

(2016) 05 KL CK 0021

In the High Court Of Kerala

Case No : AS. No. 564 of 2001 (E) (Against the Judgment and Decree in Os No. 978 of 1993 of Addl. Sub Court, Kottayam dated 21.03.2001)

K.J. Abraham

APPELLANT

Vs

Mrs. Mariamma Itty

RESPONDENT

Date of Decision : 26-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 9, 96
Limitation Act, 1963 — Article 65

Citation : (2017) AIRCC 5 : (2016) 3 ILRKerala 98 : (2016) 3 KHC 718 : (2016) 4 KLT 18

Hon'ble Judges : Mr. Antony Dominic and Mr. A. Hariprasad, JJ.

Bench : Division Bench

Advocate : Sri. G.S. Reghunath, Advocate. in AS. No. 564 of 2001 (E), Sri. T.P. Varghese and Sri. Philip T. Varghese, Advocates. in Cross Objection in As. No. 564 of 2001 (E), for the Appellant; Sri. T.P. Varghese, Advocate, Sri. Philip T. Varghese, Advocate, Sri. B

Final Decision : Dismissed

Judgement

Hariprasad, J.—This first appeal is filed by the plaintiffs in a suit for multifarious reliefs. The trial court disallowed major part of the reliefs claimed; hence they are in appeal. For brevity and clarity, the parties are hereinafter referred to as the plaintiffs and defendants. Before marshaling the facts, it will be profitable, for the ultimate analysis of the case, to take note of the reliefs sought in the plaint:

"(A) Declaring that the sale deed No.868 of 1978, the agreement No.3904 of 1979 and document No.3321/1980 of the Additional Sub Registrar's Office, Kottayam, are false and fraudulent documents created by the defendants without any authority and that they are not binding on the plaintiffs and the plaint properties, or, in the alternative cancelling the said documents; and declaring plaintiffs' title and possession over B schedule;

(B) Putting up and demarcating the eastern boundary of plaint B schedule property and the building portion therein; after recovery of the same if the same is found in the possession of defendants;

(C) Directing defendants 3 and 5 to settle the accounts with the plaintiffs and allowing the plaintiffs to recover from those defendants and charged on plaint C schedule property a sum of Rs.50,000/- (Rupees Fifty thousand only) or such other sum found due to the plaintiffs;

(D) Allowing the costs of the suit from the defendants and their assets;

(E) Allowing such other reliefs as are found necessary in the nature of the suit."

2. Trial court decreed the suit in part, allowing rendition of accounts against the legal representatives of deceased 3rd defendant. Although, title to the plaintiffs over a portion of the land was declared by the court below, the plaintiffs are aggrieved that the court below committed a grave error in not considering the genuineness and binding effect of the documents challenged by them. In spite of getting a decree for fixation of boundary, the plaintiffs are dissatisfied as the relief allowed did not conform to their demand. Plaintiffs' claim to set aside Exts.A2, A4 and A5 has been disallowed.

3. Now, we shall deal with the relevant facts: 1st defendant is the wife of 3rd defendant. 3rd defendant subsequently died. His legal heirs are on the party array. 2nd defendant is the son and defendants 6 and 7 are the daughters of defendants 1 and 3. 4th defendant is the brother's daughter's husband of the 1st defendant. 5th defendant is the mother's sister's daughter's son of the 3rd defendant. An extent of 9.728 cents of land in survey No.18/3 of Vijayapuram Village was owned and possessed by the 8th defendant. Plaintiffs and defendants 1 and 2, as per Ext.A1 sale deed, purchased the property from 8th defendant on 23.06.1975. That property is described in plaint A schedule.

4. By virtue of the said sale deed, 1st plaintiff obtained right over 2.049 cents on the northern side of the western 4.549 cents described in Ext.A1 sale deed. 2nd plaintiff obtained 2.5 cents on the southern side of the 1st plaintiff's property. They obtained an undivided half right over the eastern 630 sq. links. Total 4.549 cents owned by plaintiffs 1 and 2 is shown in B schedule to the plaint. Remaining extent of 4.549 cents on the eastern side of the plaintiffs' property is owned by defendants 1 and 2 and that is scheduled as C schedule to the plaint. They also have a co-ownership right in respect of 630 sq. links shown as D schedule in the plaint.

