

Received on :

Registered on :

Decided on :

Duration :

D M Y

Exh.

IN THE COURT OF JUDGE SMALL CAUSE COURT

AT SURAT

SMALL CIVIL SUIT NO. 237 OF 1995

Plaintiffs :

1. Naniben Ismailbhai Desai
2. Iqbalbhai Ishabhai Desai
3. Heirs of Zahirbhai Ishabhai Desai
- 3.A Zohraben Wd/o Zahirbhai Ishabhai Desai
4. Idrishbhai Ishabhai Desai
5. Ilyasbhai Ishabhai Desai
6. Imtiyazbhai Ishabhai Desai
7. Hajraben Ishabhai Desai
8. Zohraben Ishabhai Desai

All residing at Begumpura, Viramgami Maholla, Surat

Versus

Defendants :

1. Chisti Khankah [Masjid, Dargah, kabrastan, a registered public Trust]
Having its office at Shahpur gate, Chisti Member, Ahemedabad.
2. Sajjada Nasin Farukhbaba Moindin Chisti,
3. Sirrajuddin Nasrudiddin Chisti
4. Rasiddudin Nasiriddudi Chisti

Above all resided at Residing at Shahbaugh, Nashirbaug, Ahmedabad.

5. Hisamuddin Badruddin Vzofdar **[Deleted]**
Residing at Shahpur Gate, Chisti chamber, Surat.
6. Abdul Haq A. Munshi **[Deleted]**
7. Sulemanbhai Valibhai, **[Deleted]**
8. Rehmatkhan Ramzan khan pathan **[Deleted]**
9. Abbasbhai Vahedali **[Deleted]**
10. Abdulkadar Ismalbhai Desai
All residing at 2, Baharistan Society, Sarkhej Road, Juhapura,
Ahmedabad.
11. Nanubhai Thakorbhai Gheewala
12. Kishorchandra Nanabhai Gheewala
13. Vasantlal Nanabhai Gheewala
All residing at Rani Talav, Bharbandh wad, Surat
14. Bansilal Nanabhai Gheewala.
Residing at 103, Amrapali Society, Ghod dod road, Surat.
15. Jagdishchandra Nanabhai Gheewala
Residing at Beside Chokhawala Estate, Near Somnath Mahadev temple,
Opp. Umra Octroi Naka, Surat.
16. Dhaneshchdra Bukhandash Gheewala
Residing at 12/2907, Saiydpura, Bharbandhwad, Surat
17. Bhupendrakumar Bhukhandas Ghashwala,
18. Dilipchandra Bhukhandas Gheewala
19. Chandravadan Bhukhandas Gheewala,
20. Rameshchandra Bhukndas Gheewala
All residing at Bharwandhwad, Sayaidpura, Surat.
21. Ratilal Maganlal Mehta
Residing at Begampura, Dalwadi Maholla, Opp. Vankar Sangh

Sub: Suit for arrears of rent and declaration, injunction etc.

Mr. N.A.Jariwala, Ld. advocate for the plaintiff.

Mr.Punawala, Ld. advocate for the defendants.

Mr.V.S.Kazi, Ld. Advocate for the defendant no.10.

JUDGMENT

The facts of the case of the plaintiffs in brief are as under:-

1. The defendant no.1 herein is a public trust and the defendant no.2 to 9 are registered trustees of the said Trust. The properties as mentioned in the plaint more particularly being portion of land admeasuring 135 feet length in east-west direction and 50 feet wide in north-south direction lying in the middle portion of land belonging to property no.2327 paiki, Ward no.4 lying at and Opp.Vankar sheri, Moti Begamwadi, Salabatpura, Surat, land admeasuring 28 x 41 feet on the south-east corner of property No.2327 as well as land admeasuring 28 ' x 40 ' at the south-west corner of property no.2327 belonged to the absolute ownership & possession as well as administration of the Trust. The said properties were taken on rent by Ismailbhai Babubhai Desai, husband of plaintiff no.1 and maternal grand father of plaintiff no.2 to 7 as well as father of defendant no.10 in the year 1962 from the defendant no.1 Trust for a monthly rent of Rs.25/- and as per the condition agreed upon between the parties. The properties were taken on rent with right to construct residential, commercial or factory premises thereon and to occupy and use the same or to sublet the same and the said Ismailbhai Babubhai Desai had constructed such properties on this lands [hereinafter referred to as suit property]. The said Ismail Babubhai Desai died on 21-5-1970 and was survived by his heirs plaintiff no.1 as well as daughter Khatijabibi Ismailbhai as well as son defendant no.10 was acquired absolute ownership right to the properties/super structure constructed on the land

alongwith tenancy right of the lands and heirs were mutated in the city survey record and property card. Out of these surviving heirs, Khatijabibi Ismailbhai Desai being daughter of plaintiff no.1 and mother of plaintiff no.2 to 7 died on 31-5-94. The plaintiff no.2 to 8 being her heirs had undivided right in the said property alongwith tenancy rights of lands beneath the properties.

2. After the death of Ismailbhai Desai defendant no.1 was looking after the administration of suit premises on behalf of all the heirs and use to recover rent from the tenants in the constructed properties. However, defendant no.10 was not the sole tenant and is not the sole owner of the constructed property and has no right or interest to surrender possession or to either compromise or negotiate transfer with owners of the land. The defendant no.10 has recovered rents from the tenants till the date of suit and has not shared any amount with the plaintiffs and has been administering the properties at his own Will. On demand of the accounts of the properties the defendant no.10 has been giving evasive reply with malafide intention to misappropriate the amounts of rent to himself to which defendant no.10 was never and is not entitled. The tenants in the said property changed from time to time and defendant no.10 has made huge profitable gains during every transfer of tenancy in the form of 'Paghadi' and misappropriated these amounts also for his own gains. The defendant no.11 to 20 are in possession of the properties on these lands as tenants and rent is recovered by defendant no.10. The present suit is filed for restraining the defendant no.10 from recovering rent from the tenants therein as defendant no.10 has lost confidence of the plaintiffs as well as to restrain the tenants from paying rent to defendant no.10.

3. The plaintiff submits that there has been hike in prices of properties and defendant no.1 to 9 are trying to sell away the tenanted properties [lands]

and it appears that for the purpose have won over the defendant no.10 and thus defendant no.1 to 10 in collusion are trying to deprive the plaintiffs of their tenancy rights by getting executed possession receipts or other writings by defendant no.10 as well as selling out the said lands by defendant no.1 to 9. The defendant no.1 to 10 have been giving evasive reply in this regard. If at all any transaction have been entered into by defendant no.1 to 9 with defendant no.10 without the consent of the plaintiff the same are null and void and not binding to the plaintiffs and hence the present suit is filed to restrain defn.on1 to 10 from acting in a manner derogatory to the right, interest of the plaintiff. If the relief as prayed for is not granted and if defendant no.1 to 10 in collusion succeed in transferring the said property on the basis of false writings, the plaintiffs will be deprived of their tenancy rights on the lands as well as ownership rights in the property and will have to face multiplicity of proceedings and purpose of the present suit will be frustrated and plaintiff will have to suffer irreparable loss which cannot be compensated in terms of money and will thereby suffer serious injury to their rights. Likewise, defendant no.11 to 21 being tenants in the constructed properties if they pay rent to defendant no.10 or enter into transaction with regard to possession of their premises without consent of the plaintiff, the plaintiffs would be deprived of their valuable rights. If the relief as prayed for is granted the defendant will suffer no harm or prejudice and ends of justice will be met with.

