

Mr. Imtiaz Pasha vs Mr. Nayaz Pasha on 9 November, 2021

Form No.9(Civil)
Title Sheet for Judgment in suit
(R.P. 91)

IN THE COURT OF THE LXXII ADDL. CITY CIVIL
& SESSIONS JUDGE, MAYO HALL UNIT,
BENGALURU, (CCH-73)

Present:

Sri.Abdul-Rahiman. A. Nandgadi,
B.Com, LL.B., (Spl.,)
LXXII Addl. City Civil & Sessions Judge, Bengaluru.

Dated this the 9th day of November, 2021.

O.S.No.25813/2015

Plaintiff:- Mr. Imtiaz Pasha,
S/o. Late Rasheed Pasha,
Aged about 55 years,
R/at No.382, 4th Square,
Austin Town, Viveknagar Post,
Bangalore-560008.

[By Sri. J. Ravindran- Advocates]

V/s

Defendant:- Mr. Nayaz Pasha,
Aged 50 years,
S/o Late Rasheed Pasha,
R/at No.368, 2nd Floor,
Center Road, Austin Town,
Viveknagar Post,
Bangalore-560008.

[By Sri Shrishail Naval Gund - Advocate]

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O.S.No.25813/2015

Date of Institution of the suit	10.09.2015
Nature of the (Suit or pro-note, suit for declaration and possession, suit for injunction, etc.)	Injunction Suit
Date of the commencement of recording of the Evidence.	19.03.2019
Date on which the Judgment was	09.11.2021.

pronounced.

	Year/s	Month/s	Day/s
Total duration	06	01	29

LXXII ADDL.CITY CIVIL AND SESSIONS JUDGE,
Mayohall Unit: Bengaluru.

JUDGMENT

This suit is filed by the Plaintiff against the Defendant for the relief of Permanent Injunction.

The Defendant has filed his Written Statement alongwith the Counter claim praying to declare him as the Absolute and sole owner of the Written Statement Property and alternatively to direct the Plaintiff to perform his obligations, inview of family Settlement recorded in MOU dated 11.06.2009.

2. Facts of the Plaintiff's case are as under:

It is the case of the Plaintiff that, he is the absolute owner of the Suit Schedule Property. The Suit Schedule Property was originally owned by his grandmother Late Azeemunissa, as she had acquired/purchased the said property from the Bangalore City Corporation, under the Registered Sale Deed dated:28.06.2002. She had executed the Gift deed in his favour. On the basis the said Gift Deed, katha was transferred in his name. Subsequently, he had applied for approval/sanction of building construction plan. On approval, he had constructed a house, consisting of ground floor, first floor, second floor and third floor. He is leaving in said house with his family members.

The Defendant who is his younger brother is pressurizing and harassing him to give away portion of the Suit Schedule Property, by way of Gift deed, contending that, he has a share in the Suit Schedule Property. But, the plaintiff explained him that, he has purchased the said property from his grandmother out of his own income in the form of a gift. Even the good advises of the friends and well wishers did not convince him. He had threatened the Plaintiff that, he will create encumbrance and dispossess the plaintiff and his family members. The plaintiff is employed abroad and his family is staying in the Suit Schedule Property. The Defendant has no manner of right, title or interest over the said property. Hence the Defendant is required to be restrained by an order of Injunction. Thus prayed to decree the suit.

3. Suit summons was issued to the Defendant. The Defendant has appeared through his counsel on 15.10.2000. The Defendant has filed his written statement on 15.12.2015.

4. The Defendant in his written statement has denied all the allegations made by the Plaintiff in the suit plaint and has specifically contend that, he and the Plaintiff are the sons of Mushtari Begum and the Suit Schedule Property originally belonged to Azeemunissa. Said Azeemunissa had shared a very close and affectionate relationship with him and he was one of her favorite grandchildren. She obtained the absolute rights in the Suit Schedule Property in year 2002 by getting executed the Registered Sale Deed in her favour from the Bangalore Mahanagara Palike. She paid the entire consideration amount, so the Suit Schedule Property was her absolute and self acquired property. She was a kind hearted lady. She wanted to give rights to all her children and grandchildren in the said property. From 2002 to 2008 his family as well as the family of the Plaintiff were staying with her. Shamshunnisa the youngest daughter of Late. Azeemunissa was also residing with them in the said property. Late. Azeemunissa was suffering from various age related complications, and she died in December 2008 at Bangalore after a prolonged illness. The Defendant was taking her care, especially during her last days when she was seriously ill and was unable to carry on any of her day-to-day activities without any assistance. The Plaintiff was consistently traveling abroad during this times, for his employment and the other grandchildren of Azeemunissa were also busy with their respective works and many of them were serving and residing abroad during this time. It was he, who was only available and taking care of his aged old grandmother. The Plaintiff fraudulently and with a dishonest intention induced Late. Azeemunissa to executed Registered Gift Deed in his favour on 17.06.2008 in respect of the Suit Schedule Property. The said act was done barely within 6 months prior to her death, when her physical and mental health both were particularly poor. Late. Azeemunissa was absolutely not in a condition to appreciate the legal effects of her actions in executing the Gift Deed and she did not execute the said document out of her own accord. The Plaintiff infact also gave a false pretext to all the other family members that only a nominal paperwork will be got done from Late. Azeemunissa inorder to get released the pension amounts due, as she had retired from services, as a Nurse, from the Government Dispensary at Neelasandra. Further the Plaintiff informed the other family members that, he will duly take the responsibility of getting the sums released for her benefit, as she was too old and unwell to do so by herself. Further contends that, his grandmother is not only shown as the 'Ostensible donor', but witnesses are also shown as the ostensible witnesses and other signatories were the victims of the said misrepresentation and fraud played by the Plaintiff. He (Defendant) is not the signatory to the said Gift Deed. Soon after the death of Late. Azeemunissa, the Plaintiff started harassing the Defendant and the other family members and tried illegally to put them out of the old house, forcibly. It is only then he (Defendant) and other family members realized the fraudulent play, played by the Plaintiff upon Azeemunissa and upon them, in getting executed the said Gift Deed surreptitiously, in his favour. The Defendant and the other family members had objected the Gift Deed and they were prepared to approach the Courts of law for suitable actions. At this juncture, the Plaintiff offered to monetarily compensate each of the claimant, to bring about an "amicable settlement". Since the Plaintiff had promised to pay many of the family members and according by paying, had obtained/procured waiver of their claims in the estate of Late. Azeemunissa. However his grandmother Azeemunissa always wanted him to enjoy the said property, as he had no other property of his own. Under such circumstances, the family settlement was arrived at inbetween all family members of Late. Azeemunissa, other then the Defendant, wherein they had accepted some cash from the Plaintiff in lieu of their share in the Suit Property and thus agreed to acknowledged the legality of the Gift Deed, got prepared by the Plaintiff, fraudulently. And it was further agreed

that, the Plaintiff and the Defendant would jointly share the Suit Property in the ratio of 75%:25%, respectively. Since the existing structure on the Suit Property was very old, small and was difficult to accommodate the families of the Plaintiff and the Defendant, they had decided to build a new structure in which three units would belong to the Plaintiff and one unit to the Defendant. With this the Plaintiff and the Defendant entered into a written memorandum of understanding (Hereinafter referred to as MOU) on 11.06.2009. The Plaintiff has suppressed the MOU. This MOU was drafted by the lawyers of the Plaintiff, wherein he had merely signed and accepted the contents of it, in good faith, under the belief that, it would be fully acted upon by his elder brother at all times, without any further ado or controversy.

Further this Defendant was assured by the Plaintiff that, there is no necessary to get registered the said MOU, so the same was not registered. The contents of the MOU speaks about a nominal gift to be effected by the Plaintiff in favour of the Defendant, in respect of the Written Statement Property viz, Second floor and appurtenant rights, including corresponding undivided interest in the land, immediately upon completion of the construction of the Defendant property by the Defendant. The MOU identifies the first floor of the Suit Schedule Property, as the Defendant share, however after the execution of the MOU, the Plaintiff had himself requested the Defendant to take the second floor and to give the first floor, to him. So that he can utilize the ground and the first floor as one unit, as a Duplex apartment. Accordingly, he has put up constructions on the second floor, for his own use and enjoyment rather than on the first floor. This is the only deviation made from the written MOU. Further contends that, the old structure standing in the Suit Property was demolished and thereafter he and the Plaintiff entrusted the construction work of the entire new multi storied building, jointly to one Mr. Venkatesh- the Contractor. An agreement is entered into with the said contractor. The original agreement is either with the Contractor or with the Plaintiff.