5. 3rd defendant is the first cousin of the 1st plaintiff. Due to the close relationship, trust and confidence reposed by the plaintiffs on defendants 1 to 3, all of them together decided to construct a building in the entire property. 1st plaintiff was employed in Dubai for more than 25 years. In those circumstances, defendants 1 to 3 agreed to construct a building in the joint names of the plaintiffs and defendants 1 and 2, who are the owners of property, in such a way

that after construction, B schedule property and the building portion thereon could be separately enjoyed by the plaintiffs and C schedule and the building thereon could be separately enjoyed by defendants 1 and 2. This joint venture was agreed upon by the plaintiffs and defendants 1 to 3 to utilise the entire land by minimising the necessity to leave open spaces required under the Kerala Building Rules. Plaintiffs would contend that they reposed absolute trust on defendants 1 to 3 in the matter of construction of the building. Accordingly, a licence was taken from Kottayam Municipality in the joint names of the plaintiffs and defendants 1 and 2. Construction of the building had been done in accordance with the approved plan. Defendants 1 to 3 used to inform the plaintiffs about the progress of construction of building in the property. They received amounts from the plaintiffs at every stage of construction. More than Rs. 5,00,000/- was entrusted by the plaintiffs to defendants 1 to 3 for the building construction. This fact had been acknowledged by the defendants in various letters.

6. After purchase of the property with an intention to construct a building, the 1st plaintiff executed a power of attorney in the name of the 5th defendant as directed by defendants 1 to 3. 5th defendant was authorised to sign all papers on behalf of the 1st plaintiff in connection with the construction of building. 2nd plaintiff also executed a power of attorney in favour of the 5th defendant to sign all papers on her behalf even before purchase of the property. Plaintiffs were having utmost trust and confidence on the 5th defendant and they, believing that accounts would be rendered by defendants 1 to 3, entrusted the construction activities with defendants 1 to 3 and 5. Plaintiffs were under a bona fide belief that the said defendants would not misuse the trust reposed on them and also that the 5th defendant would not abuse his powers in derogation of the plaintiffs' interests.

7. Finally a building was constructed and it was rented out. For collecting rent, the plaintiffs executed a power of attorney in favour of the 3rd defendant as requested by him. While the plaintiffs were staying abroad, they had no occasion to suspect the bonafides of the said defendants. However, when the 1st plaintiff came to Kottayam in June, 1992 and contacted defendants 1 to 3, he understood that the 5th defendant had, by that time, left India and his whereabouts were not known. From the behaviour of other defendants, the plaintiffs could understand that they had concealed true facts from the plaintiffs. Said defendants were making huge profits from the building without sharing it with the plaintiffs. When enquiries were made in Kottayam Municipality, the plaintiffs understood that the defendants had created certain false documents regarding plaint A schedule property and the building without the knowledge and consent of the plaintiffs. It is the definite case of the plaintiffs that the 5th defendant was not authorised to execute any sale deed regarding the plaintiffs' property. Plaintiffs could find out on enquiry that the 5th defendant had executed Ext.A2 sale deed in favour of the 4th defendant on 03.04.1978 in respect of a portion of plaint B schedule property. This document is the result of a fraud practised by the

5th defendant on the plaintiffs in collusion with defendants 1 to 4. 5th defendant had not given any information or accounts to the plaintiffs in respect of the impugned sale proceeds. The said document was executed by the 5th defendant in excess of powers conferred on him by the 1st plaintiff by virtue of a power of attorney executed in his name. Ext.A2 sale deed is ab initio void and therefore, not binding on the plaintiffs or their rights in the properties. Plaintiffs came to know about the document only in 1992. Defendants 1 to 3 prompted the plaintiffs to execute a power of attorney in favour of the 5th defendant. Plaintiffs could understand only much later that it was a ploy by these defendants in collusion with one another to defraud them. According to the plaintiffs, act of the defendants executing the document amounted to a breach of trust. Plaintiffs also understood that defendants 1 to 3, 5 and 8 have created documents in the name of defendants 4, 6 and 7 regarding plaint B schedule property illegally and fraudulently. An agreement, viz., Ext. A5, was executed on 15.12.1979 between defendants 1 to 7 in which the 5th defendant purported to have represented the plaintiffs unauthorisedly. The said agreement is also not binding on the plaintiffs as it is void. It is further seen that the 8th defendant had executed a document purported to be a correction deed on 10.11.1980 (Ext. A4). That was done without the knowledge or consent of the 2nd plaintiff. Exts. A2, A4 and A5 are void documents and therefore, they do not bind the plaintiffs. Deceased 3rd defendant had not settled the accounts with the plaintiffs in respect of the rent received by him from the portion of the building in the plaint B schedule in spite of repeated demands. Hence the plaintiffs filed the suit.