4. The plaintiffs have filed the present suit praying for relief of declaration to the effect that the defendant no.10 has no right to surrender tenancy rights or possession of the suit properties to the defendant no.1 to 9 as well as the defendant no.1 to 10 have no right to obstruct the plaintiffs in their enjoyment of tenancy rights. The plaintiffs have prayed for an prohibitory order restraining defendant no.10 from transferring possession of the suit properties to

defendant no.1 to 9 as well as from acting in a manner depriving the plaintiffs of their tenancy rights as well as from transferring the constructed properties on the lands as well as from recovering rent from tenants defendant no.11-21 by way of permanent injunction against defendant no.10. The plaintiffs have prayed for an prohibitory order restraining defendant no.1 to 9 from recovering possession of the lands or any portion thereof from defendants no.10 to 21 as well as from demolishing the constructions thereon or making any new constructions therein as well as from doing any acts tending to deprive the plaintiffs of their tenancy rights by way of permanent injunction. The plaintiffs have prayed for an prohibitory order restraining the defendants no.11 to 21 from paying rent in respect of the lands or super structure thereon or any portion thereof to defendant no.10 as well as from handing over possession of their respective portion in the constructed properties to defendant no.1 to 19 or any of there as well from subletting, or transferring by way of licensee or partnership or by way of goodwill by way of permanent injunction. The plaintiffs have prayed for an order directing the defendant no.11 to 21 to deposit the rent of their respective premises in the court till the final disposal of the suit. The plaintiffs have prayed for an decree in terms of the amount belonging to the share of the plaintiff by calling for accounts of the rent recovered by defendant no.10 from the tenants of the constructed properties.

5. The Defendants no.11 to 20 have filed Written Statement to the suit at Exh.20 and have denied the contention in the suit. The defendants have not disputed that the defendant no.1 is a Trust but have no knowledge of its trustees and reserve their right to file further reply on submission of copy of PTR with the latest amendments & changes therein. The defendants have not disputed the suit property but have disputed the measurements. The defendants have specifically contended that the Trust is the owner of only the open lands. The

deceased Ismailbhai Desai was permitted to sublet under the tenancy and this amounts to contract to the contrary under the law. There was a specific stipulation to sublet and this stipulation is complied with. The defendants have not disputed the fact that the administration of the properties is looked after by defendant no.10. The defendant no.10 has filed Small Civil Suit no.269/94. The present defendants are joined as parties to the suit which is a former suit and hence the suit of the plaintiff is not tenable and is liable to be stayed under Sec.10 of CPC as well as Sec.151 of CPC. The defendants are in no way associated with the disputes of defendant no.10 and that they have been falsely joined as parties in the present suit. The defendants no.11 to 20 are in lawful possession and are protected under the Rent Act. The defendants are not required to be associated with the disputes between plaintiffs and Abdul Kadar Ismailbhai. The defendants have specifically contended that they have not delivered possession and do not intend to do so. There is no cause of action against the defendant no.11 to 20. The plaintiffs have no prima facie case against them. The plaintiffs are not entitled to any injunction and are not likely to suffer hardship if the injunction is not granted. The defendants do not intend to sublet or give by way of licence or under partnership though such negotiation are valid under the law. If the injunction as prayed for is granted it would amount to deciding the suit before the stage of trial. The defendants were not made parties to earlier suit no.348/12. The defendants have not agreed to deliver possession and are lawfully holding tenancy rights. The defendants have prayed for rejection of the suit.

6. The Defendant no.10 has filed Written Statement to the suit at Exh.25 and has denied the contention in the suit. The defendant has not disputed that the defendant no.1 is a public trust, defendants no.2 to 9 are trustees of defendant no.1 Trust as well as that the suit properties [lands] belong to

defendant no.1 Trust. The defendants have also not disputed the status of deceased Ismailbhai Babubhai. The defendant has specifically contended that prior to his death on 28-2-1970 deceased Ismailbhai Babubhai Desai had made an oral gift according to Mohammedan law in the presence of Maganbhai Lallubhai Bhagat and Abdul Nai by which he had given property bearing no.2327 in gift under a Deed of recital. Since the defendant no. 10 was a minor at the relevant time, his mother Punjiben had accepted the oral gift on his behalf. The actual physical vacant possession of the property was given to Punjiben as a guardian and friend of defendant no.10 Ismailbhai Babubhai Desai & Punjiben had put their thumb marks in the recital deed and Maganbhai Lallubhai had subscribed the thumb marks and thus the oral gift fulfilled all the requirements of a valid gift under the Mohammedan law and since then Ismailbhai Babubhai Desai had not remained the owner of the property no.2327. Ismailbhai B. Desai left properties without their actual possession and debts of big amounts which consisted of Government dues and debts of private individuals. This property is not included in the schedule attached to the plaint in RCS no.702/81. The said property was taken on rent by deceased Ismailbhai Babubhai Desai at one and the same time but gradually at intervals and the rent amount falling due is repaid by defendant no.10 and his mother by installments and in all have paid Rs.5252/- falling due as rent from Ismailbhai Bhulabhai Desai and have paid Rs.45,325/- in Small Cause Suit no.348/82. The plaintiffs have thus no right, title interest in the suit properties. The defendant no.10 is in sole & physical possession of the suit properties adversely to the plaintiffs and other claimants and shown for more than 12 years and since defendant no.1 has accepted defendant no.10 as tenant plaintiffs and other claimants have lost their rights. The defendant no.10 has been collecting rent and is the sole tenant of the properties. The defendant has specifically contended that open land had been taken on lease and super structures are built by sub-tenants and hence

Ismailbhai Babubhai Desai was never the owner of superstructures over the lands. A public caution notice was issued in 'Gujarat Mitra' on behalf of defendant no.1 on 18-2-1990 but no action was taken by the plaintiffs. The defendant no.10 is managing the suit property since 1971 as sole tenant having sole tenancy rights in the suit properties by virtue of the oral gift and recital deed.

7. The defendant submits that Special Civil Application no.1163 of 1975 is moved before the Gujarat High Court wherein the Hon'ble High Court by order dtd. 6-7-1978 had ordered to enter names of all the heirs and legal representatives in City Survey records and that rights of parties were left to be decided by Civil Court. The defendant claims that thus the rights of the parties will be decided in RCS NO.702/81 and the present suit is merely redundant and the so called rights of plaintiffs are not going to be jeopardized by any act of the defendant no.10 as they were not parties to the suit. The defendant claims that thus where a suit is filed against some of the heirs, eviction decree obtained therein would not be binding to those heirs who were not made parties to that suit and the decree would be null and void. The defendant claims that even as per the definition of word 'tenant' the person legally liable to pay rent is the tenant. Thus, the defendant no.10 being the only tenant in the suit lands, if restrained from recovering rent from tenants, the rent would be time barred. In the alternative if the plaintiff succeeds in the suit the defendant no.10 will be liable to render accounts. The defendant claims that he has filed Small Cause Suit no.269/94 challenging the legality and validity of the eviction decree in Small Cause Suit no.348 of 1982 on the ground of fraud and hence the apprehension of plaintiffs that defendant no.10 will handover possession of the suit premises is not well founded. The defendant has prayed for rejection of the suit.

