy Naidu, and the said notice issued for said story is a collusion between K.Sheshagiri Rao and the defendants 1&2 and plaintiff's brother Mustafa. It is further averred in the notice that plaintiff is owner of northern cellar portion Municipal Nos.7-1-621/ B, 7-1-621/ B/ A, 7-1-621/ B/ A/ 1,Ameer chambers, Ameerpet and he is paying property tax regularly including NALA tax and the plaintiff's brother Mustafa taking advantage of plaintiff's absence from the country, set up the 1st defendant to be the Managing Director of M/ s. Regency Tiles and 1st defendant set up the stockiest point for the Regency Tiles including doing retail business, extracted illegal amounts and what transpired between the defendants and plaintiff's brother Mustafa not known to the plaintiff for Mustafa did not inform the plaintiff regarding the permission to set up the stockiest point and in spite of demands by plaintiff regarding payment of rents for the

premises, plaintiff's brother is dodging under one pretext or other. The plaintiff being owner of the cellar portion in the occupation of the defendants which is situated in Ameer Chambers, Ameerpet, demanding to vacate and deliver possession within two months from the service of notice i.e. by the end of June, 2001, else to initiate legal recourse including for damages of use and occupation at Rs.10,000/- p.m. for the past three years and Rs.15,000/- p.m. from 1st July, 2001. What the notice averments of there is an oral gift by Hiba and there is also a memorandum of gift showing the northern portion of 3300 sq.yards out of total 6600 sq.yards of Ameerpet of Sy.No.26 gifted to plaintiff as discussed supra, not covered and not correct for such a mention in the notice of what is not covered directly by the Annexure to the Ex.A.1 so called memorandum of oral gift for what it shows of 3300 sq.yards each to plaintiff and his brother Mustafa were given at best. Without even survey number and total extent that too by shown retained by donor 3070 sq.yards and even for the different extents given to others ranging from 930 sq.yards to 1000 sq.yards that also not described in which side of those extents are lying in the survey number 26 and of what is the total area of it at Ameerpet.

19. The Ex.A.21 dt.28.06.2001 reply given by the defendants to the plaintiff's Ex.A.17 notice (Ex.A.18 to 20 acknowledgments) is by disputing the notice contents as false and mala fide and suppression of true facts relating to construction of the complex and ownership of the northern cellar portion and that originally the plaintiff and his brother Mustafa were owners of the 6600 sq.yards of vacant land in Sy.No.26 of Ameerpet and plaintiff and his brother Mustafa entered into partnership agreement, dt.09.12.1981 with G.Krishna Murthy Naidu(2nd defendant), one K.Sheshagiri Rao and one Y.Sridevi in order to develop said vacant

land of 6600 sq.yards by constructing commercial complex therein and as per terms and conditions of the partnership deed, said property becomes the Firm's property and as per clause 9 of the agreement, the plaintiff and his brother Mustafa to get 11500 sq.feet in the built up area in the ground and first floor of the commercial complex on construction within the prescribed period and 2nd defendant-G.Krishna Murthy Naidu along with the two others supra constructed the commercial complex in said land and out of the built up area, the area of 11500 sq.feet was delivered possession to the plaintiff and his brother and consequently they would cease to be the partners of the Firm. Since there was delay in completion of the complex, 2nd defendant-G.Krishna Murthy Naidu and the two others partners paid to the plaintiff and his brother Mustafa damages at the rate of Rs.10,500/- p.m. and they passed receipts and the southern side cellar portion fell to the share of K.Sheshagiri Rao, northern side fell to the 2nd defendant-G.Krishna Murthy Naidu, whereas, the defendants are running tiles business under the name and style 'Rainbow Agencies' ever since the completion of the complex and they have also been paying municipal tax for it to the MCH. That it is crystal clear that 2nd defendant-G.Krishna Murthy Naidu is the absolute owner of the northern cellar portion bearing municipal No.7-1-621/ B, 7-1-621/ B/ 1, 7-1-621/ B/ A/ 1 and they are running their business of tiles therein. The plaintiff is neither owner nor got any manner of right over said property and what transpired between the plaintiff and his brother Mustafa is not known to the defendants, so also in relation to their change in mutation etc. It is also averred that in O.S.No.4717 of 2000 filed by the plaintiff against K.Sheshagiri Rao and others for permanent injunction the order of exparte injunction initially obtained was later vacated on contest in I.A.No.560 of 2000 by dismissing the injunction