Further contends that, he has personally spent the amount necessary to put up the second floor over the Suit Property and to get interior works done therein. Thus he is the owner of the second floor of the structure, by virtue of MOU as he has erected it, by his own costs. He has designed the construction on the said floor as per his choice and taste. He has expended Rs.7,00,000/- to complete his constructional work.

The Defendant has filed a counter claim contending that, he has incurred expenses of Rs.7,00,000/- for construction of the second level floor, on the basis of the MOU entered into in between him and his brother- the Plaintiff. His brother has orally gifted 25% interest in the Suit Schedule Property in his favour, as such he may be declared as the owner of the Schedule Property to the extent thereof. He is entitled to have the relief of Specific Performance of the family settlement/MOU, by virtue of which the Plaintiff is required to be directed to execute an appropriate title deed to acknowledge his right in relation with the Written Statement property. The Plaintiff and his family members are attempting to interfere with his peaceful and lawful possession over the Written Statement Schedule Property. So they are required to be restrained by an order of Permanent Injunction from doing so. He has pleaded the cause of action in Para No.56 of the Written Statement/Counter claim and pleaded that he has paid Court fee of Rs.87,125/-. Hence prayed to dismiss the suit of the Plaintiff and prayed to award the reliefs of Declaration, Specific Performance and Injunction as claimed in the Counter Claim.

5. This Court has framed the following issues on 28.08.2018, as under:

ISSUES

1. Whether the Plaintiff proves that, he is in lawful Possession and enjoyment of the Suit Schedule Property on the date of the suit?
2. Whether the Plaintiff proves the alleged interference by the Defendant over the Suit Schedule Property?
3. Whether the Plaintiff is entitled for the relief of Permanent Injunction as claimed, in this Suit Complaint?
4. What order or decree?

6. Further on the basis of the Counter claim, this Court has framed an additional issues on 22.10.2018.

1. Whether the Defendant proves that, he is in possession and enjoyment of the written statement schedule property, as on the date of the suit?
2. Whether the Defendant proves that, a memorandum of undertaking dt:11.06.2009 was entered in between the Plaintiff and the Defendant, thereby agreed to share the suit property, in the ratio of 75% : 25%?
3. Whether the defendant proves that, he has personally spent the amount for construction, as alleged in the counter-claim?
4. Whether the Defendant proves that, the Plaintiff has gifted the written statement schedule property by way of oral gift (Hibba), as per the customs prevailing in the parties?
5. Whether the Defendant is entitled for the relief of Declaration, as claimed by him, in the counter-claim?
6. Whether the Defendant is entitled for an alternative decree of Specific Performance, as prayed and contended in the counter-claim?
7. What order or decree?

7. The Plaintiff in order to prove his case, got his Power of Attorney Holder/wife examined as PW1 and got marked 06-documents as Ex.P.1 to Ex.P.6. PW1 was cross examined on behalf of the Defendant on 13.09.2019 & 18.10.2021. Ex.D1(A) to Ex.D1(H) - signatures of the Plaintiff (signatures of the husband of PW.1) got marked on confrontation to PW.1.

The Defendant got examined himself as DW.1 and got marked o3 document as Ex.D2 to Ex.D4. DW.1 was cross examined on behalf of the Plaintiff on 31.01.2021. Signatures of his mother, his aunts were got marked on confrontation on Ex.P2- Gift Deed, as Ex.P2 (A) to Ex.P2(G).

8. The suit was initially allotted to CCH-20. The same was transferred to this Court on 02.08.2018, as per Notification No. ADM- I(A)413/2018 dtd.31.07.2018.

9. Heard the Arguments of the Learned Counsels for the Plaintiff and the Defendant, respectively.

The Learned Counsel for the Plaintiff has filed his Written Arguments on 18.10.2021.

Percontra, the Learned Counsel for the Defendant has filed written synopsis on 04.10.2021 and has placed his reliance on six decisions, viz., reported in 1) (2008) 4 SCC 594; 2) (2011) 5 SCC 654; 3) 2010 SCC Online Jhar 1346; 4) (1999) 3 SCC 457; 5) (1987) 2 SCC 555; and 6) (1976) 3 SCC 119.

10. My findings on the above said issues are as under:

Issue No 1	:	In the Affirmative;
Issue No 2	:	In the Affirmative;
Issue No 3	:	In the Affirmative;
Addl. Issue No.1:		In the Negative;
Addl. Issue No.2:		In the Negative;
Addl. Issue No.3:		In the Negative;
Addl. Issue No.4:		In the Negative;
Addl. Issue No.5:		In the Negative;
Addl. Issue No.6:		In the Negative;
Issue No 4 & Addl. Issue No.7:		As per final order for the following:

:R E A S O N S:

11. The undisputed facts inbetween the

Plaintiff and the Defendant, as per their contentions are:

a) relationship inbetween the Plaintiff and the Defendant, interse, as brothers;

b) Suit Schedule Property originally belonged to the grandmother of the Plaintiff and the Defendant by name Azeemunissa, as the said property was allotted to her by BMP and a Registered Sale Deed was executed in her favour on behalf of the Corporation by its Commissioner, as per the Sale Deed dtd.28.06.2002;

c) the grandmother of the Plaintiff and the Defendant by name Azeemunissa was

having three daughters and one son viz., Sabira Begum; Mushtari Begum (mother of the Plaintiff and the Defendant);

Shamshunnissa; and Nasir Husain;

d) mother of the Plaintiff and the Defendant by name Mushtari Begum is having five sons viz., Imtiyaz Pasha (Plaintiff); Nayaz Pasha(Defendant); Riyaz Pasha; Mashood Pasha; and Zameer Pasha;

e) during the lifetime of Azeemunissa, she was residing alongwith her daughters Mushtari Begum and Shamshunissa, including the Plaintiff and the Defendant.

12. Issue No.1 & Addl. Issue Nos.1 to 4:

Since all these issues are interrelated to each other, they are taken for joint discussion, in order to avoid repetition and confusion, in the discussion.

12.01. Plaintiff contends that, he is in possession of the Suit Schedule Property as the said property was gifted to him by his grandmother Azeemunissa under the Registered Gift Deed dtd.23.06.2008. Thereafter he has constructed a building over the said property, consisting of ground, first, second and third floors, on obtaining necessary building construction permission.

12.02. Per contra, the Defendant contends that, during the lifetime of his grandmother Azeemunissa, he was in joint possession of the Suit Schedule Property and after her death, he and his brother have entered into a MOU on 11.06.2009, wherein his brother- the Plaintiff had undertaken to give him the first floor of the building, on its construction, by way of Hiba. Further contends that, as per the request of his brother- the Plaintiff, he was put into possession of the second floor of the said building.

He is in possession of the said second floor. He has inducted the tenant in it. The Plaintiff has failed to adhere to the terms of the MOU dtd.11.06.2009 and thereby has failed to execute Hiba in his favour, in respect of the second floor in the Suit Schedule Property.

13. The first contention taken up by the Defendant in his Written Statement that, his brother- the Plaintiff has got executed the Gift Deed in his favour by mis-presenting his grandmother Azeemunissa and other family members contending that, the said document was only a nominal paper work required for the release of the pension amounts due, as she had retired from her services as Nurse from the Govt. Dispensary at Neelastandra.

13.01. The Plaintiff has produced

a) the Original Registered Gift Deed dtd.17.06.2008 at Ex.P2. As per this document, it is seen that, Smt. Azeemunissa W/O Rahim Husain has bequeathed the Suit Schedule Property allotted to her by the BMP Corporation i.e., property bearing No.382, 4th Square, Austin town, situate at Ward No.71, Bengaluru, having PID No.714/54/382, measuring East to West: 22 feet-6 inches and North to South: 25 feet, bounded to the East: by BCC Quarters No.399; to the West: by Road; to the North: by BCC Quarters No.389; and to the South: By BCC Quarters No.383, to Imtiyaz Pasha- the Plaintiff. Further this documents evidences that, the donor has delivered the actual possession of the property under gift, to the donee; and the donee has accepted the said gift. Further this document speaks that, Sabira Begum, Mushtari Begum, Shamsunissa have affixed their thumb marks and signature on the said document as the consenting witnesses.

b) Uttar Patra issued by the BBMP dtd.07.07.2008 at Ex.P3. As per this document, it is seen that, the name of the Plaintiff is shown to be the Khatedhar of the property bearing No.382, situate at Austin Town, in Ward No.71. Further this document also speaks that, the khata of the said property is transferred in the name of the Khatedhar on 30.06.2008, on the basis of the Gift Deed.

c) Khata extract at Ex.P4. As per this document, it is seen that, the name of the Plaintiff is shown as the owner of the property bearing No.382, situate at Austin Town.

d) Property tax receipts for the years 2018-19 at Ex.P5. As per this document, it is seen that, the name of the Plaintiff is shown to be the owner of the property bearing No.382, Austin Town Quarter, having PID No.71-54-382.

e) Original Power of Attorney executed by infavour of his wife-PW.1 at Ex.P1.