8. The Defendants no.1 to 4 have filed Written Statement to the suit at Exh.67 and have denied the contention in the suit. The suit is barred by rule of Limitation and is liable to be dismissed. The suit is required to be stayed under Sec.10 of CPC. The suit is bad for non-joinder of parties. The defendants have specifically admitted that Ismailbhai Babubhai Desai was the father of defendant no.10. The defendants have specifically contended that the suit lands were not taken on rent in one lot but different parcels were taken on rent at different intervals for business purpose and now according to the defendants the superstructure are being used for business purpose. The defendants have specifically admitted that deceased Ismailbhai Babubhai Desai was a monthly tenant in suit land. The deceased father had bequeathed suit lands in favour of defendant no.10 by way of gift under the Mohammedan law in presence of two witnesses on 28-2-70 which was duly accepted and the defendant no.10 had hereinafter entered into a Rent note with defendant no.1 Trust in the year 1978, according to which the monthly rent of the suit lands in three parts was fixed at Rs.185/- and was being thus paid under receipts to defendants no.1 Trust. The defendant being in arrears of rent of more than 6 months notices were issued by defendant no.1 trust to defendant no.10 was neither replied to nor complied with the notices and hence Small Civil Suit no.348/82 came to be filed by the Trust against defendant no.10 to recover rent and possession. The defendant no.10 has not deposited any amount towards arrears of rent till date of framing of issues in the suit. The Trust has therefore moved application u/s 11(4) of the Rent Act to strike out defence of the tenant. The defendant no.10 had thereafter deposited rent under order of Court. As he apprehended decree against him in the suit, the defendant no.10 arrived at a compromise with the Trust and a deed of compromise was signed on 16-9-94 and a compromise decree was drawn. The defendant no.10 was in arrears of rent of Rs.2500/- on the date of compromise.

9. The defendants claim that as per the decree the defendant no.10 has delivered constructive possession of the suit lands to the Trust and the tenancy rights of defendant no.10 came to an end. The said fact was never objected to by the plaintiffs during the pendency of the suit and were not parties to the suit no.348/82 and the decree therein is not challenged in appeal. Thus, the tenancy rights of defendant no.10 in the suit lands come to an end with effect from 16-9-94. The defendants claim that the defendant no.10 has delivered possession of the superstructure on the land belonging to sub-tenants to defendant no.1 Trust.

10. The defendant no.10 had thereafter filed Small Civil Suit no.269/94 in respect of the suit lands against defendant no.1 Trust which is yet pending for decision. The injunction below Exh.5 has been vacated & dismissed. The defendant no.10 moved in Appeal by way of this Civil Appeal no. 23/96 which also came to be rejected on 8-11-96. The Small Cause Suit no.348/82 is decreed in favour of the Trust on 16-9-94 by way of compromise decree which has not been set aside. The plaintiffs have moved an application for being joined as third parties to the suit no.269/94 and this suit is pending in the same court in which the present suit is filed and hence the present suit is not legally tenable and the present suit is barred by resjudicata.

11. The plaintiffs being well aware of the fact that deceased Ismailbhai Babubhai Desai was a tenant in the suit lands had never raised any claim of tenancy rights of the suit properties as heirs of deceased Ismailbhai Babubhai Desai and were never in possession of the suit properties and the defendant no.1 Trust has never recovered any rent from the plaintiffs nor the same was paid by plaintiffs to the defendant Trust. The plaintiffs have not asserted their rights, claim even after a considerable lapse of more than 12 years since the death of Ismailbhai Babubhai Desai in 1970 and have not sued

either the defendant Trust as trustees nor restrained them from recovering rent from defendant no.10 nor any notice was issued to defendants and hence the suit being barred by Limitation the suit is liable to be dismissed. The plaintiffs are not entitled for any reliefs as prayed for. The plaintiffs have an alternative remedy of recovering rent from defendant no.10 in the event the plaintiff succeed in the suit. The defendants have prayed for rejection of the suit.

12. Looking to the facts of the case, the following issues have arisen for deciding the case of the plaintiff which are framed by my predecessor at Exh.297 :

ISSUES

- [1] Whether plaintiff prove that he is a tenant and with construction right for all purpose hired on monthly rent for Rs.25=00 ?
- [2] Whether plaintiff prove that defendants are try to sell out suit property in collusion ?
- [3] Whether defendant no.10 to 20 proves that as per condition suit property was sub let [right to contract contrary] ?
- [4] Whether defendant no.1 to 4 proves that tenancy right of defendant no.10 is over as compromise ?
- [5] Whether defendant no.1 to 4 proves that plaintiff has no any tenancy right in the suit property, not paid any rent to the defendant no.1 ?
- [6] Whether the plaintiff is entitled to get relief as prayed for ?
- [7] What order and decree ?

13. The plaintiffs have produced documentary evidence as well as oral evidence to prove their case :

Oral Evidence:

Exh.304 Deposition of Mr.Ilyasbhai Ishabhai Desai.

Documentary evidence :

- Exh.311 Original death certificate of plaintiff no.1 Naniben Ismailbhai Desai.
- Exh.312 Certified copy of Will of deceased plaintiff no.1.
- Exh.313 Original death certificate of plaintiff no.3 Jahirbhai Ishabhai Desai.
- Exh.314 Original death certificate of plaintiff no.6 Imtiyazbhai Ishabhai Desai.
- Exh.315 Copy of pursis of Misc.Civil Application No.24/2006 regarding death of defendant no.5 to 9.
- Exh.316 Original death certificate of defendant no.10 Abdulkadar Ismail Desai.
- Exh.317 Certified copy of City Survey Ward no.4, nondh no.2327 of suit premises.
- Exh.318 Notice given by deceased plaintiff no.1 to defendants.
- Exh.319 Original RPAD slip for notice sent to defendants.
- Exh.320 Original delivery certificate issued by postal department for notice sent to defendants.
- Exh.321 Certified copy of Exh.5 with order of Reg.Civil Suit no.702/1981.
- Exh.322 Certified copy of plaint of Reg.Civil Suit No.702/1981.

14. The defendant has produced oral and documentary evidence to prove his case :

Oral Evidence:

- Exh.355 Deposition of defendant no.10-B Abdulkadar Ismailbhai Desai.
- Exh.377 Deposition of witness Sangita D/o Maganbhai Balubhai Bhagat.