8. Defendants 1, 3 and 6 filed a joint written statement. In the written statement they have candidly admitted the relationship between the parties as stated in the plaint. Statements in the plaint regarding the manner in which the plaint A schedule property was purchased are also admitted by these defendants. Similarly the averments in paragraph 3 of the plaint, regarding the respective areas/portions owned and possessed by the parties are also admitted. Statements in paragraph 4 of the plaint are also admitted. They would contend that the proposed joint venture was meant for the advantage of all the parties. There is an express admission in the written statement of these defendants that it was agreed between the parties that after completion of the building, the B schedule portion would be allotted to the share of the plaintiffs and the C schedule to the share of defendants 1 and 2. According to the averments in the written statement, the 3rd defendant, on behalf of defendants 1 and 2, had informed the plaintiffs at all times about the expenditure of the building construction. It is stated that money required for construction of the building was sent by the plaintiffs to their power of attorney (5th defendant), who had spent amounts for the construction. These defendants admitted the execution of power of attorney by plaintiffs 1 and 2 in favour of the 5th defendant. According to them, this was done not at the instance of defendants 1 to 3. These defendants contended that they were not aware as to the date when the 5th defendant left India. They would further contend that they were not fully aware of the details

relating to the sale deed in favour of the 4th defendant, which is impugned in the suit. According to them, Ext.A5 agreement was executed with the knowledge and consent of all the parties including the plaintiffs, who were represented by the 5th defendant as power of attorney. Neither the deceased 3rd defendant nor the defendants who succeeded to his estate, are liable to make any payment as claimed in the plaint.

9. 4th defendant filed a separate written statement. According to this defendant, by virtue of Ext.A2 sale deed, the property described therein was purchased by him for valid consideration from the 1st plaintiff through his power of attorney, the 5th defendant. It was executed by the 5th defendant by virtue of a power of attorney attested by the Consul, Consul General of India, Dubai dated 21.07.1975. According to the 4th defendant, 1st plaintiff has no right or title over the property included in Ext.A2 sale deed. Consideration for the sale was `7,500/- and the said amount was paid through an account payee crossed cheque drawn in the name of the 1st plaintiff. The cheque amount had been credited to his account. Plaintiffs were fully aware of the sale deed in favour of the 4th defendant at the time of its execution itself. Allegations regarding fraud practised by the 5th defendant and collusion between him and the other defendants are false. 4th defendant is not a party to any such collusion. The plaintiffs have no right to get any relief against Ext.A2 document. Plaintiffs have no cause of action against the 4th defendant. Ext.A2 was executed in the year 1978. The suit filed nearly 15 years after the execution of Ext.A2 is barred by limitation. 4th defendant has perfected his title by adverse possession. Hence the suit is liable to be dismissed.

10. Heard Sri. G.S. Reghunath, learned counsel for the plaintiffs, Sri. Philip T. Varghese, learned counsel for defendants 1, 2, 6 and 7 and Sri. Bechu Kurian Thomas, learned Senior Counsel for the 4th defendant. Argument notes submitted by the counsel have been perused. We have considered the cross-objection filed by defendants 1 and 2.

11. Before dealing with various contentious issues, let us consider the material aspects born out from the oral evidence. PW1 is the 1st plaintiff. He testified on behalf of his wife too. He proved Ext.A1 and the contents therein. In the chief-examination, PW1 specifically stated that the 5th defendant is also known as Ravi and a power of attorney was executed in his name by the 1st plaintiff, authorising him to appear before the Municipality and to do the needful in connection with the building construction. It is his definite case that the 5th defendant was not given any power to assign any portion of PW1's property. He also deposed that the said power of attorney was entrusted with the 3rd defendant, a close relative of PW1, along with whom the 5th defendant was residing at that time. Deposition of PW1 would show that his relationship with defendants 1 to 3 became strained when he asked for accounts from them. It is the clear version of PW1 in chief-examination that Ext.A2 assignment deed was executed by the 5th defendant in favour of the 4th defendant without any power