13.02. Coming to the ocular evidence, on this point, more specifically,

a) cross examination of PW.1, at Page No.6, Para Nos.1 and 2, which reads as under:-

"It is true to suggest that suit schedule property originally belongs to Azeemunissa, as she had purchased the said property from BBMP, as she was working in the hospital run by the corporation. Said Azeemunissa died on 07.12.2008, due to her advanced age, as she was aged about 110 years. Said Azeemunissa was knowing Urdu language and Tamil language.

Ex.P2 Registered Gift Deed
dt.17.06.2008, was prepared by

Azeemunissa. I am a witness to the said Gift Deed- Ex.P2. I am not the beneficiary under the Gift Deed - Ex.P2. Witness volunteers that my husband is the beneficiary under the Gift Deed - Ex.P2. On the day of execution of Gift Deed - Ex.P2 I did not accompany Azeemunissa to the Sub-Registrar office."

As per this evidence, PW.1 affirms the suggestion made to her that originally the Suit Schedule Property belongs to Azeemunissa as she has purchased the said property from BBMP, as she was

working in the hospital run by the Corporation. Further she contends that, Azzemunissa died on 07.12.2008, due to her advanced age. She was aged about 110 years. Further contends that, Registered Gift Deed dtd.17.06.2008-Ex.P2 was prepared by Azeemunissa and she was a witness to the said Gift Deed, but not beneficiary under the said Gift Deed. She further contends that, her husband is the beneficiary under the said Gift Deed.

b) cross examination of PW.1, at Page No.10, Para No.1, which reads as under:-

"Since, I was residing in the house, earlier to construction of a building in the suit schedule property and my husband was looking after all the affairs of Azeemunissa, she on deciding with her children, she gifted the said property to my husband. Witness volunteers that her husband paid an amount of Rs.3,60,000/- to the elder daughter of Azeemunissa by name Sabeera, Rs. 2,00,000/- to another daughter of Azeemunissa by name Mustri Begum (Mustri Begum is the mother-in-law of the witness), Rs.2,00,000/- to another daughter of Azeemunissa by name Shamshunissa and Rs.1,40,000/- to Shainaz W/o. Late Nisaar Pasha (Nisaar Pasha is the son of Azeemunissa). I do not know the exact date when the above said payments were made to the above said persons, but the said payments were made on the date of execution of the Gift Deed, for which the recipients have affixed their signatures on the Gift Deed-Ex.P2."

As per this evidence, PW.1 contends that, since she and her husband were residing in the house, earlier to the construction of the building in the Suit Schedule Property, they were looking after all the affairs of the Azeemunissa. Said Azeemunissa on consulting her children has gifted the said property to her husband. Further she contends that, her husband has paid an amount of Rs.3,60,000/- to the elder daughter by name Sabeera; Rs.2,00,000/- to her another daughter by name Mushtari Begum- her mother-in-law; Rs.2,00,000/- to her another daughter Shamshunissa; and Rs.1,40,000/- to Shainaz W/O Late Nisaar Pasha- the daughter-in- law of Azeemunissa. But she cannot state the exact the date when the said payments were made to them, but the said payments were made on the day of the execution of the Gift Deed, for which the recipients have affixed their signatures on Gift Deed- Ex.P2.

c) cross examination of DW.1 at Page No.19, Para No.4 to Page No.20, Para No.4, which reads as under:-

"My aunt Shamshunnissa has also affixed her thumb impression to the said Gift Deed as the consenting witness on the rare side of page NO.2 of the said document. Now I see her photo. The said photo of Shamshunnissa is marked on confrontation as Ex.P2(C).

My senior aunt Sabira Begum has also affixed her thumb impression to the said Gift Deed as the consenting witness on the rare side of page NO.2 of the said document. Now I see her photo. The said photo of Sabira Begum is marked on confrontation as Ex.P2(D).

My grandmother Azeemunissa has also affixed her thumb impression to the said Gift Deed on the rare side of page NO.1 of the said document. Now I see her photo. The said photo of Azeemunissa is marked on confrontation as Ex.P2(E).

Now I see the Photograph of my brother Imtiyaz Pasha and his signature on the rare side of page NO.1 of the Gift Deed. On confrontation the said photo and signature of Imtiyaz Pasha is marked as Ex.P2(F) and Ex.P2(G)."

As per this evidence, Defendant/DW.1 admits that, her mother Mushtari Begum has affixed her signature on the Gift Deed-Ex.P2, as consenting witness, her photographs and her signature is identified by the Defendant, which is marked as Ex.P2(A) and Ex.P2(B).

Further the Defendant has identified the photo of his senior aunt Sabeera Begum on the Gift Deed - Ex.P2, as Ex.P2(D).

Further the Defendant has identified the photo of his grandmother Azeemunissa on the Gift Deed -Ex.P2, as Ex.P2(E).

Further the Defendant has identified the photo and signature of his brother Imtiyaz Pasha on the Gift Deed -Ex.P2, as Ex.P2(F) to (G).

13.03. The Learned Counsel for the Defendant would contend that, Ex.P2- Gift Deed is the outcome of misrepresentation and fraud played by the Plaintiff upon Azeemunissa and her heirs; and he would contend that, such a gift is not a valid one.

13.04. Admittedly, Azeemunissa has died on 07.12.2008. The Gift Deed-Ex.P2 is said to have been executed on 23.06.2008. Till the death of Azeemunissa, the said Gift Deed is not challenged by her.

After the death of Azeemunissa her legal heirs viz., Sabira Begum; Mushtari Begum, Shamshunissa or Nasir Hussain or his legal heirs have not challenged the said Gift Deed.

All the daughters of Azeemunissa, viz., Sabira Begum; Mushtari Begum and Shamshunissa have signed the said Gift Deed, as the consenting witnesses.

But the Defendant who is the son of Mushtari Begum, is challenging the same.

Firstly, the Defendant cannot challenge the Gift Deed -Ex.P2, executed by her grandmother, in the event, when the daughters of her grandmother, more specifically his mother Mushtari Begum has offered her consent and the same has not been challenged by her.

Secondly, the Defendant contends that, the Plaintiff has entered into a MOU with him on 11.06.2009, wherein he has undertaken to gift the first floor of the building to be constructed on the Schedule of property shown in the Gift Deed.

By virtue of this contention, the Defendant admits the ownership of the Plaintiff over the Schedule Property shown in the Gift Deed.

Unless the Defendant admits the ownership of the Plaintiff over the Scheduled property and unless the Defendant admits the Gift Deed -Ex.P2, he will not be entitled for the relief of Specific Performance of MOU- Ex.D1, claimed by him.

13.05. Thus, in order to conclude, on the basis of the oral and documentary evidence, referred to supra, it can be said that, Azeemunissa has executed a Gift Deed in favour of the Plaintiff on 23.06.2008, as per Ex.P2, in respect of the Suit Schedule Property, consisting of old house, then. In furtherance of the said execution, the khata pertaining to the said property has been transferred in the name of the Plaintiff, as can be seen as per Ex.P3 to Ex.P5. So the Gift Deed executed by Azeemunissa has been acted over.

Further on close scrutiny of Ex.P2- Gift Deed dtd.23.06.2008, it is seen that, it consists of all the three ingredients of Hiba, as required under Mohammedan Law viz., 1) Declaration of a gift by donor; 2) acceptance of the Gift Deed by the donee expressly or impliedly; and 3) Delivery of possession to and taking possession thereof by the donee actually or constructively.

