

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

+ **Cross-Objections(SR) No.50296 of 2004**

In/and

C.C.C.A.No.269 of 2004

-

% Dated 22.04.2016

Between:

#Hifazath Hussain and others ...Appellants/Plaintiffs

and

\$Sadiq Hussain @ Mushraf respondent/defendant.

! Counsel for the appellants : Sri K.K. Waghray

^ Counsel for respondent : Sri V.Sudhakar Reddy

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? Cases referred: :

- [1] AIR 1949 Patna 237
2. ILR 1949 Nagpur 426
3 21 Madras L.J. 958
4 AIR 1964 SC 275
5 AIR 2011 SC 1695=2011(5) SCC 654
6 AIR 1922 PC 281
7 1954(2) MLJ 113
8 AIR 1962 AP 199
9 AIR 1927 Cal 197
10. AIR 1972 Kerala 27
11 AIR 1975 AP 271
12 2007(2) ALT 38
13 (2004) 6 ALT 753
14 (1985) 2 MLJ 136
15 AIR 1974 JK 59
16 AIR 1984 Gowhati 41
17 AIR 1973 Gau 105
18 AIR 1995 SC 1205
19 (2014) 6 ALT 40.1 & 2(DNSC)= (2014) 8 SCJ 146
20 (2014) 10 SCC 459
21 AIR 1976 SC 1541
22 AIR 1916 Allhabad 351

- 23 AIR 1968 Patna 481
24 1880(3) Alahabad 266
25 AIR 1964 SC 275
26 AIR 1932 PC 13
27 AIR (2009) 6 SCC 160
28 (2014) 2 SCC page 1
29 AIR 1954 SC 526(1)
30 AIR 1965 SC 1506
31 AIR 1954 SC 606
32 (2002) 1 ALT 466 DB
33 2003(8)-Supreme Today-194 at 196+AIR (2003) SC 4548=
2003(8) SCC-752=2004(1)ALT 2641 26.2(DNSC)
34 (1998) 6 ALT 555
35 AIR 1981 SC 2235

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Cross-Objections(SR) No.50296 of 2004

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JUDGMENT:

This appeal is filed by the sole plaintiff in O.S.No.390 of 2001(old O.S.No.842 of 1995 seeking to declare the plaintiff as the absolute and exclusive owner of the suit schedule property, for recovery of possession of the same and for recovery of mesne profits at the rate of Rs.600/-p.m. from the date of suit till delivery of possession of the suit schedule property), on the file of XIV Additional Chief Judge, City Civil Court, Hyderabad against the defendant, impugning the dismissal decree and judgment of the trial Court supra dated 12.07.2014 seeking to set aside the same by allowing the appeal. The sole defendant after service of appeal summons maintained cross-objections vide Cross-Objections(SR) No.50296 of 2004).

2. The appeal and Cross-Objections were while coming together for hearing and during the pendency of the same, the sole appellant/plaintiff died and his legal representatives are brought on record as appellant Nos. 2 to 6 to the appeal as per orders dated 17.09.2007 in CCCAMP No.386 of 2007 and they were also brought

on record as respondent Nos. 2 to 6 to the Cross-Objections as per orders of even date in CCCAMP Nos.844 to 846 of 2007. It is further to mention that the 5th appellant also later died and his legal representatives were brought on record as appellant Nos. 7 and 8 to the appeal as per orders dated 30.01.2013 in CCCAMP No.2 of 2013 and this Court brings them equally as respondent Nos. 7 and 8 to the Cross-Objections.

3. The plaint schedule property consists of a portion of house bearing municipal No.20-2-655 comprising on an area of 85sq.yards with two rooms, kitchen, bathroom, and W.C. situated at Hussaini Alam, Hyderabad bounded by North: the other portion of H.No.20.2.655, South: public lane East: Open land of plaintiff and West: neighbour's house.

4.The case of the plaintiff in nutshell is that the plaintiff is the absolute and exclusive owner of a portion of the house bearing No.20-2-655 comprising on an area of 372sq.yards situated at Hussaini Alam, Hyderabad in which the plaint schedule is a part, that Smt.Ameerunnisa Begum, the mother of the plaintiff being original owner of the property, orally gifted the same to the plaintiff on 29.09.1985 in the presence of witnesses and gave symbolic possession of the same, that she later executed a memorandum of oral gift on 03.10.1985(Ex.A.1) attested by a public notary with a plan(Ex.A.2) showing the gifted property in red colour, that the gifted property was in possession of three tenants at the time of gift and they were atorned to the plaintiff, that a small portion of 85sq.yards out of the gifted property, which is the plaint schedule property, was in possession of one of the tenants by name Mahammad Osman till he vacated the same and delivered the vacant possession thereof to the plaintiff in the month of January, 1991. While so, the defendant, no other than the son of plaintiff's one of the brothers, requested the plaintiff to permit him to reside in said plaint schedule for a period of

three years on free of rent. Accordingly, the plaintiff permitted him since 01.03.1991 in the plaint schedule property as a licensee with a condition to vacate the same by the end of February, 1994. The defendant instead of vacating the same, filed a criminal case vide C.C.No.79 of 1995 against the plaintiff and his sons, which was on contest ended in acquittal. The defendant deposed in the criminal case that the suit schedule property would be bequeathed to him by his paternal grandmother Smt.Ameerunnisa Begum. When the plaintiff issued a legal notice on 20.06.1995(Ex.A.3), the defendant gave a reply on 24.06.1995(Ex.A.4), claiming as if owner of the plaint schedule property under a gift deed as against the earlier plea of getting the property under the will. As a matter of fact, the defendant was in permissive possession of the suit schedule property under the plaintiff and neither any will nor any gift was made and executed in his favour by the plaintiff's mother, that since the defendant has malafidely denied the title of the plaintiff to the suit schedule property and also refused to vacate the same and is in illegal possession of the suit schedule property. Plaintiff filed the suit for the reliefs supra.