Documentary Evidence:

- Exh.356 Certified copy of Gift Deed.
- Exh.357 Certified copy of public caution.
- Exh.358 Certified copy of public notice given by Surat Peoples Co.Op.
Bank Ltd.
- Exh.359 Certified copy of four numbers of rent receipts.
- Exh.360 Certified copy of rent receipts 3 numbers.
- Exh.361 Certified copy of rent receipts 2 numbers.
- Exh.362 True copy of affidavit of Maganbhai Lallubhai Bhagart.
- Exh.363 Certified copy of death certificate of Abdul Hai Abdul Haqed
Mansuri.
- Exh.364 Certified copy of Special Civil Application no.119702012 Index of
Hon'ble Gujarat High court.
- Exh.365 Certified copy of Rent note received from Hon'ble Gujarat High to
to 372 Court.
- Exh.373 Certified copy of compromise of Small Civil Suit no.348 of 1982.
- Exh.374 Certified copy of plaint of Small Civil Suit no.269 of 1994 from
Hon'ble Gujarat High Court.
- Exh.375 Certified copy of Special Civil Application No.11970 of 2012 from
Hon'ble Gujarat High Court.
- Exh.376 Certified copy of List of dates and events of Special Civil
Application No. 11970 of 2012 from Hon'ble Gujarat High Court.

15. I have heard the Ld.Advocate Mr.N.A.Jariwala for the plaintiffs and Ld.Advocate Mr.V.S.Kaji, Mr.Punawala for the defendants.

16. The Ld.Advocate for the Plaintiffs has submitted that the present suit is filed for declaration and injunction. The ingredients of Gift-Deed are not proved.The evidence of daughter of attesting witness cannot be considered as far

as element of gift is considered. The defendant no.10 has failed to prove that property is gifted to him. The defendant has no knowledge of construction and ownership. The gift of rented premises is not valid. The original tenant remained as such till his death and the tenancy rights were not transmitted during his lifetime to anyone else. The plaintiffs have rights transmitted in them. The defendant no.10 has no right to realise the rent.

17. The Ld. Advocate for defendant no.10 has submitted that the dispute is regarding tenancy rights between grandchildren of the original tenant who are the heirs of his two wives. The parties are governed by Shariat law. The plaintiffs are required to establish their right at first to the suit property. No prayer is made in the suit to decide tenancy rights and hence the suit is not maintainable. There is a separate rent-note in the name of defendant no.10. The rights of plaintiffs extinguished during the survival of original tenant on execution of gift-deed. Gift-deed under Mohammedan law is not required to be registered or stamped and only the essential requisites are to be fulfilled which are done as in the present case. The plaintiffs have failed to establish their rights under S.5(11)(c) of the Rent Act. The suit is based on wrong cause of action. The defendant has prayed for rejection of the suit. Reliance is placed on the relevant citations and provisions under the Evidence Act.

18. Considering the pleadings, relevant submissions, evidence placed on record and the reasons as mentioned hereinafter, I answer the above issues as under :

- [1] In the negative.
- [2] In the negative.
- [3] Partly in the affirmative.
- [4] In the negative.

- [5] In the affirmative.
- [6] In the negative.
- [7] As per final order.

REASONS

19. **Issue No.1:**

It is the case of the plaintiff that the suit property comprising of portion of land ad- measuring 135 ft. length in east west direction and 50 feet wide in north south direction in the middle portion of land belonging to property no.2327 paiki, Ward no.4, land ad measuring 28 x 41 feet on the south east corner of property no.2327 as well as land ad-measuring 28 x 40 feet at the south west corner of property no.2327 lying at and opposite Vankar Sheri, Motibegam wadi, Salabatpura, Surat belonging to the ownership possession and administration of defendant no.1 trust was taken on rent by Ismailbhai Babubhai Desai husband of plaintiff and maternal grandfather of plaintiff no.2 to 7 as well as father of defendant no.10 in the year 1962 at monthly rent of Rs.25 on terms and conditions agreed upon between the parties with a right to construct residential, commercial and factory premises thereon and to occupy and use the same and sublet the same. The said Ismail Babubhai Desai had constructed properties on a portion of their lands. The plaintiffs claim that on death of Ismailbhai Babhubai Desai on 21-5-70 the plaintiff no.1, plaintiff no. 2 to 8 as heirs of deceased Khatijabibi Ismailbhai acquired absolute ownership rights to the properties/superstructure constructed on the land and shed had undivided rights in the said properties along with tenancy rights of lands beneath of property. The said facts is reflected in the deposition of Ilyasbhai Ishabhai Desai on oath on behalf of plaintiff at Exh.304. In his cross examination he has admitted that the entire property no.2327 was not taken on rent by Ismailbhai

Babubhai Desai but plots of the property were taken on rent in 1962. Three sheds were constructed on the land.

In his cross examination he has further admitted that Ismailbhai Babubhai Desai had given rented premises to Abdul Kadar during his survival and that after the death of Ismail Babubhai Desai neither the deponent nor his mother had paid rent of the property to the defendant Trust. He has stated that he does not know whether Abdul Kadar Ismailbhai Desai had entered into any rent note with the trust and that he has not seen any such rent note. In his cross examination on behalf of defendant no.10, he has stated that there is no documentary evidence to suggest that the construction was done by Ismailbhai Babubhai Desai. He has stated that neither the taxes nor education cess is paid by deponent plaintiff. The plaintiffs have produced extract from City Survey record being certified copy of property card of suit property no.2327, Ward no.4 produced at Exh.317 which evidences the fact that heirs of Ismailbhai Babubhai Desai were ordered to be brought on record by virtue of order of Dy. Secretary(Appeals) Revenue Department in 55/ Special Civil Application no.93/74 dtd.15-2-75 and the orders of City Survey – Collector as well as for Choryasi, Surat were to be deleted. The said fact is narrated by way of Entry no 453 dtd.15-4-75. The said fact is again reflected by way of Entry no.13 dtd. 11-8-75 pursuant to order passed by Gujarat High Court in Sp.Civil Application no.1163 and 1175 dtd.2-8-75 which merely indicates the legacy as heirs of original tenant of Ismail Babubhai Desai. The plaintiffs have not produced any documentary to indicate that their tenancy rights are still existing in the property. The plaintiffs have even not produced any rent note to this effect.

In the light of the above, I answer Issue no.1 in the negative.

20. **Issue No.2:**

It is the case of the plaintiff that after the death of Ismailbhai Babubhai Desai defendant no.10 was looking after administration of the suit premises on behalf of all the heirs and use to recover rent from the tenants in the constructed properties. However, defendant no.10 was not the sole tenant and is not the sole owner of the constructed property and has not right or interest to surrender possession or to either compromise or negotiate transfer with owners of the land. The defendant no.10 has recovered rents from the tenants till the date of suit and has not shared any amount with the plaintiffs and has been administering the properties at his own Will. On demand of the accounts of the properties the defendant no.10 has been giving evasive reply with malafide intention to misappropriate the amounts of rent to himself to which defendant no.10 was never and is not entitled. The tenants in the said property changed to time to time and defendant no.10 has made huge profitable gains during every transfer of tenancy in the form of 'Paghadi' and misappropriated these amounts also for his own gains. The defendant no.11 to 20 are in possession of the properties on lands as tenants and rent is recovered by defendant no.10.