Thus, it can be concluded that, Azeemunissa has gifted the property shown as Schedule of Property, under the Gift Deed dtd.23.06.2008-Ex.P2 to her grand son Imtiaz Pasha-the Plaintiff and he is in possession of the Suit Schedule Property, by virtue of the said Gift Deed dtd.23.06.2008 - Ex.P2.

14. The second contention raised by the Defendant, that there was a MOU in between him and the Plaintiff, wherein the Plaintiff had agreed to give the first floor of the constructed building to him, by way of Hiba, for which he has to bear his own constructional costs for the construction of the said floor.

Further he contends that, though it was agreed to give him the first floor, but at the request of the Plaintiff, he has taken the second floor, in order to accommodate the Plaintiff and his family to enjoy the ground floor and the first floor, as a Duplex.

Further he contends that, he has incurred expenses of more than Rs.7,00,000/- towards construction of the second floor.

Per contra, the Plaintiff denies the said contentions taken up by the Defendant. And further contends that, it is the Plaintiff who has obtained sanction for construction of a building in the Scheduled property and has constructed the building consisting of the ground, first, second and third floors, without their being any contributions from the Defendant, as alleged.

14.01. With regard to construction of the building in the Scheduled Property:

14.01.01. The Plaintiff has produced Approved blue print map for construction of a building, approved by the BBMP Authorities at Ex.P6. As per this document, it is

seen that, the said construction plan was sanctioned for construction of the building with the specification, shown therein. The said sanction was for a period commencing from 09.02.2012 to 08.02.2014 and the said sanction was granted at LP No.29/2011-12.

14.01.02. Coming to the ocular evidence, on this point, more specifically,

a) cross examination of PW.1, at Page No.8, Para No.3, which reads as under:-

"My husband had applied for sanction of building construction plan to the BBMP authorities. As on the date of filing an application for sanction of building construction plan, my husband was not in India. I had made efforts to obtained the said building construction plan from the BBMP authorities. All the office work follow up was looked after and was done by our contractor Mr. Venkatesh. It is true to suggest that Mr. Venkatesh - the building contractor was the only contractor who was looking after the construction work of the entire building in the suit schedule property. There was no any agreement inbetween us and the said contractor Mr. Venkatesh, for construction of the building in the suit schedule property. No any status report was availed from the said contractor as I was personally inspecting the building."

As per this evidence, PW.1 contends that, her husband has applied for sanction of building construction plan to the BBMP Authorities, but he was not in India, when such application was filed. She has made efforts to obtain the said building construction plan from the BBMP Authorities. All the office work and follow up was looked after and was got done by the Contractor Mr. Venkatesh. He was only the Contractor who was looking after the construction work of the entire building. There was no any agreement inbetween the owner and the Contractor, nor there was any status report given by the said Contractor. And she contends that, she was personally inspecting the building.

b) cross examination of DW.1, at Page No.21, Para No.4, Line Nos.5 onwards, which reads as under:-

".... It is true to suggest that my brother Imtiyaz Pasha - the Plaintiff had obtained building construction permission from the concerned authorities as per the Sanctioned Plan - Ex.P6. Property tax of the Suit Schedule Property is paid by Imtiyaz Pasha- the Plaintiff."

As per this evidence, Defendant/DW.1 admits that, his brother Imtiyaz Pasha- the Plaintiff had obtained building construction plan from the concerned authorities, as per the sanction plan- Ex.P6. And the property tax of the Scheduled Property is paid by the his brother-Imtiyaz Pasha- the Plaintiff.

14.01.03. As per the documentary evidence and ocular evidence referred to supra, it can be conclude that, it is the Plaintiff who has obtained the building construction permission to construct a building

in the Scheduled Property.

14.02. With regard to the contribution of the Defendant, for construction of the second floor:

14.02.01. The Defendant has got confronted PW.1 the signatures of her husband on the MOU-

Ex.D1. So Ex.D1 was got marked for identification. As per the said document, more specifically, Clause- 5, which reads as under:-

"5. That the entire proposed ground, second, third, fourth floor construction in respect of schedule property shall be borne by the first party. Further the entire proposed first floor construction cost in respect of schedule property shall be borne by second party as per his choice/taste and deposits, road cutting expenses, civic charges, miscellaneous charges, expenses, relating thereto in respect of proposed I floor over schedule property shall be borne by second party alone, that is an condition precedent, and on completion the second party shall peacefully stay/reside therein, and the first party shall come forward and make necessary arrangement to gift the entire proposed I floor after construction over the schedule property, in favour of second party. In terms of Islamic rites and customs by way of oral gift Hibba, and the expenses thereof shall be borne by the second party alone."

As per the recitals found in ExD1, it is seen that the ground, second and third floors construction is to be borne by the first party i.e., the Plaintiff and first floor construction cost is to be borne by the second party i.e., the Defendant.

14.02.02. The Defendant has also produced his bank passbook at Ex.D2, to show his contribution towards construction of building in the Scheduled Property, which he contends that, he has paid to the Contractor.

On careful perusal of this document, it is seen that, there is an entry dtd.30.11.2012, for making the payments of Rs.50,000/- to one Mr. Venkatesh, which the Defendant contends that, he has paid to the Contractor.

14.02.03. Coming to the ocular evidence, on this point, more specifically,

a) cross examination of PW.1, at Page No.8, Para No.2, which reads as under:-

"Building in the suit schedule property was commenced for its construction in the month of February 2012. In the year 2012, my husband has visited India in the month of June. I was taking care of construction of the building in the suit schedule property. One Venkatesh had undertaken the contract work for construction of the said building. The total cost of construction of the building was Rs.30,00,000/- and each floor costed about Rs.7,20,000/-. I was making the payments to the contractor

and for availing the materials for construction of the said building. All the payments were made interns of costs. I am not an employee, but I am a housewife. I have not received any formed receipts form the persons who have made the payment, but I had obtained their signatures. I have misplaced the said documents."

b) cross examination of PW.1, at Page No.12, Para No.3, which reads as under:-

"I do not know whether the Defendant has contributed towards the construction of a new residential building in the Suit Schedule Property. I do not know whether the Defendant has paid approximately an amount of Rs.7,00,000/- towards construction the new residential building in the Suit Schedule Property."

c) cross examination of DW.1, at Page No.22, Para No.4, which reads as under:-

"As per Ex.D2 - Bank statement entry dated 30.11.2012 shows that, an amount of Rs.50,000/- is paid to Venkatesh contractor. Apart from this entry, there is no other entry to show that I have paid amount to Venkatesh contractor. Witness volunteers that initially he was paying to Venkatesh contractor by way of cash and subsequently he has paid by way of cheque. I have not taken any cash receipts from Venkatesh contractor for having paid cash amount to him."

14.02.04. Merely producing the pass book showing an entry of Rs 50,000/- is not sufficient to hold that the said amount is paid to the Contractor by name Venkatesh. But no any specific evidence, either oral of documentary, is led by the Defendant to show that the said amount is paid to the Contract only. Here the Defendant ought to have led the evidence of the said Contractor to prove the fact of either making payments with regards to the entire cost of construction of the first floor, or Rs 50,000/- as contended by placing reliance on the Pass Book- ExD2.

14.02.05. Further the Defendant contends that, as per the request of the Plaintiff, he was given second floor for which he has incurred construction cost and has constructed in the second floor.

The Defendant has neither shown that, there was such an understanding inbetween him and the Plaintiff, that he has to take the second floor and get constructed the said floor and occupy the same and the Plaintiff has to take the first floor. No any document is forthcoming from the side of the Defendant to show the said adjustments, as contended by the Defendant.

14.02.06. On perusal of the ocular evidence of the Defendant, more specifically, cross examination of DW1 at Page No 22, Para No 3, which reads as under:

"I am residing in the 3rd level floor in the Suit Schedule Property. I have produced my bank statement to show that I have got constructed the 3rd level floor in the Suit Schedule Property, out of my funds".

As per this evidence, the Defendant contends that he has produced the Bank Statement to shown that he has got constructed the third floor.

14.02.07. The Defendant has not mentioned as to which floor in the Suit Schedule Property, is the Counter Claim Schedule Property. But the Defendant has shown the Counter Claim Schedule Property as, 25% interest in the Property bearing PID NO 71-54-382 and Municipal Door No 382, 4th Square, Austin Town, Ward No 71, Bengaluru.