petition on 22.01.2001. The plaintiff, through his G.P.A. by name Mohd.Ali Khan and his brother Musthafa, having entered into partnership agreement with the 2nd defendant-G.Krishna Murthy Naidu, K.Sheshagiri Rao and Sridevi for construction of the commercial complex and thereby the plaintiff as if not signatory or no knowledge of it is not correct, so also the alleged collusion between the 2nd defendant-G.Krishna Murthy Naidu and Sheshagiri Rao with plaintiff's brother-Musthafa, for same is nothing but a cooked up story and the allegation of the plaintiff is owner of the northern cellar portion is not correct for it belongs to the 2nd defendant-G.Krishna Murthy Naidu and the 1st defendant set up Regency tiles stockiest point-cum-sale point and is running the same and therefore the question of demand to pay rent or to vacate the premises does not arise, so also for any claim of damages much less past damages of Rs.10,000/- p.m. and future damages of Rs.15,000/- p.m. and requested not to precipitate any illegal or high handed action, else to resist. These are the only documents on which the plaintiff rested his suit claim, besides the oral evidence of plaintiff with no other witness and not even cause examined his brother either as witness on his side or atleast with a request to the court to call as court witness.

20. Now from this even coming to plaint averments which are nothing but replica mostly of the Ex.A.17 notice contents and in page 1 para-1 of the plaint what is averred is his mother Smt. Rahamath Khatoon, the original owner of 6600 sq.yards in Sy.No.26 of Ameerpet, orally gifted in her lifetime said extent by Hiba in favour of plaintiff and his younger brother Mustafa supra to hold half share each and delivery of possession also to them, it is not mentioned as northern half even fell to plaintiff and southern half given to plaintiff's younger brother Mustafa, but for in para-12 of plaint mentioned as the plaintiff became absolute

owner of northern portion 3300 sq.yards by virtue of said Hiba covered by memorandum of gift, dt.19.01.1972. From this, now coming to plaintiff schedule already referred supra, the south boundary is shown as southern cellar portion belonging to Mohd. Mustafa Ali Khan i.e. plaintiff's brother Musthafa and there was striking of his name by incorporating with pen southern cellar portion as belonging to plaintiff's brother. No doubt, it describes the plaintiff schedule is northern half and the plinth area mentioned for 7-1-621/ B, 7-1-621/ B/ A, 7-1-621/ B/ A/ 1 together of 3200 sq.feet along with undivided share of land admeasuring 118.66 sq.yards out of $1/3^{\text{rd}}$ area of 356 sq.yards. There is no whisper anywhere in the plaint as to plaintiff made any construction separately in the northern half; what is mentioned in para-2 of page 2 of the plaint middle is while saying northern half to plaintiff and southern half to his brother each 3300 sq.yds, common building was constructed. It is further averred that complex was constructed on the north-west corner of the above land over an extent of 356 sq.yds consisting a cellar, ground floor and first floor, what is the plaintiff schedule claims is 118.66 sq.yds to say $1/3^{\text{rd}}$ out of the 356 sq.yards supra in the constructed area and the plinth area claimed 3200(sic.3300) sq.feet. The plaintiff did not aver anywhere that he applied to the municipality for permission much less in his name in making construction or even he and his brother together so applied and if so when and by what proof and with what means and proof and at what period constructed and he did not show any plan and its approval by any proceedings in his name or in the name of himself and his brother and he did not claim specifically of he made the construction from what is referred supra importantly, much less by any rejoinder despite defendants dispute the same in their written statement supra, leave about prior to suit for notice with such stand in

the reply, apart from the defence as such by said K. Sheshagiri Rao in the plaintiff's earlier bare injunction suit.

21. What he mentioned is his brother cause assessed the premises in his name by mistaken representation and later on his representation; the municipal authorities cause mutated by correcting the same. It clearly shows out of the northern portion built up area, he and his brother got right. When such is the case, his brother is importantly a necessary party to the suit and non-impleadment of him and also said Sheshagiri Rao and Sridevi the other alleged partners is fatal to the suit. Despite notice and reply by facts supra disputing vehemently plaintiff's right and title to the suit schedule property, the plaintiff instead ejectment only, could also seek for declaration of title with consequential relief of possession and did not do so till date and not even summoned to cause examine his brother. The trial court also should have seen from the plaint averments reflecting notice and reply show cloud on plaintiff's title, to hold plaintiff ought to have been asked for declaration and without which for relief of ejectment only with damages suit claim won't lie, that too when it is the claim of entering into partnership by plaintiff through his G.P.A. for his G.P.A. also necessary witness if not also a party to the suit for effective adjudication of the lis.