5. The contentions in the written statement are that the plaint schedule with boundaries are misleading and cannot be identified at the spot. It is his contest that he is the owner of 147sq.yards of site with structures thereon forming part of municipal No.20-2-655 which he got under an oral gift dated 15.06.1975 followed by memorandum dated 30.11.1991 executed by Smt. Ameerunnisa Begum, attested by Fakeeruddin no other than one of the brothers of plaintiff and one of the sons of the executant. The paternal uncle of the defendant Sri Mozammain, was also gifted thereunder to an extent of 118sq.yards (exclusive of open space) and the total property comes to 147 sq.yards, that the subject matter of the gift was mentioned in the schedule of the gift deed and also clearly delineated in the plan annexed thereto and thus that the defendant is in possession of the plaint schedule property in his own right. He denied the plaint

averments of the plaintiff got said property as part of the oral gift of 372 sq.yards and permitted the defendant to reside in the premises as licensee. He contends that Mrs. Ameerunnisa Begum gifted certain portions of the property in the same building bearing No.20-2-655 to her other sons namely Fakruddin and Hakim Ali, that she died possessed of 199 sq.yards which is now in possession of the plaintiff which is a matruka property and it is liable to be distributed. He contends further that names of the alleged tenants of the plaintiff are not even mentioned in the plaint, that the plaintiff has to produce the original memorandum of oral gift deed dated 03.10.1985 which he suppressed. The plaintiff entered into possession of 199 sq.yards of house portion in collusion with the tenants of late Ameerunnisa Begum, that the subject matter of the present suit is not part of the said 199 sq.yards. The plaintiff was a resident of Nagarjunasagar as an employee and later he shifted to Hyderabad and the Rent Control Case (RCC) filed by the plaintiff shows the manner in which he entered into possession of 199 sq.yards of the building, that the relationship between the plaintiff and Ameerunnisa Begum were strained that he never lived with her since 1952 and she never wanted to give any property to the plaintiff due to his misbehavior and due to his ill-treatment of her, that the defendant and Fakruddin have been in exclusive possession and enjoyment of the respective portions gifted to them right from 15.06.1975 and there were oral gifts or Hibas in favour of Fakruddin and Hakim Ali and they accepted the same. Hence, the suit is liable to be dismissed.

6. Basing on the pleadings, the trial Court framed the issues that 1) Whether the plaint schedule is not correct? 2) Whether the plaintiff is entitled to the declaration as prayed for? 3) Whether the plaintiff is entitled to the relief of possession? 4) Whether the plaintiff is entitled to mesne profits if so, to what amount? and 5) To what relief.

7. from the pleadings and issues, during the course of trial, the

plaintiff got examined P.Ws.1 to 4 by names Naseer Hussain, Khader Ali Khan, MSA Sheeraz and KC Vasanth Kumar and got marked A.1 to A.54 viz; memorandum of oral gift in favour of the plaintiff with plan, , legal notice of plaintiff with reply by defendant, electricity bill, demand notice by MCH for payment of tax, notice issued by MCH to plaintiff and defendant cancelling both the mutations, order in Rc.No.454/93 filed by the plaintiff, compromise petition in RC.No.454/93, death certificate of Ameerunnisa Begum, Electricity bills receipts, municipal tax receipts, Register maintained by Registrar for thumb impressions, letter from Sub-Registrar, Doodbowli and thumb impression in Ex.A.52 register at page 24 of register(Ameerunnisa Begum). On behalf of the defendant, he was examined himself as D.W.1 and also cause examined his paternal uncle who is also brother of plaintiff by name Fakruddin as D.W.2 and got marked Exs.B.1 to B.40 viz; Legal notices issued by plaintiff to Mr. Osman and Md.Ali, and reply of Osman, certified copy of the deposition of defendant in C.C.No.79 of 1995, Money order receipts, order in Rc.No.454/1993 equal to Ex.A.9, death certificate of Ameerunnisa Begum equal to Ex.A.11, memo of gift in favour of the defendant with plan, OP ticket of Ameerunnisa Begum issued by SD Eye hospital, Hyderabad, number cards, medical bill of Ameerunnisa Begum, medical bills and a prescription, passport to go to Iraq issued to Ameerunnisa begum, paper publication, covering letter, bills and demand notices with regard to the Municipal tax, bills relating to BPCL, Electricity bills and receipts, water cess receipt, complaint given by defendant to MCH, order in STC No.8/1997 passed by I Spl. MM, Hyderabad, BSNL Receipts, (telephone bill receipt), Extract of Assessment register in respect of H.No.20.02.655 from 1982 to 1996, Deposition of P.W.1 in STC No.8/97, Agreement of sale executed by Ameerunnisa, Begum in favour of B.Venkata Swamy, legal notice given to Ameerunnisa Begum, Death certificate of Hakeemuddin and telephone bill. Ex.X.1 is the report of the finger print Expert and Ex.X.2 is the letter from the Director of Fingerprints Bureau.

8. On hearing both sides, with reference to the pleadings and evidence supra, the trial Court held ultimately that the plaintiff failed to prove the identity of the property in possession of the defendant as part of the property alleged to have been gifted to him by his mother and he also failed to prove the gift itself, hence he is not entitled to any relief sought in the suit and as per the documents produced by the defendant, it shows that during life time of Ameerunnisa Begum, herself divided the property into four portions and gave the same to her surviving three sons by names Hakim Ali, Fakruddin and plaintiff and also to the defendant being the son of her pre-deceased son and they are in possession of their respective portions of house and site. Further the trial Court held that the Exs.A.1 memorandum of oral gift in favour of plaintiff and A.2 plan attached to Ex.A.1 were set up by the plaintiff and Ex.B.9 memo of gift in favour of defendant and B.10 plan attached to Ex.B.9 were also set up by the defendant and those are not genuine documents. D.W.2 did not file the gift deed said to have been executed in his favour by Ameerunnisa Begum on the ground that his property is not the subject matter of this suit.

9. Impugning the decree and judgment of the trial Court, the unsuccessful plaintiff preferred the appeal with the contentions in the grounds of appeal that the trial Court failed in appreciating the evidence on record and simply based on presumptions and assumptions in dismissing the suit, that the trial Court ought to have seen the P.W.2 spoke about not only execution but also attestation and about notarizing the Exs.A.1 and A.2, further P.W.2 in the year, 1986 got issued notice under which he mentioned about the Exs.A.1 and A.2, thus the evidence of P.W.2 is very important and it proves the execution of Ex.A.1 and A.2, however, the trial Court failed to appreciate the relevant point and simply rejected the relief on the ill-appreciation of evidence. The further contest is that the trial Court also failed to appreciate the fact that the defendant came out with false defence based on fictitious document and the trial Court while holding

that the defendant/ respondent failed to prove title under Ex.B.9, dismissed the suit without any basis, that the trial Court should not have considered the Exs.X.1 and X.2 report of finger print Expert as the said Expert did not give any finding about the thumb impression in his report, that the trial Court ought to have seen the non-examination of the attesor of Ex.A.1 is not fatal as the notary who has notarized the document, was examined as P.W.2 and any act done by notary is under the provisions of Notary Act, however, the trial Court failed to appreciate the evidence of P.W.2 and wrongly rejected the Exs.A.1 and A.2 for non-examination of attesor, that the trial Court misdirected itself while dealing with the question of identity of suit property and gave erroneous finding based on irrelevant considerations, that the judgment under appeal suffers from legal infirmities and requires interference by this Court as otherwise results grave injustice and hence to set aside the decree and judgment of the trial Court in O.S.No.390 of 2001 by allowing the appeal.