The plaintiff submits that with the hike in the prices of property the defendant no.1 to 9 are trying to sell away the tenanted property and for the purpose have been over defendant no.10 and defendant no.1 to 10 in collusion are trying to deprive the plaintiffs of their tenancy rights by getting executed possession receipts or other writings by defendant no.10 as well as selling out the said lands by defendant no.1 to 9. The defendant no.1 to 10 have been giving evasive reply in this regard. If at all any transactions have been entered into by defendant no.1 to 9 with defendant no.10 without the consent of the plaintiff the same are null and void and not binding to the plaintiffs and hence the present suit is filed to restrain defendant no.1 to 10 from acting in a manner derogatory

to the right, interests of the plaintiff. The plaintiffs have produced for a prohibitory order restraining defendant no.10 from transferring possession of the suit properties to defendant no.1 to 9 as well as from acting in a manner depriving the plaintiffs of their tenancy rights as well as from transferring the constructed properties on the lands as well as from recovering rent from tenants defendant no.11-21 by way of permanent injunction against defendant no.10. The plaintiffs have prayed for an prohibitory order restraining defendant no.1 to 9 from recovering possession of the lands or any portion thereof from defendants no.10 to 21 as well as from demolishing and construction thereon or make any new constructions therein as well as from doing any acts tending to deprive the plaintiffs of their tenancy rights by way of permanent injunction. The plaintiffs have prayed for an prohibitory order restraining the defendants no.11 to 21 from paying rent in respect of the lands or super structure thereon or any portion thereof to defendant no.10 as well as from handing over possession of their respective portion in the constructed properties to defendant no.1 to 19 or any of them as well as from subletting or transferring by way of licensee or partnership or by way of goodwill by way of permanent injunction. Bearing averments the plaintiffs have not produced any specific evidence in support of their contentions.

In the result, I answer Issue No.2 in the negative.

21. **Issue no.3**

The contention raised by the defendant no.11 to 20 is that the deceased Ismailbhai Desai was permitted to sublet under the tenancy which amount to a contract to the contrary under the law. However the defendants have further contended that there was specific stipulation in the rent agreement to sublet and this stipulation is complied with. The defendant no.10-B has relied upon the rent agreement at Exh. 369 between defendant no.1 trust and defendant

no.10 Abdul Kadar Desai which evidences the fact that Ismail Babubhai Desai had sublet different portion to different tenants who made construction and he had been receiving rent from these tenant. The dispute arising there from are resolved under the new rent agreement at exh.369 where in the sub-tenant accepted by defendant no.1 trust including their legacy to the construction over the property.

In the result, I answer this issue accordingly as partly in the affirmative.

22. **Issue no.4:**

The contention raised by defendant no.1 to 4 is that the deceased Ismail Babubhai Desai had bequeathed the suit land in favour defendant no.10 by gift under Modamdaeim law in presence of two witnesses. The defendant no.10 had therein after entered into rent note with defendant no.1 trust in the year 1978. The defendant being in arrears of rent, the trust had filed Small Civil Suit no. 348/82 against defendant no.10 to recover rent and possession. The defendant no.10 arrived at compromise with the trust which was signed on 16-9-94. The defendant claims that as per the decree the defendant no.10 has delivered constructive possession of the suit land to the trust and tenancy right of defendant no.10 in the suit land have come to end with effect from 16-9-94.

Possession receipt executed by Abdul Ismail Desai is produced at Exh.371 which evidences the fact that they are in possession and occupation of the property belonging to the Trust as a monthly tenant w.e.f. 16-7-71 at a monthly rent of Rs.185/-. The possession alongwith the sub-tenants is surrendered to the Trust. The possession receipt is in respect of portion of 4/2727 ad measuring 135 x 50 feet and the remaining two portions are retained by him. Compromise arrived at between parties in Small Rent Suit no.348/82 is

produced at Exh.373 which evidences the fact that Abdul Ismail Desai has delivered possession of portion of 4/2527 alongwith arrears of rent to the Trust. This is accompanied by compromise pursis.

In the result, I answer Issue no.4 in the negative.

23. **Issue No.5:**

The contention raised by defendant no.1 to 4 is that the plaintiffs being well aware of the fact that deceased Ismailbhai Babubhai Desai was a tenant in the suit lands had never raised any claim of tenancy rights of the suit properties as heirs of deceased Ismailbhai Babubhai Desai and were never in possession of the suit properties and the defendant no.1 Trust has never recovered any rent from the plaintiffs nor the same was paid by plaintiffs to the defendant Trust. The plaintiffs have not asserted their rights, claim even after a considerable lapse of more then 12 years. Since the death of Ismailbhai Babubhai Desai in 1970 and have not sued either the defendant Trust or trustees. Admittedly the defendant is not cross examined on this aspects. On the contrary plaintiff Ilyas admitted in his cross examination that after the death of Ismail babubhai Desai neither he nor his mother had paid the rent of property to the defendant trust and neither the contrary to the place on record to the suit.

In the result, I answer Issue no.5 in affirmative.

24. **Issue no.6,7:** In order to avoid repetition of facts and circumstances, Issue No.6,7 are hereby decided together.

24.1 It is the case of the Plaintiffs that the suit property comprising of different parcels of lands was taken on rent by Ismailbhai Babubhai Desai, husband of plaintiff and maternal grandfather of plaintiffs no.2-7 as well as father of defendant no.10 with a right to construct thereon,occupy,use and sublet the same.The original tenant Ismailbhai Babubhai Desai had constructed

superstructures on the said land. The Plaintiffs claim that on death of original tenant Ismailbhai Babubhai Desai, the Plaintiff no.1, plaintiff no.2-8 as heirs of deceased Khatijabibi Ismailbhai acquired absolute ownership rights to the superstructures constructed on the land and hold undivided rights in the said property together with tenancy rights in the lands beneath the superstructures.

24.2 The Plaintiffs claim that on death of original tenant Ismailbhai Babubhai Desai the defendant no.10 was looking after the administration of the suit properties on behalf of all heirs and used to recover rent from the tenants in the constructed properties. However the defendant no.10 is not the sole tenant and has no right, interest to surrender possession or either to compromise or negotiate transfer with owners of the lands. The defendant no.10 has recovered rents from the tenants till the date of suit and has not shared any amount with the plaintiffs and has been administering the properties at his own Will. The defendants no.1-9 in collusion with defendant no.10 intend to sell away the rented properties and are trying to deprive the plaintiffs of their tenancy rights by getting Possession receipt and other writings executed by defendant no.10. The Plaintiffs have sought for a prohibitory order restraining defendant no.10 from transferring possession of the suit properties to defendants no.1-9 as well as from acting in a manner depriving the plaintiffs of their tenancy rights as well as from transferring the constructed properties on the lands as well as from recovering rent from tenants defendants no.11-21 by way of permanent injunction against defendant no.10.

24.3 The contention raised by the defendant no.10 is that the original tenant Ismail Babubhai Desai prior to his death on 28-2-1970 had made an oral gift according to Mohammedan law in the presence of Maganbhai Lallubhai Bhagat and Abdul Nai by which he had given property bearing no.2327 in gift

under a deed of recital. Since the defendant no. 10 was a minor at the relevant time, his mother Punjiben had accepted the oral gift on his behalf. The actual physical vacant possession of the property was given to Punjiben as a guardian and friend of defendant no.10 Ismailbhai Babubhai Desai & Punjiben had put their thumb mark in the recital deceased and Maganbhai Lallubhai had subscribed the thumb marks and thus the oral gift fulfilled all the requirements of a valid gift under the Mohammedan law and since then Ismailbhai Babubhai Desai had not remained the owner of the property no.2327.