14.02.08. Further on close perusal of the materials on record, it is seen that three versions are coming from the side of the Defendant viz.,

a) as per MOU-ExD1, the Defendant contends that the Plaintiff had undertaken to gift the first floor of the constructed building in the Schedule Property;

b) as per the contention of the Defendant, more specifically Para No 26 of his Written Statement, he contends that, there was an adjustment inbetween him and the Plaintiff, that he should take the second floor and the Plaintiff should take the first floor; and

c) as per the ocular evidence, the Defendant contends that he is residing in the third floor, which can be seen as per the cross examination of DW1 at Page No 22, Para No 3 and at Page No 23, Para No 3, which reads as under:

"I am residing in the 3rd level floor in the Suit Schedule Property. I have produced my bank statement to show that I have got constructed the 3rd level floor in the Suit Schedule Property, out of my funds.

I do not have any documents like electricity bill pertaining to the 3 rd level floor of the Suit Schedule Property, to show that, electricity meter connection with regard to 3rd level floor is standing in my name."

As per this evidence, the Defendant contends that he is residing in 3rd floor of the building.

So the Defendant is not clear, whether he has been given the first floor, as per the recitals of MOU-ExD1; or he has been permitted to construct and occupy second floor, as per his contentions in Para No 26 of his Written Statement; or he is residing in the third floor, as per the ocular evidence, referred to supra.

14.02.09. So the Defendant has failed to prove that, he has borne the constructional cost for construction of the building, either on the first level floor, or the second level floor, or of the third floor.

Hence, I am constrained to answer ADDL ISSUE No 3 IN THE NEGATIVE.

15. Withregard to the Possession of the Defendant, over the counter claim Schedule Property:

15.01. The Defendant contends that, he is in possession of the second floor and he has inducted the tenant, in it.

Percontra, the Plaintiff contends that, he is residing in the ground and the first floors and the second, third and fourth floors are given on rent. This version of the Plaintiff can be seen as per the cross examination of PW1 at Page No 6, Para No 4, which reads as under:

"I am living in the suit schedule property with my children in the ground floor and 1st level floor. Suit schedule property consist of ground floor, 1st floor, 2nd floor, 3rd floor and 4th floor. It is true to suggest that the 2nd floor, 3rd floor and 4th floor are given on rent. One Nisaar Pasha is residing in the 2nd floor as a tenant, since 4 years. It is true to suggest that said Nisaar Pasha was inducted in the 2nd floor of the suit schedule property by Nayaz Pasha - the Defendant. Earlier to Nisaar Pasha one Tippu Fairoz was residing as a tenant in the 2nd floor. The said Tippu Fairoz was there 2 years. It is true to suggest that the Tippu Fairoz was inducted in the 2nd floor of the suit schedule property by Nayaz Pasha - the Defendant and he (Nayaz Pasha) was receiving the rent from the said tenant. It is true to suggest that the present tenant of the 2nd level floor by name Nisaar Pasha is paying rent to the Defendant.

Witness volunteers that the said tenant Nisaar Pasha is paying water charges amounting to Rs.500/- per month, to me. It is true to suggest that the Defendant was entering into the rental agreements with the tenants in respect of the 2nd level floor of the suit schedule property. I am aware that, my son Sadique Pasha has affixed his signature as witness to the rental agreement entered into inbetween by the Defendant and Tippu Fairoz, in respect of the 2nd floor of the suit schedule property. Witness volunteers that as on the date of affixing the signature, my son Sadique Pasha was 17 years old and I was not there in Bengaluru and I was in Dubai at that time. I do not know the date on which on my son Sadique Pasha has affixed his signature on the said agreement."

15.02 The Defendant has produced the Rental Agreements at ExD3 & ExD4. As per these documents it is seen that, the Defendant has entered into Rental Agreements with Afreen Begum D/O:

Shaik Habeeb on 22.09.2016 & 20.05.2019, in respect of the Second floor.

15.03. Coming to the ocular evidence on the point of lease in favour of Afreen, which can be seen, as per the cross examination of PW1 at Page No 9, Para No 2, which reads as under:

"I know one Afreen Begum. She is the wife of Nisaar Pasha the tenant in the 2nd floor of the building, situate in the suit schedule property."

As per this evidence, PW1 contends that, she knows one Afreen Begum W/O: Nisaar Pasha, who is the tenant in the second floor of the building situate in the Suit Schedule Property.

15.04. On careful scrutiny of the ocular and documentary evidence, referred to supra, it can be seen that, as per ExD3 & ExD4-Rental Agreements, one Afreen Begum D/O: Shaikh Habeeb is shown to have entered into the rental agreement in respect of the second floor with the Defendant, but as per the ocular evidence, one Afreen Begum W/O: Nisaar Pasha is suggested to be the tenant of the second floor.

Firstly, the Defendant has not led the evidence to show that, Afreen Begum D/O: Shaikh Habeeb and Afreen Begum W/O: Nisaar Pasha are one and the same.

Secondly, the Defendant has not proved ExD3 & ExD4-Rental Agreements.

The Defendant ought to have led either ocular or documentary evidence to prove the said fact. But the Defendant has failed to prove the said fact.

15.05. As observed earlier, the Defendant has also failed to show his possession either on the first floor, as per the recitals of MOU-ExD1; or to show that, he has been permitted to occupy the second floor, as per his contentions in Para No 26 of his Written Statement; or to show that, he is residing in the third floor, as per the ocular evidence, referred to supra.

15.06. So also, the Defendant has failed to prove that, he is in possession and enjoyment of the building, either of the first level floor, or of the second level floor, or of the third floor.

15.07. Unless the Defendant proves that, the Plaintiff has been dispossessed, on he entering into possession of any of the floors of the Suit Schedule Property, the presumption of possession over the entire Suit Schedule Property, lies in favour of the Plaintiff.

So also, the Plaintiff has proved that, he is in possession and enjoyment of the Suit Schedule Property from the date of execution of the Gift Deed - Ex.P2; and on coming into possession of the said property, he has constructed the ground, first, second, third and fourth floors on obtaining necessary sanction from the competent authority.

Hence, I am constrained to answer ADDL ISSUE NO 1 IN THE NEGATIVE AND ISSUE NO.1 IN THE AFFIRMATIVE.

16. The Defendant contends that, the Plaintiff had undertaken to gift the first floor after its construction, to him and had executed MOU on 11.06.2009.

The Defendant No.1 had got confronted the MOU to PW.1 with regard to the signatures of the Plaintiff, which PW.1 has admitted the signatures of the Plaintiff, on the said document. On admission the said signatures are marked as Ex.D1(A) to Ex.D1(H).

On careful perusal of the MOU dtd.11.06.2009- Ex.D1, more specifically, Para No.5, wherein a recital is found, contending that, the Plaintiff shall come forward and make necessary arrangement to gift the entire proposed first floor after construction over the Scheduled property in favour of the

Defendant, in terms of Islamic rites and customs byway of oral gift

- Hiba and the expenses thereof shall be borne by the Defendant.

16.01. Learned Counsel for the Plaintiff would contend that,

a) merely admitting of signatures of the Plaintiff by PW.1 on Ex.D1-MOU dtd.11.06.2009, will not dispensed with proof of the contents of the said document, but the contents of the said document is required to be proved by the Defendant, as per law.

On careful perusal of the MOU-Ex.D1, it is seen that, the said document is attested by one attesting witness and even a person identifying the Plaintiff has affixed his signature on the said document. Neither the said witness nor the identifier has been examined, to prove due execution of the document coupled with the contents and situation in which the said document has taken birth. The Defendant has failed to make any efforts to prove the execution and contents of the document.

Admitting the signature of the Plaintiff by PW.1 in her cross examination will only show the existence of the document, but mere admitting the signature will not prove the contents of the document. In order to prove the contents of the document independent and cogent evidence/material is required to be brought on record by the Defendant, which he has failed.

Though a recital is found in Ex.D1 about making of necessary arrangement to gift the proposed first floor, but the Defendant has not led any independent evidence to prove the contents of the said document, more specifically, the recital found in Para No.5 of the said document.

b) It is asked to believe that, Plaintiff had affixed his signature on Ex.D1, on 11.06.2009; the Defendant has affixed his signature on 18.06.2009; identifier had affixed his signature on 11.06.2009; and the Notary Public had put his signature on 18.06.2009. Affixing of the signatures are on different dates, it leads to suspicious circumstances.