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10. The defendant filed cross objections in the appeal stating that the finding of the trial Court on Exs. B.9 and B.10 in para No.24 of its judgment is contrary to law, weight of evidence and probabilities of the case that Exs.B.9 and B.10 would have been accepted; that the Court below having observed in the commencement of Para-No.24 that of judgment that "As the plaintiff failed to prove his title and as he is not entitled to the reliefs sought in the suit, it need not enter into discussion about the title of the defendant" ought not to have entered into any discussion with regard to the Exs.B.9 and B.10, that the trial Court having observed that it is quite natural for Smt. Ameerunnisa Begum, the paternal grandmother of the defendant/Cross-objector to give some property to the defendant(grandson) as one of her sons who is the father of the defendant/Cross-Objector was admittedly a mad man and died on 24.08.1976 and the mother of the Cross-objector also left him

and went away and that the circumstances of the case justify the contention of the Cross-Objector that Smt. Ameerunnisa Begum herself during her lifetime made provision to her four sons, by dividing the property into four portions and gave one said share to the Cross-objector also, who is the son of her pre-deceased son and in possession of the respective portion, itself establishes genuineness of the Exs.B.9 and B.10, that the trial Court ought to have seen that the Exs.B.9 and B.10 have been proved by examination of the Cross-Objector besides one of the attestors thereto. Hence, to set aside the finding recorded in the para No.24 of the Judgment dt.12.07.2004 in O.S.No.390 of 2001 and also dismiss the appeal confirming the trial Court's judgment in other respects.

11. Heard both sides and perused the material on record in both the appeal and Cross-Objections.

12. Now the common points that arise for consideration are:-

1. Whether there is any oral gift in favour of the plaintiff, for the entire house property bearing D.No.20-2-655 undisputedly in which the plaint schedule is part, by his mother and the same by evidencing executed the document covered by Ex.A.1 memorandum with Ex.A.2 plan appended to Ex.A.1 and if so, the plaintiff is the owner of the plaint schedule property and the defendant is a licensee permitted by the plaintiff to continue and if not with what right rate the defendant is entitled to continue and if not whether the plaintiff is entitled to the relief of declaration of plaint schedule property and consequently for directing the defendant to deliver vacant possession of the suit property to the plaintiff so as to take possession through Court of law?

2. Whether there is any oral gift in the lifetime of Smt. Ameerunnisa Begum, mother of plaintiff and grandmother of the defendant, whereunder the plaint schedule property is given to the defendant, being son of her mentally challenged late son among her four sons including the plaintiff and if so, the defendant is absolute owner of the plaint schedule property and plaintiff is not entitled to the suit schedule property?

3. To what extent the trial Court's dismissal decree and

judgment finding of Ex.A.1 memorandum of oral gift with Ex.A.2 plan relied on by the plaintiff in support of the suit claim and Ex.B.9 memorandum of oral gift with Ex.B.10 plan relied on by the defendant in support of the defence, are unsustainable and set up which require interference by this Court while sitting in appeal pursuant to the appeal and Cross-Objections contentions supra and to what extent this Court while sitting in appeal can interfere with the said findings and ultimate dismissal decree and judgment of the trial Court?

4. To what relief?

Point Nos. 1 to 3:

13. In deciding the points 1 to 3 supra commonly for the sake of convenience and to avoid repetition of facts, it is necessary to mention that the first appellate Court is the ultimate fact finding Court where despite no Cross-Objections on any finding against the appeal respondent that can be attacked for the entire matter is at large for re-appreciation of the fact and law but for the limitation of merely because some other view is also possible that is not a ground to readily interfere by the appellate Court with the trial Court's conclusions and findings.

14. From the above, now coming to the oral gifts set up by the plaintiff and the defendant respectively as to the genuineness of any of them covered by Ex.A.1 and B.9 including on the correctness of the findings of the trial Court in this regard, it is necessary to mention the legal position that Hiba is pure and simple which is a gratuitous gift where the donor receives nothing in return thereby it is different from Hiba Bil Iwaz to mean gift made is subject to return or Iwaz(consideration) which may be a conditioned one for the gift or subsequent to the gift all depend upon the manner of the gift known as a mutual gift in relation to the Iwaz to acquire legal character practically of a sale or exchange in disregard to the sufficiency of consideration or equalness of the return. If it is an exchange other than cash consideration like sale, is known as Hiba-ba-Shart-ul-Iwaz to say in

one way a reciprocal gift. The book of Mohammadian law authored by Syed Amir Ali, 4th Edition particularly from pages 34 onwards of volume-1 from the expression of the Division Bench of the Patna High Court in **Mahammad Usman Vs. Ameer Mian**^[1] and from the expression of the Nagpur High Court in **Jainab Bee Vs. Jamal Khan**^[2] clarified the position, if not reiterating the expression of the Division Bench of the Madras High Court in **Kamarunnisa Vs. Hazarath Sahed**^[3]

15. Thus Hiba is a voluntary gift by a major with sound mind as a gratuitous and act of generosity by a transfer of ownership of a property to another without any consideration and on acceptance and taking possession by a donee. In case of donee a minor or insane can be accepted by sane guardian who can be even a non-muslim and the guardian need not even be the natural guardian vide **V.P.Whatelar Umrna and others Vs. P.N.Kondama**^[4]

16. Coming to the mandatory requirements to be satisfied to validate an oral gift by Hiba, though it does not require registration of any memorandum of oral gift as a subsequent acknowledgment of such an oral gift since valid under Muslim law and Chapter 7 Section 129 of the Transfer of Property Act, 1882 saves *donations Mortis causa* and Mohammedan gifts, in recognition of a custom as a source of law of oral gift under Mohammedan law by excludes application of Section 123 to Mohammedan gifts: The fact, however, remains for such oral gift under Mohammedan law known as Hiba, the pre-requisites that must be established to validate the oral gift are, there must be a declaration of gift that is required to be established showing that the donor, either in the presence of the witnesses or otherwise by public statement declared in making the gift and this pre-requisite as *sine qua non*, the other two conditions if the same subsists are that of there must be acceptance of the gift by donee expressly or impliedly and giving

and taking of possession of the property actually or constructively.