24.4 The defendant no.10 claims that the rent amount falling due is repaid by defendant no.10 and his mother by installments and in all have paid Rs.5252/- falling due as rent from Ismailbhai Bhulabhai Desai and have paid Rs.45,325/- in Small Cause Suit no.348/82. The plaintiffs have thus no right, title interest in the suit properties. The defendant no.10 is in sole juridical & physical possession of the suit properties adversely to the plaintiffs and other claimants for more than 12 years and since defendant no.1 has accepted defendant no.10 as tenant, plaintiffs and other claimants have lost their rights. The defendant no.10 is managing the suit property since 1971 as sole tenant having sole tenancy rights in the suit properties by virtue of the oral gift and recital deed.

24.5 Barring mere averemnt the plaintiffs have not produced and specific evidences in support of their contention. In his cross examination on behalf of defendant no.1 to 9 the witness examined on behalf of plaintiff at Exh.304 Ilyas Ishabhai Desai has stated that he has admitted that Ismailbhai Babubhai Desai had given the rented premises to Abdulkadar during his survival. He has denied that it was given by way of Gift deed. After the death of Ismailbhai Babubhai

Desai neither the deponent nor his mother had paid the rent of the properties to the defendant Trust.

24.6 The defendant has produced documentary evidence in support of their contentions Affidavit sworn by Maganbhai Lallubhai Bhagat is produced at Exh.362 wherein he has stated that the properties of Ismail Babubhai Desai at Surat and Dhandhuka are orally gifted to his son Abdul Ismail in 1970 and he being minor the gift was accepted by Punjiben on his behalf. The gift was made in his presence and in presence of other witness Abdul Haiji Abdul Haq. He has signed on a witness in the writing of gift deed prepared thereafter on 28-2-76. Punjiben had put her thumb impression in token of acceptance of the said gift which was identified by the written and had put his signature Ismail Babubhai Desai had signed in his presence the other witness had signed at the instance of Ismailbhai Babubhai Desai. Death certificate of Abdul Haq Abdul Haji Mansuri is produced at Exh.363.

24.7 Copy of Rent agreement executed in favour of Ismailbhai Babubhai Desai is produced at Exh.365 which evidences the fact that the suit property was taken on rent from Kaji Nasuruddine Fakrudiddin Chisti Ismailbhai Babubhai Desai w.e.f. 1-11-61 at a monthly rent of Rs.25/- on terms and condition on set out in the Rent agreement. The duration of the Rent agreement is 10 years. Rent agreement Exh.367 1-10-63 monthly rent Rs.28/- Duration 10 years.

24.8 Rent Agreement Rent between Trust and Abdul Kadar Desai 16-7-1971 is produced at Exh.369 which evidences the fact that the suit suit property was taken on rent by his father Ismailbhai Babubhai Desai under rent agreement. His father has sublet different portion to different tenants who have

made construction thereon which are run as factories. His father has been receiving rent from these tenants. The Trust had issued notices to his father and subtenants. The disputes arising thereafter are resolved under the said agreement. The new Rent were fixed as standard rent. The monthly rent of the 3 portion comprising of suit property is fixed at Rs.185/-. The agreement is to commence w.e.f. 1-6-1971. The sub-tenants were accepted including their legacy to the constructions over the property.

24.9 In his deposition at Exh.364 the defendant no.10-b has stated that he has stated that his father had bequeathed a oral gift according to Muslim Shariat in the presence of two witnesses in favour of his father Abdulkadar. As he was a minor at the relevant time, the gift was accepted on his behalf by his grandmother Punjiben in present of witness Maganbhai Lallubhai Bhagat and Abdulbhai this grandfather was in sound state of mind and body at the time of gift in respect of property no.2327 of ward no.4. The gift deed was written on 28-2-1970 and the has been implemented and since then his father became the owner and occupier of the properties. The writing is 30 years old and remained with his father. The stamp paper was purchased by him. He has identified the signature of his father and grandfather and thumb impression of Punjiben. The thumb impression is identified by Maganbhai Lllubhai Bhagat who has also signed as witness. An affidavit was shown by Maganbhai Lallubhai Bhagat in this regard which is produced at Exh.362. The stamp paper was purchased by Maganbhai Lallubhai was purchased by Maganbhai Lallubhai and bears his signature as well as thumb impression occupied by his proof which is registered before Public Notary A.R.Ghantiwala at Sr.No.8723 dtd. 19-12-09 which bears the seal & signature of Notary and identified by Advocate Bharat More. The original affidavit is lying with the deponent. The other witness

Abdulbhai Abdulhaq happened to be the friend of his grand father. The said Abdulhaq expired on 26-9-93.

24.10 The defendant no.1 had recovered rent from his father and had accepted him as tenant. His father had been recovering rent from tenants in the property. The land was taken on rent and the superstructure were constructed by lawful sub-tenants and thus any right of the plaintiff was given away by way of adverse possession since the time of his father. According to him the validity of Gift Deed cannot be decided in the present suit. The plaintiffs have not filed any suit challenging the validity of the Gift Deed.

24.11 His father was looking after the administration of suit properties since 1971 and he alone had tenancy rights in the suit lands. Ismailbhai Babubhai Desai had taken on rent certain portion of open land of property no.2327 under Rent note dated 1-7-1965 from Pirzadalagi Nasuruddin. The original Rent note is placed on record of 269/94. Certified copy of which is produced at Exh.365. The wiring is 30 years old. According to the terms in this Rent note, the defendant no.10 was entitled to construct properties on the suit lands. He has relied upon the typed copy at Exh.365 to 372. The other premises of land was taken on rent under Rent note dtd.1-10-1963. Certified copy of which is produced at Exh.365 to 372 and typed copy of which is produced at Exh.365 to 372 & type d copy at exh.365 to 372. The other Rent note in respect of the suit lands is produced at Exh.365 to 372 in respect of land taken on rent by defendant no.10 on 16-7-1971 the certified copy of which is produced at Exh.365 to 372 and typed copy of Exh.365 to 372.

24.12 In his cross-examination he has admitted that Ismailbhai Desai is not the owner of the suit properties. The property belongs to Chisti Khanka Trust and Ismailbhai Desai was a tenant of its lands. The rent was being paid by

Ismailbhai Babubhai Desai. He was not born at the time of his death. He has no personal knowledge of the transaction entered into by him during his survival. He was born in 1983. He was not borne when the gift deed took place and has no personal knowledge about it. Nothing useful to the case of the plaintiff is brought his cross examination. The defendant no.10-b is not cross examined on the aspect of rent note executed by defendant no.10 with defendant no.1 trust.

24.13 The defendants have examined Sangita Maganlal Bhagat at Exh. 377 for verification of signature of witness to the gift deed Maganlal Lallubhai Bhagat to proves their signature was in the hand writing a person affixing it.