22. At least plaintiff could have been summoned his G.P.A holder and his brother-Musthafa if not as witnesses on his side, as Court witnesses to unfold the truth. He cannot escape saying it is for the defendant to cause examine or in saying defendant could have been and did not choose to examine the plaintiff's brother or plaintiff's G.P.A. The inter se affidavit between the plaintiff and his brother itself shows they are in cordial terms and there is nothing to show subsequently as to

what transpired to show the terms were disturbed between the plaintiff and his brother for his non-examination, at the cost of repetition otherwise he is a necessary party to the suit and non-impleadment also fatal. When it is the duty of plaintiff to cause examine his brother and his G.P.A, his mere say of his brother is not in cordial terms to escape his examination though a material witness no way exempt his obligation in proving the case of him and in discharging his burden to establish the northern 3300 sq.yards site fell to his share and his brother got the southern 3300 sq.yards, when if at all both or any of them constructed and with what proof, from contest of defendants of while both the brothers jointly entered into partnership with defendants and two others as per case of defendants even from their reply before filing the suit.

23. As in a suit for ejectment like in declaration of title with possession if any or for injunction based on title, it is for the plaintiff to establish his right and title to the entitlement including for ejectment to win his case on his own strength in the proof by preponderance and it is only on discharging the burden lies on the plaintiff, the onus shifts on the defendants to rebut the proof by preponderance from the side of plaintiff, for otherwise even denial of title of plaintiff is enough for the defendants. The expression of the Apex Court in RVS Gounder supra clarifies the position as discussed supra.

24. Further in cause of action para of the plaint, there is nothing shown how and when cause of action arisen. What all averred is first arose in the year 1971 when the plaintiff's mother gifted the property by way of Hiba to the plaintiff and subsequently the building was constructed and property was mutated in the name of plaintiff and subsequently on demands several dates plaintiff paid property tax and when the plaintiff issued notice and received reply by defendants. A

perusal of the Ex.A.1 schedule no way correlates to the plaint schedule undisputedly but for if at all northern side 3300 sq.yards site part of which covered therein is subject matter of the suit construction. Once it is no way correlates, it is not the cause of action for the plaintiff but for to show how the defendants entered and when and in what manner and who constructed the premises and with what proof on further details of the months/year of construction and with or without any approved plan and by whom and when defendants entered into possession and by what manner that gives cause of action for the plaintiff's claim of ejectment. No doubt the Court cannot keep common sense in cold storage in understanding the pleadings but when either in the cause of action para or anywhere in the plaint it is required to be mentioned how right accrued to the plaintiff to maintain that suit and with what essential facts to state so specifically when that is lacking and vague; the very sustainability of the suit is in cloud to say emphatically.

25. It is not the be all and end all for such an objection for want of cause of action to reject the plaint not raised by the defendant by filing any application under Order VII rule 11 CPC. Apart from that there is no specific issue as to existence of cause of action sought to formulate. Here, it is important to note, once the 2nd defendant in particular in the suit mentioned that the plaintiff and his brother got common right over the property under the gift from their mother for the total extent 6600 sq.yards, though the admitted facts in the pleadings need not be proved, for otherwise mere admission does not confer title. The claim of plaintiff in para-1 of the plaint referred supra with reference to said written statement plea of defendant shows plaintiff and his brother got common ownership for the entire 6600 sq.yards in Sy.No.26 of Ameerpet. Apart from the northern portion, no doubt,