17. In the absence of any of the three qualified pre-requisites such an oral gift even claimed cannot be validated. The principles of Mahammedan law, 19th Edition, authored by Mullah at page 120 also reiterates the same. It is further to say the three essential requirements of gift by Mahammedan are again reiterated by scanning the law by the Apex Court in the expression of 2JB in **Hafeeza Bibi Vs. Shaikh Farid (dead) by LRs** ^[5] by further saying whenever there is a writing of such oral gift if otherwise valid, requires registration or not, depends on facts and circumstances of each case. The form is immaterial but the substance

of the three pre-requisites supra to construe a valid gift. It speaks if the document itself under which the gift is created though orally made valid, it requires registration and if it is not contemporaneous with the making of the gift but a factum of prior oral gift made reduced to writing, not required registration. In fact, the Privy Council in the case of **Mohammad Abdul Ghani Khan vs Fakhr Jahan Begam** ^[6] referring to *Syed Ameer Ali's Mahammedan Law supra* by approving the statement made therein, held the three conditions necessary for a valid gift under the Mahammedan 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. There are, no doubt, two judgments of one by Madras High Court and the other by this Court, viz; **Sankesula Chinna Budde Saheb Vs. Raja Subbamma** ^[7] referring to the three essentials of oral gift supra

held, 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 and the Full Bench of this Court subsequently held in **Inspector of General of Registration and Stamps, Govt. of Hyderabad Vs. Smt. Tayyaba Begum**^[8] on a reference made by the Board of Revenue u/sec.55 of the Hyderabad Stamp Act, as to a gift deed or oral gift acknowledging in writing later under Mahammedan law requires registration or not in answering the same, it was held that the purpose for which it was designed to serve in reducing any gift to writing is one of the decisive factors to say whether the executant did not treat it as a memorandum of completed oral Hiba (of the past transaction) from some of the sentences in the recitals from the terms of the document, the documents transfer title and not mere record of past transaction and attested by two persons as witnesses to the document, it requires registration as not a mere memorandum of past oral gift. However, the Division Bench of Calcutta High Court in **Nasib Ali Vs. Wajed Ali**^[9], held that when deed of gift by Mahammedan is not an instrument effecting, creating or making the gift but a mere piece of evidence, even if it is reduced to writing unless the three essentials and forms are observed since not valid according to law, a deed executed thereby is not an instrument effecting, creating or making gift but mere piece of evidence, more particularly deemed so happened after a lapse of time that evidence, observes all above three pre-requisites might not be forthcoming though it is sometimes that pretend to reduce the fact that a gift has been made into writing, then it is not a document of title but to serve a piece of evidence and that no way requires registration and the bar under Section 17 of the Registration Act thus has no application. Whereas, the Kerala High Court in *Makku Rawther's Children: Assan Ravther Vs. Manahapara Charayil*^[10] in answering the issue again came for consideration before it having relied on the expression of this Court in *Nasib Ali* supra, did not agree with the Full Bench expression of the Calcutta High Court in *Tayyaba*

Begum supra, saying one may respect the ruling but still reject the reasoning and the logic of the law matters more than the judicial members behind a view. The subsequent single Judge Bench expression of this Court in **Choto Uddandu Saheb Vs. Masthan Bi (died)**^[11] held that according to Mahammedan law, if the three essential pre-requisites of gift are satisfied, there could be a valid gift which is not necessary to reduce into writing as a deed of gift to make it valid and it should be registered unless the deed is merely a memorandum of an already effected oral gift that is not an instrument and not a contemporaneous document. In subsequent expression of another single Judge of this Court in **Mahammad Moinuddin Vs. Mahammad Ali**^[12] it was held in a memorandum of gift refers to the earlier oral gift by a Muslim and delivery of possession of the property from its acceptance on that day is only a proof of previous oral gift as a past transaction and not contemporaneous document and thereby the same no way requires registration and for that conclusion referred not only the **Tayyaba Begum** supra of the Full Bench but also other expression of **Syed Fatruddin Vs. Golla Shadrak**^[13] The Madras High Court in **Amir Khan Vs. Ghouse Khan**^[14] so also the earlier Full Bench of the Jammu and Kashmir High Court in **Gulam Ahmed Sofi Vs. Mahd. Sidiq Dareel**^[15], adopted the view of the Full Bench of this High Court referred supra. In **Hesabuddin Vs. Md. Hesaruddin**^[16] referring to earlier expression in **Jubeda Khatoon Vs. Moksed Ali**^[17], the Gowhati High Court held that, it all depends on facts and circumstances of each case before the Court to consider in arriving a finding whether the writing requires registration or not. When the matter came before the Apex Court in **Hafeeza Bibi** Supra, referring to the expressions supra and the earlier expression of the Apex Court in **Mahaboob Sultan Vs. Syed Ismail**^[18] Sections 123 and 129 of the Transfer of Property Act and Section 17 of the

Registration Act, and relying upon the expressions of the Kerala and Calcutta High Courts respectively in **Assan Ravther and Nasib Ali** supra concluded that what are the essential requirements under Mahammedan law are open declaration, acceptance and delivery of possession and once these three pre-requisites are satisfied, a gift can be oral and need not be written, much less to register and even reduced to writing on a piece of paper the transaction of the oral gift, that does not render the oral gift, invalid as also observed by **Jubeda** supra saying the written deed of oral gift is only a form of declaration by the donor and not an instrument of gift contemplated by Section 17 of the Registration Act. Once there is a valid gift from the three pre-requisites that is proved that becomes complete and irrevocable, whether it is reduced to writing or not later is of no significance being inconsequential.

18. In V.**Sreeramachandra Avadhani died by L.Rs. Vs. Shaik Abdul Rahaman**^[19], 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. In the latest expression of the Apex Court in **Resheeda Khatoon Vs. Ashiq Ali**^[20], 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 Mahaddian Law claimed the gift is made orally that was later reduced into writing by canceling with what the trial Court held of oral gift is valid, thereby subsequently reduced to writing of the same no way requires registration by referring to some of the expressions supra, particularly of Calcutta High court in **Nasib Ali** Supra, of the Apex Court in **Boya Ganganna Vs. State of A.P.**^[21],

the Alahabad High Court in **Kesam Ilahi Vs. Sharfuddin**^[22], of the Patna High Court in **Bishwanadh Gosain Vs. Dulhin Lambhani**^[23] and **Kamarunnisa Bibi Vs. Hussaini Bibi**^[24] and also the other expressions of the Apex Court in **Mahaboob Sahib** supra and **Hafeeza Bibi** supra and of the Kerala High Court in **Assan Ravther** supra, of the Gowhati High Court in **Jubeda Khattoon** supra and of the Privy Council in **Mahaboob Sahib** supra, holding the three essentials of gift under Mahammadian law are declaration of the gift by the donor openly, acceptance of the gift by the donee and delivery of possession for nothing mandates in writing to validate the same, every gift fulfilling 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 Mahammadian 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 under in **Hafeeza Bi** supra. The Apex Court in the recent expression in **Rasheeda Khattoon** 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.**^[25] 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)P508 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 not valid gift. For that conclusion also referred to **Sidiq Ali Khan Vs. F.J.Begum**^[26] 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 by the Apex Court on facts that no physical possession or formal entry even necessary in the Mahammedan 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 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.