24.14 The Plaintiffs have sought for a declaration to the effect that the defendant no.10 has no right to surrender tenancy rights or possession of the suit properties to the defendant no.1 to 9 as well as the defendant no.1 to 10 have no right to obstruct the plaintiffs in their enjoyment of tenancy rights. As discussed earlier,there exists relationship of landlord and tenant between defendant no.1 and defendant no.10.The plaintiffs have filed the present suit making allegations against the defendant no.10 but have not been able to prove their allegations against defendant no.10.In the instant case,according to the findings given hereinabove,the defendant no.10 has continued to be in possession and occupation of the suit land.The Plaintiffs have failed to establish the precise nature of the violation of the legal rights claimed by them and thus cannot avail of injunction as prayed for.In view of the oral and documentary evidence on record, the plaintiffs have failed to establish their case.It is established on record by virtue of own admission of the paintiff that no rent is tendered by them to defendant no.1 Trust.The Plaintiffs have not placed anything on recrd adverse to the character of defendant no.10.Barring mere averments the plaintiffs have not adduced any substantial evidence to prove the

allegations in the plaint. In this context, in the light of the provisions for grant of injunction for the acts as complained of the plaintiffs are not entitled to maintain a suit for injunction against the defendants. Thus the plaintiffs have failed to make out a case for injunction. There is no evidence that the act of the defendant has caused a pecuniary loss to the plaintiff. The plaintiffs have not pointed out compelling circumstances or circumstances of extreme hardship and have not succeeded in making out a case for injunction.

24.15 On the oral and documentary evidence on record it stands established that the defendant no.10 has continued to be in possession and occupation of the suit property as tenant.

25. Reliance is placed on behalf of defendant no.10 on text from Mohammedan Law in respect of sec.149 and Sec.150.

149. The three essentials of a gift – *It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor (2) an acceptance of the gift, express or implied. By or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Sec. 150. If these conditions are complied with, the gift is complete (K).*

The three essential requisites for a valid gift are (1) the offer of the gift (2) acceptance thereof (3) delivery of possession in pursuance thereof. In this case it is established as a fact that the appellant made an offer of gift over the property made on offer of gift over the plaintiff schedule property to the respondent as guardian, accepted the offer on behalf of the respondent. She has been in possession and enjoyment ever since the delivery of the plot. Therefore, the gift is complete on taking possession of the plaintiff schedule property. Therefore, the revocation deed is invalid and not binding on the respondent.

150. Delivery of possession – *(1) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of (1) As observed by the Judicial Committee, 'the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.'*

26. Reliance is placed on behalf of the defendant no.10 on the judgment in the case of **Rasheeda Khatoon (D) Through Lrs. Vs. Ashiq Ali s/o Lt. Abu Mohd (D) Through LRs** as reported in **2015 (2) CCC 86 (SC)**.

While discussing the prepositions of law relating to the gift under the Mohammedan Law it is observed as under:

16. *From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan Law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances required registration; that to be a valid gift under the Muhammadan Law three essential features namely (I) declaration of the gift by the donor, (ii) acceptance of the gift by the donee expressly or impliedly and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift deed it does warrant registration under Section 17 of the registration act.*

19. *The real thrust of the matter, as well perceive, is whether the essential ingredients of the gift as is understood in the Muhammadan Law have been satisfied. To elaborate, a deed of gift solely because it is written instrument does not require registration. It can always be treated as a piece of evidence evidencing the gift itself is a significant one, that gift must fulfill the three essential conditions so that it may be termed as a valid gift under the Muhammadan law.*

27. Reliance is placed on behalf of the defendant no.10 on the judgment in the case of **Abdul Rahim and Ors. Vs. Sk.Abdul Zabar and Ors.** as reported in **AIR 2010 SC 211** where in it is observed that when requisite conditions for valid and complete gift under Muslim law are made out the transfer of constructive possession would sub-serve the requirement of law. It is observed as under:

10. *A gift indisputably becomes complete when a person transfers with immediate effect the ownership of his movable or immovable property to another person, and that other person himself or someone else with his consent takes possession of the property gifted. Under Mohammedan Law it is a contract which takes effect through offer and acceptance.*

The conditions to make a valid and complete gift under the Mohammedan law are as under:

- (a) *The donor should be sane and major and must be the owner of the property which he is gifting.*
- (b) *The thing gifted should be sane and major and must be the owner of the property which he is gifting.*
- (c) *If the thing gifted is divisible, it should be separated and made distinct.*
- (d) *The thing gifted should be such property to benefit from which is lawful under the Shariat.*
- (e) *The thing gifted should not be accompanied by things not gifted; i.e. should be free from things which have not been gifted.*
- (f) *The thing gifted should come in the possession of the donee himself, or of his representative, guardian or executor.*

It is also well settled that if by reason of a valid gift the thing gifted has gone out of the donee's ownership, the same cannot be revoked.

The donor may lawfully make a gift of a property in the possession of a lessee or a mortgagee. For effecting a valid gift, the delivery of constructive possession of the property

to the donee would serve the purpose. Even a gift of a property in possession of trespasser is permissible in law provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

28. Reliance is placed on behalf of the defendant no.10 on the judgment in the case of **Hafeeza Bibi and Ors Vs. Shaikh Farid by Lrs and Ors** as reported in **AIR 2011 SC 1695**. It is observed as under:

The three essentials of a gift under Mohammedan law are; (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession, the rules of Mohammedan Law do not make writing essential to the validity of gift; and oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Merely because the gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on plain piece of paper. The distinction that if a written deed of gift recites the factum or prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and not in conformity with the rule of gifts in Mohammedan law.

Section 129 of T.P. Act preserves the rule of Mohammedan Law and excludes the applicability of S.123 of T.P. Act to a gift of an immovable property by a Mohammadan. It is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under S.17 of the Registration Act. Each case would depend on its own facts.

29. *In our opinion, merely because the gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites that factum of prior gift then such deed is not required to be registered by when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammedan Law.*

29. Reliance is placed on behalf of the defendant no.10 on the judgment in the case of **Jagdish Prasad Vs. State** as reported in **2015 (3) CCC 478 (Del.)** wherein it is observed that in case of Will which requires two attesting witnesses, when both witnesses are dead not available, the Will did not

fail and the same can be proved by proving signature, thumb impression of the executant as well as of the attesting witnesses.

Reference is made to the observation made in 2003(2) SCC 91 wherein referring to Sec.68,63,69 of Evidence Act which deal with the provision relating to examination of attesting witness. It is observed as under:

It has been held by the Supreme Court in Janki Narayan 2003 (2) SCC 91 that it is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proved due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a Will in a Court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses derogatorily under Section 63 of the Succession Act. A plain reading of Section 63 of 1925 Act makes it clear that it declares that substantive law regarding execution or unprivileged will and mandates that the testator has to sign or affix his mark or under his direction some other person as in his presence signed the Will. Section 69 while dealing with a situation where no attesting witness can be found requires evidence to the effect that the signatures on such documents are that of the executant with further proof that there is attestation in his handwriting by one attesting witness. The law does not envisage that if both attesting witnesses are dead or not available, that would be end of the Will.