On the basis of the dates found alongwith the signatures of the concerned parties to the said documents viz., the executor; the beneficiary; the identifier; and the Notary Public, it is seen that, the Plaintiff and the identifier has affixed their signatures on 11.06.2009; and the Defendant and the Notary Public have affixed their signatures on 18.06.2009. Therefore, affixing of signatures by the above parties are not on the same date, more specifically, by the executor; and by the beneficiary.

The Defendant has not shown as to what was the reason, why he has affixed his signature on 18.06.2009 and as to why the executor - the Plaintiff has affixed his signature on 11.06.2009. The Defendant ought to have clarified the situation, if any, either through the identifier; or through the Notary Public; or through the witness, shown to be the parties to the said document. Even the Defendant has not clarified the said situation in his evidence, as to what was the reason for affixing the signatures on different dates.

Considering all these aspects, it can be concluded that, the Defendant has neither proved the contents of MOU-Ex.D1; the execution of the said document. Hence, the contention of the Defendant that, the Plaintiff has entered into MOU dtd.11.06.2009, wherein he had agreed to share the property in the ratio of 75:25, cannot be believed in the absence of necessary and cogent evidence.

Hence, I answer ADDL. ISSUE NO.2 IN THE NEGATIVE.

17. Further the Defendant contends that, his brother- the Plaintiff has gifted the Written Statement Schedule Property to him by way of Oral Gift-Hiba, which the Plaintiff has denied it.

17.01. The Defendant has place his reliance on the MOU-ExD1. And the Learned Counsel for the Defendant would contend that the Defendant has proved all the three requisites of a valid Hiba and has placed his reliance on the below mentioned decisions:

a) of the Hon'ble Apex Court in the case of Hafeeza Bibi & Ors Vs Shaikh Farid (Dead) by Lrs, reported in (2011) 5 SCC 654, wherein it is observed at Para Nos 24 & 26 as under:

"24. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are; (i) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing.

26. Mulla, Principles of Mahomedan Law (19th Edition), Page 120, states the legal position in the following words:

"Under the Mahomedan law the three essential requisites to make a gift valid : (1) declaration of the gift by the donor: (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein.

But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case."

b) of the Hon'ble High Court of Jharkhand in the case of Mohammad Sagir Vs Mohammad Sabir & Ors, reported in (2011) 5 SCC 654, wherein it is observed at Para No 10 as under:

"10. On plain reading of Order VI Rule 2, it is clear that the pleading has to contained contain only a statement in a concise form of the material facts and pot the evidences by which they are to be proved. It is an admitted fact that the Plaintiff has specifically pleaded to have acquired the suit property by virtue of oral Hibba. Mulla in his famous book "Principle of Mohammadan Law" has mentioned three essential to prove an oral Hibba: (I) declaration of gift by the donor, (ii) the acceptance of gift by donee expressly or impliedly and delivery of possession of the subject matter of the gift by donor to the donee."

17.02. Incontinuation of the discussion made while answering Addl Issue No 2, supra, with regard to MOU-ExD1, it is further seen that the said MOU-ExD1 contains certain terms creating performance of certain obligations by the parties to the said document viz.,

a) the Plaintiff had to pay Rs 1,00,000/- to the Defendant as part performance (as per Clause 4 of the said document).

No any material is produced or placed by the Defendant to show that, either the Plaintiff has performed this terms, or the Defendant has enforced the same.

b) Payment of cost of construction of either the first or the second floor, to be borne by the Defendant.

It is already discussed supra, and concluded that the Defendant has failed to prove his contribution towards construction of the any one of the floors in the Schedule property, muchtheless the Written Statement Schedule Property.

c) Payment of Civic charges, deposits, BBMP taxes, charges pertaining to bifurcation of number, etc., inrespect of the proposed first floor, was to be borne by the Defendant.

But no any materials are produced or placed by the Defendant to show that, he has paid the said charges, taxes, deposits, etc. 17.03. Thus the Defendant has failed to show his part performance/obligations enumerated under the MOU-ExD1. In the absence of performance of such obligations by the Defendant, it can be said that terms of MOU-ExD1 has not been acted over.

18. Secondly, on close perusal of the MOU- ExD1, more specifically, Clauses mentioned at Page No 2 of the said document, it is clearly stated that,

a) the Plaintiff is the absolute owner of the Schedule Property therein, by virtue of the Registered Gift Deed dated 17.06.2008; and

b) the Defendant has no any right, title, claim, share, interest whatsoever of any kind, manner inrespect of the Schedule Property, therein.

It can be said that, no any right has been awarded or allotted or granted to the Defendant in the Schedule Property, shown under MOU-ExD1, muchtheless a declaration of donating any right over it.

19. Thirdly, inorder to have a valid Hiba-Oral Gift, three essential requirements are to be proved by the Defendant, viz.,

a) Declaration of Gift by the donor;

b) the acceptance of the Gift by the donee, either expressly or impliedly; and

c) delivery of possession of the subject matter of the gift by the donor to the donee.

19.01. Coming to the first requirement, the Learned Counsel for the Defendant would contend that, recitals in MOU-ExD1 will form declaration of the Gift of the Written Statement Schedule Property by the donor- the Plaintiff to the donee- the Defendant.

Firstly, though MOU-ExD1 contains the recital in clause 5 that, the Plaintiff shall come forward and make arrangement to gift entire proposed first floor after its construction. As discussed, supra, the Defendant has failed to prove the said contents;

Secondly, the declaration required to have a valid Hiba, must be an unequivocal declaration; there should not be any conditions attached to such declaration. Inotherwords, the declaration must be voluntary and out of free will and volition. Here the declaration required cannot be mis-understood as a promise. Promise is different then the declaration. Declaration involves an act which is already done, infurtherance of departing the rights, whereas the promise involves the act to be done.

Viewing the recitals of MOU-ExD1, from any angle, it cannot be said that, there exist a declaration from the Plaintiff to depart his rights of ownership over the proposed first floor, after its construction. So there is no declaration, as required to constitute a Hiba-Oral Gift.

19.02. Coming to the second requirements, withregard to the acceptance of Gift.

Firstly, inorder to prove acceptance, the Defendant has to prove that the terms and recitals of MOU-ExD1 has been acted over by both the parties to the said document. But the same is not proved by the Defendant. The same is discussed, supra.

Secondly, the Defendant has failed to bring the materials on record to show that, there was a declaration to part away the rights by the Plaintiff, which is accepted by him.

So the second requirement is also not proved by the Defendant.

19.03. The third requirement is withregard to delivery of possession.

As discussed supra while answering Addl Issue No 1, the Defendant has firstly failed to prove his possession over the so called gifted property;

secondly, the Defendant had to show the conduct of the parties, more specifically the conduct of the Plaintiff. But nothing is brought on record by the Defendant to show the conduct of the Plaintiff with regard to departing of the rights over the so called gifted property.

Even third requirement is also not proved by the Defendant.

19.04. So the Defendant has failed to prove that the Plaintiff has orally gifted (Hiba) the Written Statement Schedule Property to him.

Hence, I am constrained to answer ADDL ISSUE NO 4 IN THE NEGATIVE.

20. ADDL ISSUE NO 5:

The Defendant contends that he has become the owner of the Written Statement Schedule Property on the basis of:

a) Oral Gift- Hiba;

b) Family Arrangement in the form of MOU- ExD1;

c) by way of license granted by the Plaintiff.

20.01. The first aspect of Oral Gift-Hiba is dealt with while discussing Addl Issue No 4, supra.

20.02. The second aspect with regard to Family Arrangement in the form of MOU-ExD1.

The Learned Counsel for the Defendant would contend that, the terms of MOU-ExD1 depicts the arrangement made in between the family members- the Plaintiff and the Defendant, to enjoy the Schedule Property in the ratio 75%:25%. He has placed his reliance on the decision of the Hon'ble Apex Court in the case of Kale & Ors Vs Deputy Director of consolidation and Others, reported in (1976) 3 SCC 119, wherein it is observed in Para No 9 as under:

"9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise "Kerr on

Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus;

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to that their rights actually are, or of the points On which their rights actually depend."

The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administering of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds.

Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement"

is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections- to the binding effect of family arrangements".

20.02.01. So in order to term the adjustment in between the members of the family, as family arrangements, following ingredients are required to be fulfilled, viz.,

- a) there must be sinking of differences and disputes;
- b) parties shall get settled or resolved their conflicting claims or disputed titles once for all; and
- c) such resolution of disputes shall be done to maintain peace and harmony in the family.