19. In fact, the Apex Court in earlier expression of **Abdul Raheem Vs. Sk.Abdul Zabaar**^[27] held that under Mahammadan 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 the tenants, to disprove said gift.

20. 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 or constructive), as the case may be, and once there is a document even subsequent to it, it no way requires registration with mere acknowledgment of past transaction, however, from the latest expression of 2014 in **Rasheeda Khatoon**, supra, there is an observation of a contemporaneous one requires registration, though, from the earlier expression of 2011 Rasheeda supra, the contemporaneous gift also no way requires registration. The latest expression of the Apex Court in **Rasheeda Khatoon** thus one way supports the Full Bench expression of the A.P. High Court in Smt. Tayyaba Begum supra. 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 effected. The concept of the pre-constitutional law covered by the Police Act, 1861 wherefrom section 44 is in conflict with Section 154 of Cr.P.C., to the extent of the repugnancy shall not prevail but for given weight to Section 154 of Cr.P.C., being the existing law as per Article 366(10) of the Constitution as laid down by the 5 judges Bench expression of the Apex Court in **Lalitkumari Vs. Government of Uttarpradesh** ^[28] at paras 57 to 63.

21. 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 four sons of the so called donor their mother and the defendant is no other than the son of late brother of plaintiff, of declaratory relief with claim that as there is oral gift by Hiba valid later reduced to writing and thereby plaintiff is the absolute owner so to

declare and deliver possession of the plaint schedule. No doubt as per the existing law, in a suit for declaration or ejectment, suit for possession based on title, the plaintiff has to establish his title. 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 covered by the trial Court judgment are **Moran Mar Basselios Chatholicos Vs. Most Rev. Mar Poulouse Athanasius**^[29] 3JB, and the other expression of 3JB in **Brahma Nand Puri Vs. Nelci Puri(died)**^[30] 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 party who loses claim to the office of a Mohanth, on the strength of any usage must establish it affirmatively by proper legal evidence. The fact that the defendant is a trespasser would not entitle the plaintiff to succeed even though he is a disciple of late Mohanth unless succeeds in proving the particular usage under which succession takes place in the particular institution and for that conclusion of success or failure is on own strength. For that conclusion, the later expression supra placed reliance upon the earlier expression in **Sital das Vs. Sant das**^[31] regarding the custom or usage to be positively proved. To succeed the claim so far as the Exs. A.1 and B.9 respective acknowledgments of oral gifts, relied by the plaintiff and the defendant respectively concerned, as per the law laid down by the Apex Court in Hafeeza Bibi supra, same no way requires registration for its admissibility provided the same satisfied the three pre-requisites to make a valid Hiba respectively.

22. The plaintiff claims oral gift made in the year 1985. In the plaint it was alleged that said oral gift was dated 29.09.1985 in the presence of witnesses by the mother of plaintiff to the plaintiff and has given symbolic possession and she executed later a memorandum of

oral gift (Ex.A.1) with a plan (Ex.A.2) showing the gifted property in red colour, on dated 03.10.1985. He did not mention specifically as to said oral gift was accepted by him but for if at all implied acceptance. The plaintiff Hifazath Hussain, as can be seen from the lower Court's judgment among the P.Ws. 1 to 4, he was known to say Hussain as referred supra, did not mention the name of the persons(alleged witnesses) before whom the deceased mother of plaintiff in her lifetime on the alleged date 29.09.1985 made the oral declaration publicly. In the absence of which, mere vague mention of witnesses' presence, is not suffice without saying who were the persons in the presence of whom said oral declaration of Hiba was made by his mother, that too, entire property of her leaving nothing for her other sons other than the plaintiff including late sons' son who is the defendant whose father in his lifetime even undisputedly mentally challenged for more concern to the mother if at all said mentally challenged son and his son who is abandoned even by mother and in destitution. The fact that the said so called oral gift claimed reduced to writing under Ex.A.1 with plan Ex.A.2 is not a sufficient proof in the absence of examination of any of the attestors to the same as to who were the witnesses to the acknowledgment of the past transaction of oral gift. It is a gift of the year 1985 by his mother solely to the plaintiff ignoring the other sons of her and if validly made by voluntary declaration of intention to transfer without consideration in favour of plaintiff and its acceptance by the plaintiff and taking of possession by plaintiff to make it valid even nothing required to be reduced to writing, once it conveys title if at all it is duly proved of the three pre-requisites. However, there is nothing among the Exs. A.1 to A.54 showing any of the tenant was given notice after September, 1985, much less any receipts or lease deeds as to any of the tenant executed any lease. The plaint averments show symbolic possession taken as tenants are by then in actual physical possession under the donor and there was atornment of rights against the tenants by the donor to the done to enforce. If such is the case, as

pleaded one Mohammad Osman was a tenant, allegedly till vacated in 1991 since prior to September, 1985; said Osman is a material witness if it is oral tenancy or at least any document in proof of his continuation as a tenant till 1991, for alleged subsequent licensee to the defendant by plaintiff to permit orally to state free of rent for three years from 1991 and to vacate. For said version at least there must be a scrap of paper. The legal notice was only on 20.06.1995. If it is a licence for three years from January, 1991 to January, 1994, there is no meaning to wait till June, 1995 even to give legal notice; even the plaint speaks wayback in February, 1994 itself the plaintiff has demanded the defendant, however, he failed to comply and was evading to vacate. There is nothing prudence in the facts for not to issue notice immediately after February, 1994 even plaintiff was conscious of defendant avoids to vacate without proper reply to the oral demands, in waiting for one and half years. Importantly, before the suit and the legal notice (Ex.A.3) dated 20.06.1995 and reply (Ex.A.4) dated 24.06.1995, there is a criminal case from the report of defendant's wife against the plaintiff that was covered by C.C.No.79 of 1995 even as per the plaint averments. The said criminal case record not even submitted at least acquittal judgment as to what was the plea and what was the finding. Along with the plaint the only Photostat copy a memorandum of oral gift dated 03.10.1985 office copy of legal notice and reply were filed and nothing more. From the Ex.A.3 notice and Ex.A.4 reply even it covers the criminal case C.C.No.79 of 1995 filed against the plaintiff by the defendant and on contest ended in acquittal on 25.04.1995. In fact that criminal case is as referred supra filed by the wife of defendant as per the Ex.A.3 and not by the defendant to say what was averred therein as a bequeath and what the present written statement of defendant as Hiba and those are as if the defendant's own versions in variance; It is also clear from the contents of the Ex.A.3 legal notice of the complaint was filed by wife of defendant and not by defendant. Said variance in her lose reference as bequeath instead of saying