30. Reliance is placed on behalf of the defendant no.10 on the judgment in the case of **C.G.Raveendran and Ors. Vs. C.G.Gopi and Ors.** as reported in **AIR 2015 KERALA 250**. It is observed that when both attesting witness are not alive Sec.68 of Indian Evidence Act cannot apply and provision that governs can be Sec.69 of the act. Though the statute prescribed that Sec.69 applies when the witness is not found, in the absence of any other provision dealing with cases wherein the presence of witnesses cannot be procured for various other reasons, Sec.69 should apply and can be extended to such cases. It is observed in para 19 as under:

19. *It is settled that mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed by Sec. 63 of Indian Succession Act. Section 69 imposes a twin fold duty on the propounder. It provides that if no such attesting witness can be found, it must be proved that attestation of one attesting witness at least is in his handwriting and also that the signature of the person*

executing the document is in the handwriting of that person. Hence, to rely on a Will propounded in a case covered by Section 69 the propounder should prove I) that the attestation is in the handwriting of the attesting witness and ii) that the document was signed by the executant. Both the limbs will have to be cumulatively proved by the propounder. Evidently, the section demands proof of execution in addition to attestation and does not permit execution to be inferred from proof of attestation. However, Section 69 presumes that once the handwriting of attesting witness is proved he has witnessed the execution of the document. The twin requirement of proving the signature and handwriting has to be in accordance with Section 67 of the Indian Evidence Act.

23. *However, when a witness is called to prove a Will under Section 69, it is not warranted that he should specifically say that he had seen the executant affixing his signature, but it will be sufficient if it is proved that the signature was in the handwriting of the person affixing it. This seems to be the essential difference in the quality and nature of evidence required under Section 68 and that under Section 69. In the case of former, the genuineness of a document required by law to be attested is proved by adducing evidence of due attestation, whereas in the case of latter it is genuineness of the document which is to be established.*

By this the defendants have tried to impress upon the plaintiff that the gift fulfilled all requirements of valid gift under Mohammedan law. However in the instant case the validity of the gift deed is not in question.

Now reverting back to the present case the plaintiff has sought for prohibitory order against defendant no.10 restraining defendant no.10 from transferring possession of the suit property to defendant no.1 to 9 as well as from acting in a manner deprived the plaintiffs of their tenancy rights as well as restrain construction property on the lands as well as from recovering rent from tenants defendant no.11 to 21 by way of permanent injunction. On the oral and documentary evidence on record it stands established that the defendant no.10 has continued to be in possession and occupation in the suit property as tenant. Admittedly nothing is brought on record by the plaintiff to show that they have challenged either the gift deed or rent note at any point of time. On the contrary notice issued by plaintiff no.1 to defendant no.1 trust calling upon them to cancel the rent note executed in favour of Abdul Kadar Ismailbhai evidences the fact that the plaintiffs were aware of the rent note executed by defendant no.10 with the trust.

The other contention raised by the defendant is that the plaintiffs being well aware of the fact that deceased Ismailbhai Babubhai Desai was a tenant in the suit lands had never raised any claim of tenancy rights of the suit properties as heirs of deceased Ismailbhai Babubhai Desai and were never in possession of the suit properties and the defendant no.1 Trust has never recovered any rent from the plaintiffs nor the same was paid by plaintiffs to the defendant Trust. The plaintiffs have not asserted their rights, claim even after a considerable lapse of more than 12 years. Since the death of Ismailbhai Babubhai Desai in 1970 and have not sued either the defendant Trust as trustees nor restrained them from recovering rent from defendant no.10 nor any notice was issued to defendants.

31. Reliance is placed on behalf of the plaintiff on the judgment in the case of **Batubhai Malubhai, since deceased by his heirs Vs. Rampyaribai Bhaulal kanwaj** as reported in **1997 Bom. RC 433**. In the facts of the writ petition suit for eviction was decreed on the ground of non payment of rent. But reversed in appeal on the ground of non joinder of necessary parties as defendant in eviction suit. It came to be observed that the case was contrary to the pleading in the plaint. The demand notice was not given to other tenants of the suit premises and they were not joined as defendants in the suit. It came to be held that there was no substance in the petition and no fault to be found with the order of appellate court dismissing the suit.

32. Reliance is placed on behalf of the plaintiff on the judgment in the case of **Anil Kumar Dadurao Dhekle Vs. Rukhiben and others** as reported in **AIR 2017 SC 1938**.

In the facts of the case which came up in appeal rent suit was filed against the original tenant who was running hair cutting saloon in the rented premises

seeking possession of the property and arrears of rent. The original tenant died during the pendency of the suit and his two sons were brought on record as defendants. One of the son independently running hair cutting saloon at some other place and other son was working in glass works company for 10 to 12 years and never work with his father nor helped in running shop while the original tenant was alive. After the death of original tenant on third person was found to be inducted in the suit premises by illegally subletting the tenant premises so as to deprive the plaintiff of his legal rights to seek possession of the suit property. The suit was decreed on the ground of default in payment of rent. Civil appeal came to be preferred before the dist. Court by heirs of original tenant which was allowed and order of eviction passed by the trial court was reversed on the finding that plaintiff failed to prove subletting by heirs of tenant to third party inducted in the premises. The plaintiff prefer revision which was dismissed.

In appeal it came to be observed that it was brought on record by plaintiff that one of the defendant was running barber shop elsewhere other then the premises and photographs were produced to prove the same while the original tenant was alive. It was observed that nothing was brought on record to show that he had been doing the business which his father at any point of time. In this context it came to be observed the first appellate court and high court failed to appreciate that one of the heirs was full time worker in glass word company and other son carrying on business separately and order of trial court was restored.

33. Reliance is placed on behalf of the plaintiff on the judgment in the case of **State of Maharashtra applicant Vs. Court Receiver, Shri Sai Baba Sansthan, Shirdi Respondent** as reported in **AIR 2000 BOMBAY 402**.

In case of reference under the Bombay Stamp Act while taking the audit of respondent Sansthan, the auditors came across a document namely receipt of goods and felt that this would attract stamp duty as per provision of Bombay Stamp Act. The controller on stamp act determined that receipts for money without consideration i.e. cash gift are exempt and receipts issued in respect of the gift received in articles i.e. movable properties are chargeable under the stamp act. Referring to the definition 'instrument of gift' covered by Sec.2(1a) it came to be observed that the related record did not involve item of immovable property and the document could not be said to be a document of making a gift or acceptance of gift and merely record the fact that the gift had been received. It can be held that there was no question of duty being attracted to it and there was answer in the negative. It is observed as under

The moment, the gift is understood as transaction without consideration, firstly, with reference to the definition of instrument in clause (1) of Section 2 of the Stamp Act, as the instrument recorded above forms the receipt issued by the Sansthan mentioned above cannot be said to be recording any right or liability as of in case with the donor or in case with the donee of the Sansthan.

Reference is made to the extract of Sec.67,68,69,70,71,72 from the text of Evidence Act.

In the facts and circumstances of the present case, the cited judgments are well applicable to the case of the defendant no.10.

In view of the above discussion, considering the pleadings, relevant submissions, evidence placed on record and the reasons as mentioned herein before I answer Issue No.6 in the negative.

In the result, I pass the following final order :

ORDER

The present suit is hereby rejected.

The plaintiffs shall pay the costs of the suit to the defendants.

Decree be drawn accordingly.

Pronounced in open court on this 30th day of June, 2018.

Date: 30.06.2018
Surat

(Meherina B.Dange)
Addl. Judge, Small Cause Court, Surat
UID NO.GJ00594