But on perusal of the recitals of MOU-ExD1, none of the ingredients are present in it.

20.02.02. Secondly, in order to constitute a Family Arrangement, all the parties i.e., all the family members shall join and get binded themselves to the terms mentioned therein.

But in the instant case, admittedly the Plaintiff and the Defendant are having other brothers, but they are not the parties to the MOU-ExD1. Even no any explaining is coming forth from the side of the Defendant, as to why all the other heirs of Mustari Begum are not the parties to the MOU-ExD1.

20.02.03. Thus the said MOU-ExD1 cannot be termed as Family Arrangement in between the Plaintiff and the Defendant.

20.03. The third aspect with regard to License.

20.03.01. The Learned Counsel for the Defendant would contend that, the Plaintiff has granted license to the Defendant in respect of the Written Statement Schedule Property, by virtue of which he has become the owner of the said property. He has placed his reliance on the decision of the Hon'ble Apex Court in the case of Ram Sarup Gupta (Dead) by Lrs Vs Bishum Narain Inter College & Ors, reported in (1987) 2 SCC 555, wherein it is observed in Para No 15 as under:

"15. If a person allows another to build on his land in furtherance of the purpose for which he had granted license, subject to any agreement to the contrary (sic he) cannot turn round, later on, to revoke the licence. This principle is codified in Section 60(b) of the Act. Moreover, conduct of the parties has been such that equity will

presume the existence of a condition of the license by plain implication to show that licence was perpetual and irrevocable."

20.03.02. License has been defined in Sec 52 of the Indian Easement Act, 1882, which states that, "License means grant of permission, by a person to the other, a right to do or continue to do, in or upon, the immovable property of the grantor, something which would, in the absence of such right, be unlawful. Such a right does not amount to an easement or any interest in the property. The rights so conferred is license. The grant of license may be expressed or implied which can be inferred from the conduct of the grantor. Section 60 provides that a licence may be revoked by the grantor unless: (a) it is coupled with a transfer of property and such transfer is in force; (b) the licensee, acting upon the licence, has executed a work of permanent character and incurred expenses in the execution. Revocation of licence may be express or implied. Section 62 enumerates circumstances on the existence of which the licence is deemed to be revoked. One of such conditions contemplates that where licence is granted for a specific purpose and the purpose is attained, or abandoned, or if it becomes impracticable, the licence shall be deemed to be revoked. Sections 63 and 64 deal with licensee's right on revocation of the licence to have a reasonable time to leave the property and remove the goods which he may have placed on the property and the licensee is further entitled to compensation if the licence was granted for consideration and the licence was terminated without any fault of his own. These provisions indicate that a licence is revocable at the will of the grantor and revocation may be expressed or implied. Section 60 enumerates the condition under which a licence is irrevocable. Firstly, the licence is irrevocable if it is coupled with transfer of property and such right is enforced and secondly, if the licensee acting upon the licence executes work of permanent character and incurs expenses in execution. Section 60 is not exhaustive."

20.03.03. So on considering the recitals of MOU-ExD1, even they will not form a License, as firstly, there is no grant of permission by the Plaintiff in favour of the Defendant;

secondly, it should be coupled with the transfer of property, which is missing; and thirdly, there is no material suggesting that the licensee/Defendant, acting upon the license has done certain acts, with the knowledge and connivance of the Plaintiff and has incurred expenses in the execution, leading to estop the Plaintiff from denying the confirmation of the rights.

20.03.04. Thus the said MOU-ExD1 cannot be termed as License, within the meaning of Sec 52 of the Indian Easement Act, 1882.

20.04. Thus the Defendant has failed to show that, he has become the absolute owner of the Written Statement Schedule Property and he is in possession of the said Property. Under such circumstances, the Defendant is not entitled for the relief of Declaration of ownership, as claimed by him in the Counter Claim.

Hence, I am constrained to answer ADDL ISSUE NO 5 IN THE NEGATIVE.

21. ADDL ISSUE NO 6:

The Defendant contends that alternatively he is entitled for the relief of Specific Performance of the terms mentioned under the MOU-ExD1.

Firstly, when the Defendant has failed to prove the contents of MOU-ExD1;

Secondly, when the Defendant has not proved the Declaration, as required for constitution of a valid Hiba;

Thirdly, the Defendant has not shown that he has performed certain terms infurtherance of the MOU-ExD1;

Fourthly, the Defendant has not brought the materials on record to show the conduct of the Plaintiff, so as to estope him from denying the rights of the Defendant over the Written Statement Schedule Property;

Fifthly, the Defendant has failed to show that the Plaintiff is bound to perform certain terms under the MOU-ExD1.

So under such circumstances, even the Defendant is not entitled to have an alternative relief of Specific Performance of the terms of MOU-ExD1, as prayed for by him, under the Counter Claim.

Hence, I am constrained to answer ADDL ISSUE NO 6 IN THE NEGATIVE.

22. ISSUE NO 2:

The Learned Counsel for the Plaintiff would contend that, as per the pleadings of the Defendant, coupled with the act and the intention of the Defendant, makes it clear about the interference of the Defendant, over the Suit Schedule Property.

22.01. The contention of the Plaintiff that he has resisted the illegal obstructions/interference made by the Defendant, in his possession over the Suit Schedule Property, coupled with agitations of the Defendant, as can be seen in his pleadings in the Written Statement cum Counter Claim, as well as the ocular evidence referred to supra, will show that Plaintiff has apprehension coupled with acts of the Defendant, amounting to attempts of trespass made by him.

22.02. Thus apprehension of injury or belief on the part of the Plaintiff, coupled with the intention of the Defendant, to do certain act, which harms the Plaintiff, amounts to interference by the Defendant.

22.03. Since the act apprehended by the Plaintiff and intended by the Defendant, is such that, if completed, give a ground for action. There is a foundation for the exercise of jurisdiction. Thus it amounts to interference.

Hence, I am of the firm opinion that Plaintiff has proved that, the prospect or apprehension and belief coupled with intention of the Defendant exhibited, if completed, will give rise to a cause of inflicting injury or receiving injury, to the Plaintiff. I find support to my above view as per the decision of the Hon'ble High Court of Karnataka reported in ILR 1978 Page 1560; in the case of Gopal M Hegde & Ors Vs U F M Narasimha Ganap Bhat & Ors, wherein it is held that, "when the Plaintiff proves the intention on the part of the defendants, to do an act or existence of the act, which in the opinion of the Court, if completed, give ground of action, there is foundation for the exercise of jurisdiction".

For the above said reasons, I answer ISSUE NO 2 IN THE AFFIRMATIVE.

23. ISSUE NO.3:

The Learned Counsel for the Defendant would contend that, the Plaintiff has not come forward to give evidence, if he would have step into the witness box, certain materials would have been elucidated from him. In order to avoid the said situation, he has kept himself away from the witness box. So an adverse inference is required to be drawn against the Plaintiff. He has placed his reliance on the decision of the Hon'ble Apex Court, in the case of Ishwar Bhai C Patel @ Bachu Bhai Patel V/s Harihar Behera and Another, reported in (1999) 3 SCC 457, where in it is observed in Para No.17, as under:-

"17. Admittedly defendant No.1 had an account in the Central Bank of India Limited, Sambalpur Branch which his father, namely, respondent No.2, was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by respondent No.2. It has been given out in the statement of respondent No.2 that when the appellant had approached him for a loan of Rs.7,000/-, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of respondent No.1 and it was on his suggestion that the respondent No.2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness box to make a statement on oath denying the statement of defendant (respondent) No.2 that it was at his instance that respondent No.2 had advanced the amount of Rs. 7,000/- to the appellant by issuing a cheque on the account of defendant (respondent) No.1. Having not entered into the witness box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act."

23.01. In the instant case the present suit is filed by the Plaintiff through his Power of Attorney Holder, who is his wife, on the basis of the Power of Attorney -Ex.P1.

Firstly, on careful perusal of the ocular evidence, it has remained an admitted fact that, Plaintiff is serving Aboard and he is not available in India;

Secondly, the Defendant has got confronted the signatures of the Plaintiff to PW.1 on MOU-Ex.D1, on admission the same have been marked as Ex.D1(A) to Ex.D1(H);

Thirdly, it is not necessary to get examined the Plaintiff, in order to prove the contents of MOU-Ex.D1. But the said contents are to be proved by the Defendant by leading cogent, believable and independent evidence.