Hiba, thus, no way a ground much less to doubt the veracity of the defence of the defendant from that alone to enable the plaintiff to make a mountain out of a mound hill. As in the very reply Ex.A.4 defendant categorically stated that the paternal grandmother made oral gift of the portions of her entire property in favour of the defendant, to the other two sons and plaintiff. The oral gift mentioned in Ex.A.4 reply notice is dated 15.06.1975 whereas, the oral gift mentioned in the plaint and Ex.A.3 notice by the plaintiff in the plaint was on 29.09.1985. It is important to note that in the Ex.A.3 notice of plaintiff to the defendant, he did not mention what right he got over the property and what is the source of his title. He did not mention that he got the property under Hiba from his mother. What he simply stated is he is the absolute owner of the premises. That is also one of the crucial and vital and important aspects for he supposed to have been mentioned, for any man of prudence in the notice as to his source of title could mention and in this case thereby for plaintiff at least by rejoinder to the Ex.A.4 reply. The plaint filed was dated 05.07.1995. The reply notice was 24.06.1995 to the legal notice dated 20.06.1995. Nothing is explained even in the plaint with reference to the reply and notice in this regard. From this background coming to so called oral gift besides Exs.A.3 notice totally silent, plaint also totally silent, as to who are the witnesses to the oral gift for intention of the donor to cause by open declaration, as *sine qua non* among the three pre-requisites. In the absence of such a mention in the plaint as to who are the witnesses what sanctity can be given to the alleged oral gift for nothing mentioned as to in whose presence said declaration of the intention of the donor to make oral gift of her entire property to the plaintiff(only one of her sons) who is even a government employee undisputedly and that too for ignoring the other brothers of plaintiff by the mother of plaintiff, including the mentally challenged son of the donor who is the defendant's father to ignore the defendant and his father, without giving any property to them and giving entirely to plaintiff in the facts is

so unnatural for no strong reasons or circumstances for ignoring all of them. In this context it cannot be ignored also of the fact that in the plant presented on 05.07.1995 through documents referred i.e. Photostat copy of memorandum of gift with plan, office copy of notice with reply. On perusal of the Ex.A.1 shows there are two witnesses and their names however strangely not mentioned in the plaint and in this context as referred supra in the legal notice dated 20.06.1995 the source of title of the plaintiff by oral gift if at all said oral gift in existence dated 03.10.1995 not even referred or mentioned and not enclosed even a copy at least for source of title of plaintiff. Prudence requires for any ordinary person so to mention, that too, the claim is oral gift exclusively from his mother in ignorance of other brothers to whom claimed nothing given under the oral gift. The two witnesses referred in the memorandum of oral gift Ex.A.1 dated 03.10.1985 more even examined by the plaintiff for the reasons better known though out of them must have been at least one would be examined. It is the document typed in English running into 4 pages. The space after last line of the typed matter in page 1 and page 2 are uneven and at page 1 there is more gap and page 2 there is some more wider gap whereas in page 3 it is very closer to the writing and also page 4 very closure to the writing. The scribe or the typist who typed not even mentioned his name. It is important to mention even there is acknowledgment by the donee at page 4 that is the defendant according to him, there is no word of he accepted the gift in that endorsement/acknowledgment which is crucial from the legal position referred supra of without acceptance gift is not complete from mere intention of donor to give or mere specifying the same. The memorandum of oral gift is dated 03.10.1985 and the alleged oral gift was dated 29.09.1985 on the four stamp papers each of Rs.5/- on which the memorandum was executed shows dated 03.10.1985 alleged stamps purchased and despite the defendant disputes and claims those are set up and created documents, the stamp vendor's original Register was not called for of

the stamp Nos. 21467 to 21470 were purchased on 03.10.1985 with reference to the original Register by the defendant from that stamp vendor that is also one of the important circumstance to show the same is genuine and to presume therefrom of the execution at that time. The donee referred in his address as in Government service and as per the evidence he was working in Nagarjuna Sagar however he shown his address at Rahamath Nagar, Hyderabad, and even the donor's address, no other than his mother, as resident of Hussaini Alam, Hyderabad, to say there is nothing to show the donor is serving to the donee by keeping with him or she was staying with him or other sons of donor are ignoring her totally for any of his saying for not giving to them any property that too he is even a government servant for others shown equally not in Government service. The Ex.A.1 refers the so called two witnesses in whose presence the donee agreed to accept the offer by the donor of oral gift mentioned as Saleem and Anis Hussain whose residential address not given and none were among P.Ws. 1 to 4 to say any of them were not even examined in proof of the donor made oral declaration of intention of the oral gift in favour of the donee and its acceptance by donee in their presence, which is crucial for the plaintiff to prove even from specific denial by the defendant of right of plaintiff or the alleged oral gift in the written statement and not only that in the reply notice Ex.A.4 itself defendant denied any right of plaintiff over the property by saying it was his paternal grandmother's property who has orally gifted wayback in 1975 in favour of her sons and to him being mentally challenged son's son of the donor for the plaint schedule. It is not even mentioned at page 2 of the Ex.A.1 memorandum while mentioning as symbolic possession given as to the property is in the occupation of any tenant and there was any atornment of the rights against the specific tenants by transfer of ownership and if so, who were the tenants, for which portion, that is also a crucial one as what it simply mentions is the gifted portion is in the possession of the three tenants without mentioning their names.

The suit filed was on 05.07.1995. Ex.A.3 notice was dated 20.06.1995 and electricity bill Ex.A.5 shows the name of plaintiff with Door Number as Hussaini Alam. It no way suffice to say entire property is only with one electrical service. In fact, Ex.A.6 municipal tax receipt is only dated 16.09.1995 which is subsequent to the filing of suit on 05.07.1995 and about more than two and half months after legal notice and reply notice between the plaintiff and defendant. On perusal of Ex.A.7 dated 27.02.1997, it shows notice issued for mutation of plaintiff's name in the municipal records and if really it was an oral gift dated 29.09.1985 covered by Ex.A.1 memorandum dated 03.10.1985 and in existence, nothing prevented to mention in Ex.A.3 notice dated 20.06.1995. Nothing shown why he did not apply for mutation immediately once the oral gift if at all validly made transferring of title immediately to apply. Leave about no notices given to the alleged tenants, no lease deeds obtained, no receipts filed of any tenant paid any rent to him after 01.10.1985. These are all the important facts and circumstances to draw inference against the existence of Exs.A.1 and A.2 with reference to Exs.A.3 to A.7 supra. Ex.A.8 is dated 17.04.1997 of cancelling mutation of both the plaintiff and defendant respectively by the Municipality. Coming to Rent Control Case vide R.C.C.No.454 of 1993 filed by the plaintiff against one Mahammad Ali. What all filed is only a compromise petition without an affidavit and compromise memo and in compromise order dated 18.07.1994, there is no schedule even mentioned for the property. Though the compromise memo shows that the plaintiff was given oral gift by his mother dated 29.09.1985 there is no reference of Ex.A.1 memorandum of oral gift. In the absence of filing the original Rent Control Case and the counter contest of tenant by filing, the same shows nothing but a collusive outcome to set up the oral gift in the compromise memo in the year 1994 filed on 18.07.1994 and compromise recorded on even date as referred supra and there is no even schedule of the property as part of the compromise memo or compromise order. It is important in this context to note that the mother