or authority to sell and therefore it is void. PW1 has not received any consideration for the sale. PW1's local bank account had been operated by defendants 3 and 5. Pass book and cheque book were in the custody of the 3rd defendant. PW1 entrusted even signed cheque leaves to the 3rd defendant. Ext.A3 is one of the pass books. According to the testimony of PW1, defendants 1 to 5, with an intention to cheat the plaintiffs, cooked up false documents. It is the specific version of PW1 that he did not receive any rent from the building. He would emphatically state that the foul play done, at the instance of the defendants, was revealed only when he came down to his native place in 1992 for permanent settlement.

12. Learned counsel for the plaintiffs pointed out that many vital aspects in the deposition of PW1 were not challenged during the cross-examination. Any fact asserted by a witness, if not challenged in his cross-examination by the adverse party, will certainly amount to acceptance of that fact. Chapter X of the Indian Evidence Act, 1872 deals with examination of witnesses. Section 136 of the said Act recognises the power of a Judge to decide as to the admissibility of evidence. Sections 137 and 138 of the above Act deal with the three kinds of examinations provided in the Evidence Act and the order of them. Section 138 makes it clear that the examination and cross-examination must relate to relevant facts, but cross-examination need not be confined to the facts revealed in the examination in-chief. If that be so, what is deducible therefrom is that in the examination-in-chief relevant facts alone can be proved and if those relevant facts are not challenged in the cross-examination, they shall be deemed to be admitted. The above legal proposition is unchallengeable. Views expressed in this regard in *Velu Pillai Padakalingam v. Paramanandam Yesudasan* (1953 KLT 587) and *State of Kerala v. Venugopalan* (1987 (1) KLT SN.15 (C.No.28)) by learned single Judges are correct and we agree with the principles mentioned in those decisions.

13. Assertions by PW1 that the 5th defendant was staying along with defendants 1 and 3, that the 5th defendant used to help the 3rd defendant in his business, that PW1's pass book and cheque books were entrusted to the 3rd defendant, that either the 3rd defendant or 5th defendant must have been operating the account, etc. are not challenged by the contesting defendants during cross-examination. It is also pointed out by the learned counsel for the plaintiffs that PW1's testimony that he knew about Ext. A2 only in October, 1992 was not challenged in cross-examination by the defendants. It is important to note in this context that PW1 has a case that Ext.A2 was falsely created as per the insistence and involvement of deceased 3rd defendant. PW1 deposed in unambiguous terms that the original powers of attorney executed by him and attested before the Consulate in Dubai in favour of defendants 3 and 5 separately were not returned by those defendants. This aspect is also not challenged by the counsel appearing for defendants 1, 2 and 6. It is pertinent to note that the 5th defendant remained absent throughout the proceedings.

14. Learned counsel for the 4th defendant cross-examined PW1. Although some

questions were put by the counsel for the 4th defendant to PW1, in respect of payment of consideration for Ext.A2 and deposit of Rs. 7,500/- in PW1's account, he maintained his position that accounts were handled by defendants 3 and 5 and the 5th defendant was not authorised to sell any portion of his property. On an over all assessment of the testimony of PW1, it could be said that the pleas set up in the plaint, regarding absence of power conferred by PW1 on 5th defendant to sell the property and PW1's lack of knowledge about Ext.A2 contemporaneous to its execution, have not been discredited or effectively impeached in cross-examination.

15. DW1 is the 1st defendant. In the written statement, defendants 1 to 3 and 6 have practically admitted most of the contentions in the plaint, excepting the case that they were party to the alleged fraud and that the 3rd defendant was liable to render accounts relating to reception of rent. DW1 also conceded that all the parties to Ext.A1 deed decided to jointly develop the land. In the chief-examination itself DW1 has admitted that as per previous understanding, herself and her son, owners of the eastern portion of the land, decided to retain the ownership over that portion of the building. And the plaintiffs would take the western portion of the building. According to DW1, entire affairs of the plaintiffs were looked after by the 5th defendant. Liability of the 3rd defendant to account for has been denied by DW1.