covered by present Ameer chambers and the northernmost is the plaintiff therein. To say that the northern portion 3300 sq.yards fell to the share of plaintiff and southern 3300 sq.yards fell to the share of brother of the plaintiff, there is no material before the Court in support of such claim of the plaintiff that is disputed by the defendant for the plaintiff on whom the burden lies to establish and prove which the plaintiff failed to prove. In fact, at the cost of repetition from the very plaint schedule, it is not for the entire 6600 sq.yards of site in Sy.No.26, but only the northern 356 sq.yds site out of total 6600 sq.yards that cannot be lost sight. When such is the case, the plaint schedule speaks northernmost cellar portion bearing Municipal Nos. 7-1-621/ B, 7-1-621/ B/ A, 7-1-621/ B/ A 1 with plinth area of 3200 sq.feet along with undivided share of land admeasuring 118.66 sq.yards only out of that 356 sq.yards to be known as Ameer Chambers situated at Ameerpet and the northern boundary shown as Ameer estate complex and the southern boundary shown as southern cellar portion belongs to the plaintiff's brother. So it is not the plaintiff's construction in his northern 3300 sq.yards site respectively out of the 6600 sq.yards site but for out of the total site in the northern side only 356 sq.yards wherein for the northernmost 118.66 sq.yards undivided site claimed even therefrom to say what the claim of plaintiff of entire northern 3300 sq.yards fallen to his share and the entire southern 3300 sq.yards fallen to the share of his brother Mustafa is not correct. There is no specific pleading even of after such Hiba and acceptance and taking of possession there was any internal arrangement between plaintiff and his brother to jointly coming of understanding in entire site to make joint construction for only in the northernmost 356 sq.yards. It clearly shows there is something undisclosed consciously by suppression or by inadvertence and not to say

still inadvertence even from positive contest of defendants to clear the cloud by plaintiff as to how he and his brother constructed and when and how the defendants entered into the property. In this context, the plea of the defendant as set out in their reply notice Ex.A.21, mostly in the written statement is relevant for consideration in disputing entitlement of the suit relief by plaintiff in putting burden on the plaintiff to establish. The plea of defendants is plaintiff and his brother who got 6600 sq.yards site through their mother, jointly entered in partnership with 2nd defendant, one K.Sheshagiri Rao and one Sridevi as part of their partnership, the property brought to the hotchpot of the partnership for the 2nd defendant and the two others to construct building with name and style of the partnership Prabhu Builders for the partnership firm to own and that the plaintiff and his brother retired from the partnership and walked out by taking the portion of built up area and subsequently the partnership was dissolved by conveying the partnership assets to the 2nd defendant and two others. Needless to say the immovable property of a partnership is part of the assets after division after dissolution like in book assets without any registered document; however that concept is different from bringing immovable property without document into the partnership. There is nothing to say how long after the partnership entered if at all subsequently the properties brought into the hotchpot of the partnership as firm property by impressing towards the share of the plaintiff and his brother if any. Undisputedly, the so called original partnership deed not filed. There is no foundation to the existence of the original and in the absence of which any secondary evidence let in can be subject to objection to admit. The copy sought to be marked was since opposed rightly rejected by the trial Court by disentitling the defendant to exhibit the so called copy of unregistered partnership

deed. The claim of the defendants is that it was lost and they filed copy of the agreement which is not even a registered one and the plan showing construction of the complex not even filed and plaintiff and his brother Mustafa were not shown parties to the partnership agreement by any other cogent evidence and thereby the so called partnership agreement to which defendants are not proved as parties no way bind them and coming to the contention of the defendants that the plaintiff through G.P.A. entered the agreement, there is no basis and there is also no proof and out of the constructed area the particular extents allotted to plaintiff and his brother which they acknowledged even to give any credence to the evidence of D.W.2 and the plaintiff is not a party to the partnership deed or its dissolution. Thereby when there is no original partnership deed that has not seen light of the day and without foundation of original deed so called copy cannot be admitted thereby not marked and in the absence of which the very partnership and so called construction agreement set up of is doubtful and defendants could not show any documents of existence of partnership for consideration of its alleged dissolution and D.W.1 admitted ownership of plaintiff over the schedule property and no agreement to show construction handed over to Prabhu Builders on any basis and no piece of evidence filed to show permission applied to MCH for construction. Further defendants could not prove and establish Exs.B.9,10,20 and 22 that are being disputed by the plaintiffs in Exs.B.2 to B.22, thereby no weight can be given to the said documents of defendants and coming to the G.P.A. issued by the plaintiff to his brother-in-law under Ex.B.1 till it was revoked in 2000, when it is not proved of signature of plaintiff or his G.P.A. and the so called partnership for the partnership deed not before the Court, there is no defence set up by the defendants through Ex.A.1

memorandum of gift objected for marking the same is admissible in evidence that too when D.W.1 cross-examination admission is there about the property belongs to the plaintiff's mother and plaintiff and his brother got the same through Hiba, the plaintiff's brother Mustafa was also examined by the defendants and to examine by the plaintiff, there is a version of plaintiff of there is rivalry between the plaintiff and his brother.