Merely since the Plaintiff has not step into the witness box, an adverse inference cannot be drawn against him. Adverse inference is to be drawn by the Courts only when there was no other evidence on record, on the point in issue and when normally there could be no better proof, then the admission of the party. I find force to my above view, as per the decision of the Hon'ble Apex Court, in the case of Pandurang Jivaji Apte V/s Ramachandra Gangadhar Ashtekar (Dead) by Lrs and Others, reported in AIR 1981 SC 2235, wherein it is held in Para No.13, as under:-

"Question of drawing an adverse inference against a party for his failure to appear in the Court, would arise only when there is no evidence on record."

23.02. Applying the above Principles of law to the instant case at hand, when the Defendant has placed his reliance on the MOU-Ex.D1, to claim the relief of Declaration and Alternative relief of Specific Performance, then it is for him to prove not only the existence, but the contents of the said document, by leading cogent, independent and believable evidence, which he has failed to do so. His failure cannot be termed to draw an adverse inference against the Plaintiff, for not appearing in the witness box to adduce the evidence.

Thus, under such circumstances, adverse inference cannot be drawn against the Plaintiff.

24. Secondly, the Learned Counsel for the Defendant would contend that, the suit for bare Injunction is not maintainable, as the Defendant has denied the ownership of the Plaintiff over the Suit Schedule Property.

24.01. As per the decision of the Hon'ble Apex Court in the case of Anathulla Sudhakar V/s P. Buchi Reddy (dead) and others reported in AIR 2008 SCC 2033, wherein it is held that, "Suit for injunction simplicitor is maintainable, when there is interference in the peaceful enjoyment and possession of the Plaintiff and when clouds of title have not been raised in other words, title of the Plaintiff is not challenged, with cogent evidence".

Further held at para No.21-(a) to (d) as under;

"(a) Where a cloud is raised over the Plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the Plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Whether there is merely an interference with the Plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property as in the case of Vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar).

Whether the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration; merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. the court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the Plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case". (Underline is mine, to lay emphasize) 24.02. Applying the above principles of law to the instant case, it can be said that, though the present suit is one for the relief of Permanent Injunction, question of title cannot be gone into, to decide the question of Possession, since in a suit for Permanent Injunction, question of adjudication of title, is foreign. But where the Defendant has putforth the counter claim against the Plaintiff, then the question of de-jure possession over it has to be seen.

24.03. On the basis of interference, and apprehension on the part of the Plaintiff, which has cropped up, at the instance of the Defendant, which forms the cause of action, which creates a right in favour of the Plaintiff, to get protected his possession, as per Sec.37 and 38 of Specific Relief Act.

24.04. The remedy available to the Plaintiff is, only by way of a suit for Permanent Injunction.

24.05. When the Plaintiff receives a threat or apprehension of committing an act, from the Defendant, if completed, amounts to interference, then such Plaintiff can file a suit for Injunction simplicitor against such Defendant.

24.06. In the present case, the Plaintiff on receiving the threat and apprehension from the Defendant, has filed the present suit for the relief of injunction simplicitor, which is quite maintainable. I find support to my above view, as per the decision of the Hon'ble Apex Court in the case of Anathulla Sudhakar V/s P. Buchi Reddy (dead) and others reported in AIR 2008 SCC 2033, wherein it is held that, "suit for injunction simplicitor is maintainable, when there is interference in the peaceful enjoyment and possession of the Plaintiff and when clouds of title have not been raised in other words, title of the Plaintiff is not challenged, with cogent evidence".

25. Mere raising a doubt/cloud, as to the title of the Plaintiff is not sufficient, but the same is to be coupled with some cogent and believable evidence, then only the suit for bare Injunction is not maintainable, otherwise, it is maintainable. I find force to my said opinion as per the decision of the Hon'ble Apex Court in the case of Jharkhand State Housing Board Vs Didar Singh & anr (Civil Appeal No 8241/2009. Date of Disposal 09.10.2018) as well as in the case of Anatullah Sudhakar Vs P. Bucchi Reddy & Anr, reported in AIR 2008 SC 2033.

25.01. Since the Defendant has failed to show that, he has become the owner of the Written Statement Schedule Property, which forms part of the Suit Schedule Property. In the absence of any such cogent evidence, it is hard to believe and consider that the Defendant is the true owner, resulting in denial of Injunction to the Plaintiff.

26. Thus, viewing the matter from every angle, it can be concluded that, the Plaintiff has proved that, he is in possession and enjoyment of the Suit Schedule Property; he has also proved the interference of the Defendant, in his possession over the Suit Schedule Property.

Under such circumstances, the Plaintiff is entitle for the relief of Permanent Injunction, against the Defendant, in respect of the Suit Schedule Property.

Hence, I am constrained to answer ISSUE NO 3 IN THE AFFIRMATIVE.

27. ISSUE NO. 4 & Addl. ISSUE NO.7:

On having answered Issue Nos 1 to 3 in the Affirmative; and Addl Issue Nos 1 to 6 in the Negative, I proceed to pass the following:

ORDER Suit of the Plaintiff is Decreed.

In the consequences the Defendant, his men, agents or any person claiming under him, are hereby restrained by an order of Permanent Injunction, from interfering with the peaceful possession and enjoyment of the Plaintiff, over the Suit Schedule Property.

Counter Claim filed by the Defendant is hereby Rejected, with costs.

Draw Decree Accordingly.

(Dictated to the Stenographer directly on computer system, computerized by her and print out taken by her, after correction, signed and pronounced by me in the open court on this the 9th day of November, 2021) [Abdul-Rahiman. A.Nandgadi] LXXII Addl.City Civil & Sessions Judge, Bengaluru. (CCH-73) :Suit Schedule Property:

All that corporation quarters allotted by the Government of Karnataka bearing No.382, 4 th Square, Austin Town, Ward No.71, Bangalore-560

047. Having PID No.71-54-382.

Measuring:

East to West: 22 feet 6 inches.

North to South: 25 feet, in all measuring 562.50 sq.ft., Bounded on the:

East by: BCC Quarters No.399, West by: Road, North by: BCC Quarters No.381, South by: BCC Quarters No.383.

[Abdul-Rahiman. A.Nandgadi] LXXII Addl.City Civil & Sessions Judge, Bengaluru. (CCH-73) :Written Statement Schedule Property:

The second floor residential unit of the building standing at property bearing PID No.71-54-382 and Municipal Door No.382, 4th Square, Austin Town, Ward No.71, Bangalore-560 047, alongwith the corresponding 25% interest in the land available at the said address, and also (a) the easement right of unimpeded access to the said second floor unit, (b) the easement right of structural support for the second floor residential unit, (c) right to common spaces and amenities in the said larger property, which are currently being enjoyed by the Defendant by virtue of his ownership and possession of the second floor, and (d) all other interests attached with the enjoyment of title and possession of the second floor of the said larger property. The boundaries of the larger property are:

East by: BCC Quarters No.399, West by: Road, North by: BCC Quarters No.381, South by: BCC Quarters No.383.

[Abdul-Rahiman. A.Nandgadi] LXXII Addl.City Civil & Sessions Judge, Bengaluru. (CCH-73) ANNEXURES:-

LIST OF WITNESSES EXAMINED FOR THE PLAINTIFF: PW.1: Mrs. Fahmida Begum.

LIST OF EXHIBITS MARKED FOR THE PLAINTIFF:

Ex.P.1: Power of Attorney.

Ex.P.2: Original Registered Gift Deed dtd.17.06.2008. Ex.P.3: Utter Patra dtd.07.07.2008. Ex.P.4: Khata extract.

Ex.P.5: Property tax receipt for the years 2018-19. Ex.P.6: Approved blue print map.

LIST OF WITNESSES EXAMINED FOR THE DEFENDANT:

DW.1: Nayaz Pasha.

LIST OF EXHIBITS MARKED FOR THE DEFENDANTS:

Ex.D.1: MOU dtd.11.06.2009. Ex.D.2: True copy of the passbook. Ex.D.3: Rental Agreement dtd.22.09.2016. Ex.D.4: Rental Agreement dtd.20.05.2019.

[Abdul-Rahiman. A.Nandgadi] LXXII Addl.City Civil & Sessions Judge, Bengaluru.
(CCH-73)