16. According to DW1's testimony, 4th defendant, in whose favour, the impugned Ext.A2 had been executed, had not spent any amount for building construction. It is also worthwhile to note that none of the parties had produced any document at all showing the cost of construction of the building or their contribution towards the cost. But, it is to be remembered in this context that nobody has any dispute that the plaintiffs have contributed towards the construction cost of the building and evidence has been produced before the court to show that PW1 had sent money from abroad for that purpose. Therefore, it becomes the bounden duty of the 4th defendant to establish that he had also spent money for building construction subsequent to Ext.A2 purchase. Absence of any evidence to show the involvement of the 4th defendant in the construction of building is a material infirmity in his case. Learned counsel for the plaintiffs drew our attention to the fact that DW1 admitted that the plaintiffs and deceased 3rd defendant were in very cordial terms and they trusted each other. It is also admitted by DW1 that after building construction, the deceased 3rd defendant used to collect rent from the tenants. It can be safely stated that DW1's testimony did not in any manner adversely affect the strength and reliability of the plaintiffs' case.

17. DW2 is the 4th defendant. According to him, he has no involvement in any of the controversies, except that he purchased a portion of the property as per Ext.A2 for a valid consideration. According to him, the 5th defendant was authorised by the 1st plaintiff to execute an assignment deed in respect of the property. It is also contended by him that he consulted the Sub Registrar

concerned before executing the document and as directed by the Sub Registrar, who had occasion to peruse the power of attorney as well, completed the transaction with all bonafides. It is also the case of DW2 that consideration was paid for the sale and it was deposited in PW1's bank account forthwith. Evidence tendered by DW2 will indicate that Ext.A2 purchase was made with the knowledge and participation of deceased 3rd defendant. Another important aspect, which we shall elaborately deal with in the succeeding paragraphs, is that in Ext.A2 assignment deed, there is a mention about handing over of a copy of the disputed power of attorney, executed by PW1 in the name of the 5th defendant, to the purchaser (4th defendant). In spite of raising a scathing attack against the authority of the 5th defendant to execute Ext.A2, non-production of the power of attorney, on a flimsy contention by DW2 that it could not be searched out, is with an ulterior motive and has to be dealt with in accordance with law, contended the learned counsel for the plaintiffs. The legal effect of non-production of power of attorney shall be considered at the appropriate time.

18. After hearing the learned counsel on both sides, we, considering the factual and legal aspects involved in the case, are of the view that following points arise for consideration.

- (i) What is the effect of improper framing and non-framing of relevant issues?
- (ii) What is the predominant nature of the suit?
- (iii) Is claim for recovery of possession based on title the substantive relief?
- (iv) Whether Article 58 or Article 65 of the Limitation Act, 1963 is applicable to this case?
- (v) Is the suit barred by limitation?
- (vi) If the plaintiffs could establish their title to the plaint schedule properties, what is the effect of not raising a proper plea regarding adverse possession and not adducing evidence thereon?
- (vii) Whose burden is to prove that the 5th defendant had the requisite authority to execute Ext.A2 by using the impugned, but produced by none, power of attorney, admittedly executed by the 1st plaintiff? What is the legal effect of non-production of powers of attorney executed by the plaintiffs in the name of the 5th defendant?
- (viii) What is the legal effect of registration of the impugned documents?
- (ix) Whether the preliminary decree for rendition of accounts is legally sustainable?
- (x) Reliefs grantable in this case?

Point No. (i)

19. Learned counsel for the plaintiffs contended that the trial court failed to

frame proper issues arising out of the pleadings. It is contended that the crucial issue, regarding the lack of power for the 5th defendant to execute Exts.A2 and A5, does not figure in the issues framed by the trial court. Vexed question regarding the burden of producing the disputed powers of attorney is also not covered by any issue. Although the trial court has granted a relief of fixation of boundary, it failed to gather the requisite materials for fixing boundary. Besides, the trial court even omitted to frame an issue regarding fixation of boundary. It is relevant to note that the parties have not adduced any oral evidence specifically touching upon this dispute. However, the plaintiffs had taken steps for collecting materials for fixation of boundary by filing I.A. No.2966 of 1994, seeking issuance of a commission for identification of the property. It is alarming to note that the court below did not pass any order on the said application till the disposal of the suit. We are in agreement with the counsel for the plaintiffs that the court below should have considered the necessity of issuing a commission for fixation of boundary. The trial court should have anticipated the possibility of allowing the prayer for fixation of boundary. Learned counsel appearing for the defendants would blame the plaintiffs for not pursuing the remedy for appointment of a commission. We are not impressed with that contention of the defendants. It is the bounden duty of the trial court to facilitate and afford an opportunity to the parties to gather proper evidence for effective final adjudication of the lis. It is therefore clear that the court below failed in collecting the requisite materials for deciding the case.