26. Coming to Ex.B.1 so called Power of Attorney said to have been executed by the plaintiff in favour of Mahammad Ali Khan, dt.07.02.1975, it speaks constituted as lawful registered power of attorney No.22 of 1975 to take possession of all property, lands, or tenements, to demand, receive and recover from all and every or any person or persons whosoever concerned or chargeable therewith all and every sum or sums of money, debts, goods, effects, securities, stocks, shares and interests which shall or may belong to or become due or payable to him during absence of plaintiff in India of the principal entitled to act under Land Ceiling Act and other proceedings in respect of their concerning all or any such property, lands or tenements and also to demand, receive, recover and give receipts for the rents and profits thereof respectively for his use and to let, sell or absolutely dispose of and convey the same or any part thereof or to join with any other persons or person/ carrying or who may share or interest with the plaintiff in any property, lands or tenements in letting, selling or absolutely disposing of the same. The plaintiff even disputes about his execution of said power of attorney. The so called power of attorney holder, for saying on behalf of the plaintiff that entered the alleged partnership, even to bind the plaintiff by agent to show as entered, admittedly not cause examined by the defendants though ought to have

been examined at least as a Court witness by summoning the power of attorney holder. In the absence of which mere filing of Ex.B.1 of plaintiff executed a power of attorney in favour of one by name Mohammad Ali Khan, which if actually given, unless shown that Ali Khan on behalf of plaintiff acted with the defendants and others to bind on the plaintiff that is totally lacking herein. The Ex.B.2 is so called receipt which is said to have been passed by plaintiff in May, 1985 equally Ex.B.3 in February, 1987, Ex.B.4 in March, 1986, Ex.B.5 in April, 1987, Ex.B.6 in December, 1987, Ex.B.7 in March, 1988, Ex.B.8 in May, 1988, Ex.B.9 in December, 1988, Ex.B.10 in July, 1989, Ex.B.11 in September, 1989, Ex.B.12 in October, 1989, Ex.B.13 in November, 1989, Ex.B.14 in December, 1989, Ex.B.15 in January, 1990, Ex.B.16 in February, 1990, Ex.B.17 in March, 1990, Ex.B.18 in April, 1990, Ex.B.19 in June, 1990, Ex.B.20 in July, 1990, Ex.B.21 in October, 1990, Ex.B.22 in December, 1990 and Ex.B.23 in November, 1991. No doubt, the defendant's claim is that the signatures are that of the plaintiff. The plaintiff denies and disputes. Once, such is the case, it is for the defendants to establish by seeking at least sending the same to handwriting expert to prove. Here, it is important to note that the receipts are supporting from 1985 and it refers to agreement dated 09.12.1981 particularly from Ex.B.2 to say from the case of defendants of the partnership or development agreement entered and taken up construction and from the clauses in the agreement for the delay in completion of construction, the plaintiff and his brother were paid respective amounts, however, for the delayed period in delivering portion of the built up area out of the constructed area as per the alleged partnership or other bilateral agreement as the case may be. A perusal of the signatures when one cannot easily arrive any easy conclusion to a naked eye without expertise even to ask the

Court to compare under Section 73 of the Indian Evidence Act, the defendant could have been duty bound to establish the disputed receipts by other evidence like getting expert opinion, to serve as piece of corroboration to substantiate their case of entering into development agreement by partnership and the property as brought to their share and walking out from partnership on giving of portion of the constructed area to the plaintiff and his brother for their so called retiring from the firm subsequently as events allegedly happened including any delay in construction and delivery of the portion of the area towards their share and for that making payments covered by the receipts when said to have been passed by the plaintiff to the 2nd defendant and others and plaintiff when disputes the signatures. Here, it is also important to note the undisputed fact that plaintiff did not come to witness box to face cross-examination. While his cross-examination was in progress, having been taken time, he failed to attend. In that case, unless there is complete evidence by cross-examination, the evidence of plaintiff has no sanctity at all even to the extent covered by the deposition in the cross-examination for plaintiff's laches in coming to witness box to face cross-examination no sanctity can be attached to his evidence in chief and part cross-examination, that too when absent to show any fault of the defendant cross-examination postponed and any subsequent inability of the plaintiff to come to witness box even then the plaintiff could have been asked to examine him from any inability to attend, at least through Court commissioner.