of the plaintiff and grandmother of the defendant by name Ameerunnisa Begum died on 04.06.1992 only at the Door No.20-2-655 part of which is the present plaintiff schedule. If really the same was donated orally in the absence of showing any right is reserved by her or she was permitted as a licensee to reside. The death certificate filed no way improves the case of the plaintiff but went against him in showing there is no valid oral gift and thereby there is no any mutation by application with municipality in her lifetime and it is only after her death having conceived or devised in course of time to set up an oral gift deed on 29.09.1985 with ante-date and with or without existence of the memorandum of oral gift dated 03.10.1985, in cause filing RCC in 1994 with that devise to give life to the ante-dated document for the first time that could be the only inference to draw in the factual background with reference to the documentary evidence of the plaintiff. Even to say by the time RCC case cause filed and compromised, the memorandum of gift dated 03.10.1985 not even devised but for conceived the idea of setting up oral gift dated 29.09.1985 later if any as observed supra. Leave about any property municipal assessment and demand notice in the name of the plaintiff earlier from 1985; coming to Ex.A.5 referred supra of November 1993, or Ex.A.12 to 43 of the years 1994 to 1999 that no way improves the case of the plaintiff and even of Exs.A.44 to 51 municipal tax receipts are but for one dated 16.10.1993, only after filing of the suit dated 05.07.1995 that also does not give any sanctity in the absence of proving by filing the original municipal assessment record as to when name of plaintiff was mutated if at all there is any orally valid gift dated 29.09.1985 for entire property. If those relate to any part of property, that is of no help to plaintiff. If oral gift of 1985 true, it is unknown why not immediately cause mutated his name in municipal records. If cause mutated what are the taxes paid if at all in the name of the plaintiff after 1985 alleged date of oral gift. In this background, it is also important to mention that plaintiff did not come to witness box. None of the so called two witnesses of the

alleged oral gift even examined. The so called tenants as on the date of the alleged oral gift, none examined and even from one tenant alleged vacated by name Mohammad Osman in the year 1991 who was a tenant by the date of alleged oral gift in 1995 and later the defendant was given license to stay for three years that Osman was also not examined though an important witness as discussed supra. There is no proof of any said persons for not examined as witnesses on his behalf in the suit are out of availability and beyond the reach of summons to secure for adducing evidence of them and without that foundation any attempt by any oral say even cannot be given credence as laid down by this Court way back in **Sanjana Granites Vs. M.S.Rao**^[32]. No credence that can be given for the evidence of P.W.1- son of the plaintiff, that too, when he claims as GPA holder and the law is fairly settled that the GPA Holder cannot speak, but for the acts done by him with personal knowledge. His version for the first time propounded in the Chief examination as P.W.1 that he was present by the time of execution of oral gift thus cannot be given credence.

23. Coming to the evidence of P.W.2-Advocate and Notary R/o A.C.Guards, Hyderabad, he claims as notarized the gift document. He claims that she put her thumb impression on Ex.A.1 in his presence and he claims that Ammerunnisa Begum came to him and gave instructions for drafting Ex.A.1 and according to her wish he drafted the same. It is important to note that there is nothing of endorsement if he is the scribe to that effect of he prepared the typed matter, but for it is simply contained to say a Notarized attestation. It is not even his case in chief examination that he got any acquaintance with that lady to personally identify her as to the person came to him with that name is the real lady. The Notary Register not even produced by him to show who put her thumb impression in the Register if at all she came whether the same tallies with the thumb impression with Exs. A.1 and A.2 if any for the Court even to compare much less through expert

examination within the power of the Court u/sec. 73 or 45 of the Indian Evidence Act. He categorically deposed in the cross-examination that he does not remember whether he was an advocate for plaintiff with regard to the premises Door No.20-3-655. The advocate himself admitted that he cause issued on behalf of the plaintiff herein notice dated 13.03.1986 which is marked for reference as Ex.B.2. He denied the suggestion of he is voluntarily deposing to accommodate the plaintiff out of his acquaintance with him. He categorically deposed that he has no personal acquaintance with Ammeerunnisa Begum and he claims Ameerunnissa came with her husband, again says her son and grandson and two witnesses came. This shows the incredibility that can be attached to the prevaricative versions of this Advocate-Notary witness. It is categorically suggested though denied by him of the thumb impressions on Exs. A.1 and A.2 are not that of Ammeerunisa Begum-mother of plaintiff and grandmother of defendant. For his saying the Register whether he entered Exs.A.1 and A.2, were destroyed even there is no record of those Registers were destroyed or those were maintained, though he denied the suggestion of there was no such execution of the document or maintaining any registers or making any entries and Exs.A.1 and A.2 are fabricated and that he is deposing falsely.

24. P.W.3 is the Junior Assistant in the Sub Registrar Office, Doodbowli, who came on summoning by the plaintiff through Court that he brought the Thumb Impressions Register Volume 47 pages 1 to 120 which is Ex.A.52 and A.53, the letter of the Sub Registrar and the said Register contains thumb impressions of Ameerunnisa dated 16.02.1987 at page 24 which is Ex.A.54 and it relates to document 58 in case No.5 which is a registered sale deed No.161/87 executed by Ameerunnisa Begum in favour of B.Gananamma W/o Venkataswamy of Golakidki, Hyderabad in respect of house No.19-1-924. In the cross-examination, he stated that he is deposing as per records and in