27. From this factual scenario and evidence on record supra, coming to Ex.A.23 agreement, dt.29.11.1991, it is inter se between the 2nd defendant-G.K.M Naidu, K.Sheshagiri Rao, Sidevi(since died represent by her husband) and others if any inter se, there is a reference

about the plaintiff and his brother got through their mother under gift of the extent 6660 sq.yards site in Sy.No.26 with TS No.8 of Ameerpet that was mutated in their names in the revenue records and they have been enjoying the gifted properties as per the schedule annexed to memorandum of gift and both the brothers entered with Sheshagiri Rao, G.K.Naidu and Sridevi by throwing into partnership their 6660 sq.yards site and pursuant to which both the brothers agreed to take 11500 sq.feet built up area in the shop of complex constructed by the association under permit No.70 of 1995 dated 17.05.1995 by the MCH in the name of both the brothers whereas, Sridevi since died her husband is representing her interest and both the brothers have been put in possession of the extent of 11500 sq.feet as shown in schedule-A annexed to the agreement for they did not have any right in the balance of land and the other built up area etc. facts. Ex.B.24 is the compromise decree in O.S.No.1561 of 1995 between the doctor G. Suresh Kumar and K.Sheshagiri Rao, Mustafa, 2nd defendant-G.K.Naidu and plaintiff herein as 3rd defendant therein in relation to agreement between the Doctor Suresh Kumar and Sheshagiri Rao the plaintiff and 1st defendant for agreement property executed by sale deed by 1st defendant in favour of Brahmi Reddy and Poorna Chandra Rao to declare as sham and nominal and in the compromise 2nd defendant remained exparte and 3rd defendant given up by dismissing the suit against 3rd defendant by awarding costs thereby it has no bar on the plaintiff from the so called compromise but for to say unexpected things happened in between and the defendants are not mere trespassers without any iota of right that too the building shown constructed by investing to decide what is the right or the protection they got to say it is not a simple suit for ejectment but for something plaintiff has to obtain necessarily for the

efficacious relief of declaration which not only confined to plaint schedule but also from the factual matrix show in relation to the entire extent of 6600 sq.yards site along with his brother with equal rights if any. Ex.B.26 of the year 1996 shows letter of Sheshagiri Rao to the Assistant Commissioner of MCH, Kharatabad, regarding the property tax demand which refers to the letter of plaintiff's brother to delete the name of K.Sheshagiri Rao in the property assessment where there is a correspondence referring to the deed executed by Mustafa dated 27.11.1995. Ex.B.27 similar letter of K.Sheshagiri Rao to the Assistant Commissioner, MCH, Khairatabad also, dt.04.10.1996 in relation to the deletion of name which is similar to Ex.B.26 to Ex.B.28 representation of plaintiff Farooq to the Municipal Commissioner, Khariatabad, dt.03.09.1996 for the premises bearing No.7-1-621/ B/ 3, 7-1-621/ B/ 4, 7-1-621/ B/ 5 and 7-1-621/ B/ 6 saying, the assessment made in the name of Mustafa and K.Sheshagiri Rao and requested to remove the existing names and enter name of the plaintiff saying he submitted affidavit from Mustafa and withdrawal agreement from K.Sheshagiri Rao even from the said letter of plaintiff, there is something intervened in between them and the agreements entered in relation to the development and 2nd defendant is not a mere trespasser under whom the 1st defendant continues for the plaintiff to maintain a simple suit for ejectment. Ex.B.29 is letter addressed to K.Sheshagiri Rao by the Municipal Corporation from the representation of Mustafa, in this regard, Ex.B.30 receipt for payment of unauthorized construction of the year 1998 for the premises D.No.7-1-621, Ameerpet and Exs.B.31 and 32, receipts of the year 1998 in the name of 2nd defendant about the compliance of G.O.Ms.No.419 in relation to the regularization of unauthorized construction in the premises No.7-1-621, Ameerpet which shows the

constructions made by 2nd defendant and others by deviations and for which they paid the amounts and not by plaintiff or his brother. The Exs.B.34 to B.38 are the electricity and telephone receipts of the premises showing the defendants continuation and Exs.B.41 to B.44 of the property tax paid in the name of 2nd defendant for the premises bearing No.7-1-621/ B for part of the plaint schedule. Ex.B.45 is the chief affidavit of plaintiff Farooq in O.S.No.4717 of 2000. No doubt, a living persons affidavit is not admissible in evidence but for to cross-examine him by confronting with the same under Sections 145 or 155(3) of the Indian Evidence Act, as discussed supra in this regard on affidavits of brother of plaintiff he cannot rely.