Ex.A.54 it is not mentioned that the thumb impression relates to document No.161/1987 and there is no number to the thumb impression as of Ameerunnisa Begum. P.W.4 is the finger Prints expert who has passed All India Board Finger Prints Experts Examination conducted by the Central Finger Print Bureau at Calcutta under Ministry of Home Affairs of Government of India in the year 1978 and got experience in the field. He referred 5 documents viz; memorandum of oral gift dated 03.10.1985(Ex.A.1), memorandum of gift deed dated (Ex.B.9) dated 30.11.1991, Original pilgrim pass(Ex.B.19), Photostat copy of pilgrim pass and Thumb Impression Registrar vol.17 of the Registrar Office(Ex.A.52) and he received through letter Dis.No.308/2003, dated 11.09.2003 from the XIV Additional Senior Civil Judge(FTC), City Civil Court, and as per the directions of the Director of the Fingerprints, he examined said documents and given Ex.X.1 report with Ex.X.2 covering letter. In the cross-examination, he deposed that the thumb impressions Q.1, 2 and 4 thumb impressions on Ex.A.1 Memorandum of oral gift can be magnified and ascertained of the clear ridge characteristics therein and can be seen through transmitted light and he did not use the method of filtering since it is a plain paper. He denied the suggestion of the ridge characteristics which clearly to mention as not clear are not sufficient to establish identity. He deposed that the thumb impressions Q6 to Q10 are partial thumb impressions on Ex.B.9 and not possible to find out the clear ridges there. In his report, he did not mention about the Q6 to Q.10 are partial. He denied the suggestion that the disputed thumb impressions are having clear ridge characteristics and they can easily be compared. This cross-examination is done by the plaintiff. The cross-examination by the defendant reported 'nil'. In fact, it is to say even cross-examination of own witness with permission of Court u/sec.154 of the Indian Evidence Act, though there is no specific order, as can be seen from no any specific request in permitting, that no way an illegality; but for to say even therefrom nothing could be brought on

record to prove the thumb impressions on Exs.A.1 and A.2 are that of the plaintiff's mother and defendant's grandmother, even of the thumb impressions in the Ex.A.54 Register maintained by the Sub Registrar where the sale transaction by mother of plaintiff stated taken place and her thumb impressions were there. From that evidence, it is crystal clear of plaintiff miserably failed to prove his case. No doubt, as per the expression of the Apex Court in **RVEE Gounder Vs RVS Temple**^[33] 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. However, the fact remains on what is discussed supra the plaintiff miserably failed to prove the alleged oral gift and the memorandum of past transaction under Exs.A.1 and A.2 to claim any right therein over the plaint schedule property to ask for ejectment of the defendant much less by establishing as licensee under the plaintiff for no entitlement by plaintiff for no proof of the oral gift. The trial Court's conclusion in this regard thereby for this Court on re-appreciation of the entire material from the facts and law afresh as discussed supra even no way requires interference but for to explain the legal possession supra on the oral gift and subsequent acknowledgment of transaction no way requires registration. Thus the trial Court was right in drawing adverse inference for non-examination of plaintiff following the expression of our High Court's expression of Division Bench in **Radhabai Vs. Yashodabai**^[34] apart from it the expression of the Apex Court in **Panduranga Jivaji Apte Vs. Ramachandra Gangadhar Ashtekar**^[35] that the question of drawing adverse inference against the plaintiff for not coming to witness box is though not an automatic but for there is no other evidence in proof of the plaintiff's case worth for consideration so to draw therefrom also as discussed supra for there is no worth material. Once the plaintiff

miserably failed to succeed his case, the question of shifting onus on the defendant does not arise. No doubt, the cross-objections filed by the defendant is against the finding equally against the Ex.B.9. From cross-examination of the fingerprints Expert P.W.4 with reference to the opinion on Ex.B.9 also of ridge marks not clear to say the so called memorandum of oral gift in the year 1975 executed by the defendant's grandmother-cum-plaintiff's mother not proved for no other worth evidence. Even among the Exs.B.1 to B.40 no record showing, if at all it is a gift of 1975, what prevented to mutate the property in the name of defendant and his other paternal uncles so called donees-cum-sons of Ameerunnisa Begum. There is no evidence in this regard even from the defendant's side. Even the evidence of D.Ws. 1 and 2 much less with reference to Ex.B.1 to B.40 thereby nothing when proved that finding of the trial Court also no way requires interference by sitting against in answering the cross-objections.

25. In the result, both the Appeal and Cross-Objections are dismissed while confirming the decree and judgment dated 12.07.2014 passed by the learned XIV Additional Chief Judge, City Civil Court(FTC), Hyderabad, in O.S.No.390 of 2001(old O.S.No.842 of 1995). Consequently, miscellaneous petitions, if any, pending in this appeal and Cross-Objections, shall stand closed. There is no order as to costs.

Dr. B. SIVA SANKARA RAO, J

Date:22.04.2016

Note:L.R.Copy to be marked.
B/o. Vvr

- [\[1\]](#) AIR 1949 Patna 237
- [\[2\]](#) ILR 1949 Nagpur 426
- [\[3\]](#) 21 Madras L.J. 958
- [\[4\]](#) AIR 1964 SC 275
- [\[5\]](#) AIR 2011 SC 1695=2011(5) SCC 654
- [\[6\]](#) AIR 1922 PC 281
- [\[7\]](#) 1954(2) MLJ 113
- [\[8\]](#) AIR 1962 AP 199
- [\[9\]](#) AIR 1927 Cal 197
- [\[10\]](#) AIR 1972 Kerala 27
- [\[11\]](#) AIR 1975 AP 271
- [\[12\]](#) 2007(2) ALT 38
- [\[13\]](#) (2004) 6 ALT 753
- [\[14\]](#) (1985) 2 MLJ 136
- [\[15\]](#) AIR 1974 JK 59
- [\[16\]](#) AIR 1984 Gowhati 41
- [\[17\]](#) AIR 1973 Gau 105
- [\[18\]](#) AIR 1995 SC 1205
- [\[19\]](#) (2014) 6 ALT 40.1 & 2(DNSC)= (2014) 8 SCJ 146
- [\[20\]](#) (2014) 10 SCC 459
- [\[21\]](#) AIR 1976 SC 1541
- [\[22\]](#) AIR 1916 Allhabad 351
- [\[23\]](#) AIR 1968 Patna 481
- [\[24\]](#) 1880(3) Alahabad 266
- [\[25\]](#) AIR 1964 SC 275
- [\[26\]](#) AIR 1932 PC 13
- [\[27\]](#) AIR (2009) 6 SCC 160
- [\[28\]](#) (2014) 2 SCC page 1
- [\[29\]](#) AIR 1954 SC 526(1)
- [\[30\]](#) AIR 1965 SC 1506
- [\[31\]](#) AIR 1954 SC 606
- [\[32\]](#) (2002) 1 ALT 466 DB
- [\[33\]](#) 2003(8)-Supreme Today-194 at 196+AIR (2003) SC 4548=2003(8) SCC-752=2004(1)ALT 2641 26.2(DNSC)
- [\[34\]](#) (1998) 6 ALT 555
- [\[35\]](#) AIR 1981 SC 2235