28. Having regard to the above, the trial Court went wrong in decreeing the plaintiff suit even having observed the plaintiff could have been sought for relief of declaration for the defendants are not mere trespassers and in unauthorized possession but for something more with some right and the plaintiff did not approach the Court in seeking the relief for possession simplicitor when entitled to seek efficacious relief of declaration also by impleading the other two persons K. Sheshagiri Rao and Sidevi or her legal representatives and the plaintiff's brother Mustafa as necessary parties.

29. Before discussing further it is just to consider whether there is necessity of plaint amendment from possession to declaration and possession from cloud on title of plaintiff from so called partnership and arrangement set up by the defendants. In this regard in *Sampath Kumar Vs. Ayyakannu*²¹ application for amendment made 11 years after the date of the institution of the suit to convert through amendment a suit for permanent prohibitory injunction into a suit for declaration of title

²¹ (2002) 7 SCC 559

and recovery of possession was allowed holding, the basic structure of the suit is not altered by the proposed amendment and if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit by allowing the amendment that would curtail multiplicity of legal proceedings. The Apex Court later relying upon *M/s. Revajeetu Builders & Developers v. Narayanaswamy & Sons & others*²² held in *State of M.P. Vs. Union of India*²³, *Ashutosh Chaturvedi V. Prano Devi*²⁴ and *South Konkan Distilleries & Anr. V. Prabhakar Gajanan Naik*²⁵ that though courts have ample power to allow amendment of plaint, said power should be exercised in the interest of justice and to determine the real questions in controversy between the parties and on such terms as may be just, though amendment cannot be claimed as a matter of right and court should not also adopt a hyper technical approach, but a liberal approach is required in exercise of the power. It was also held by the Apex Court in *Ramachandra Sakharam Mahajan V. Damodar Trimbak Tanksale*²⁶ that when the amendment sought for would enable the Court to pin-pointedly consider the real dispute between the parties and thereby help to render a decision more satisfactorily, it ought to be allowed. This Court by scanning and updating the entire case law in the latest expression, vide common order dated 17.10.2016, in the Civil Revision Petition Nos.1751, 1752 and 1753 of 2016, held by reiterating the settled law- that amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceedings. It is in the interest of justice that a suit shall be decided on

²² 2009 (10) SCC 84=AIR 2009 SC (Supp) 2897

²³ 2011 (12) SCC 268

²⁴ 2008 (15) SCC 610

²⁵ AIR 2009 SC 1177

²⁶ (2007)6 SCC 737

all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit that includes appeal suit as continuation of suit. There can be a situation where there is change of circumstances in the course of pendency of a proceeding and if a matter in issue arises upon such change of circumstances, then amendment becomes necessary. According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose any conditions. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit.

30. This Court, having regard to the above factual matrix can within its power under Order I Rule 10 of C.P.C. also implead suo-moto the said plaintiff's brother Mustafa and K. Sheshagiri Rao and husband and son of Sridevi representing her interest for all parties to the alleged agreement to decide in their presence the lis subject to its proof.

31. Having regard to the above and in the result, the appeal is allowed and from the material lapses and lacunas in evidence from both sides for the material on record is insufficient to decide the lis and the plaint also requires amendment to declaratory relief and consequential relief of possession by permitting to amend and also to implead suo-moto said plaintiff's brother Mustafa and K. Sheshagiri Rao and husband and son of Sridevi representing her interest for all parties to the alleged agreement to decide in their presence the lis subject to its proof and for that feels just to remand, even remand gives further life to the litigation, and thereby remands the matter directing the trial Court for

their impleadment and for additional pleadings including amendment of plaint to permit from the above on application of plaintiff and consequently for additional written statements if any therefrom and with opportunity of further evidence including by recall for further examination of necessary witnesses of both sides including of plaintiff and with reference to the additional pleadings supra to subserve the ends of justice. Pursuant to the above remand directions, to give every endeavour for early disposal at least within nine (9) months from the date of receipt of the judgment. No order as to costs.

32. Pending miscellaneous petitions, if any, in this appeal shall stand closed.

Date:02.12.2016

Note: L.R. copy to be marked.

b/o. Vvr



Dr. B. SIVA SANKARA RAO, J