20. As mentioned above, the court below did not frame an issue regarding fixation of boundary. Order 14 of the Code of Civil Procedure, 1908 (in short, "the Code") deals with settlement of issues. As per Order 14, Rule 1 of the Code, an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Issues are of two kinds, viz; issues of fact and issues of law. Law on the point is clear that at the first hearing of the suit, the court shall, after reading the plaint and written statement, if any and after examination under Rule 2 Order 10 of the Code and after hearing the parties or their pleaders, ascertain upon what material proposition of fact or law, the parties are at variance. Thereupon the court shall proceed to frame and record issues on which the right decision of the case has to rest.

21. Framing of issues is not an empty formality. That is intended for riveting attention of the court and also the parties to the factual and legal issues to be proved in order to resolve the disputes. Law is too well settled that the parties are expected to adduce evidence only in respect of issues framed adhering to the principles in Order 14 of the Code. This will take care of two things, viz; (i) the parties cannot digress and adduce unnecessary and irrelevant evidence, resulting in the waste of judicial time and obfuscation of the real issues and (ii) it will be easy for the court to arrive at the correct decision and also that it will help the court to attain more clarity and specificity in its judgment and decree.

22. Order 14, Rule 2 of the Code says in general terms that the court shall

pronounce judgments on all issues. Exceptions are carved out in Sub-rule (2) to the Rule, where issues both of law and fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, then it may try that issue first. Further condition to be satisfied is that such legal issue must be relating to jurisdiction of the court or a bar to the suit, created by any law for the time being in force. Excepting those two situations, in all cases, the court is bound to pronounce judgment on all issues. Issues can be framed based on the materials referred to in Rule 3 Order 14 of the Code, apart from the pleadings and examination of parties. Allegations made on oath by the parties or by persons present on their behalf or made by the pleaders of such parties and the allegations made in the pleadings or in the answers to the interrogatories delivered in the suit and also the contents of documents produced by either party could be referred to by the court for framing issues. Rule 4 prescribes that the court may examine witnesses or documents before framing issues. A reading of all these provisions would make it amply clear that raising proper issues in a suit is an unshirkable responsibility of the court.

23. This is a case wherein the plaintiffs have, in addition to other reliefs, claimed fixation of boundary of the properties. They have paid court fee also for that relief. Non-framing of an issue relating to fixation of boundary is a serious flaw on the part of the trial court. Denial of an opportunity to the plaintiff to take out a commission was another grave mistake on the part of the court below. Even though the relief of fixation of boundary has been granted, it will be difficult to execute the same in the absence of any material to do so. Further, we do not find any direct evidence adduced by the parties enabling the court to fix the boundary of the plaintiffs' property. It is relevant to note that there is a serious dispute regarding the lie of the properties included in Exts.A2 and A5. Item Nos.3 and 4 in Ext.A1 together have been described in B schedule to the plaint. Similarly, item Nos. 1 and 2 in Ext.A1 is the plaint C schedule property. C schedule properties lie on the eastern side and B schedule properties on the western side is not disputed. Property shown in D schedule to the plaint is the eastern most strip of land, kept in common to the assignees in Ext.A1. Learned counsel for the plaintiffs contended that it is impossible to plot item Nos.1 and 2 shown in Ext.A2 in item No.3 of Ext.A1. In other words, if we follow the descriptions of the properties in Ext.A2 and if we attempt to plot them in item No.3 in Ext.A1 (a portion of plaint B schedule), it will result in whole lot of a confusion. Boundary descriptions in respect of item No.1 in Ext.A2 are a bit confusing. Both the contesting parties produced before us conflicting sketches indicating placement of various items in Ext.A2 document. We are of the considered view that both the sketches fail to convincingly show that any one of them represented the real state of affairs. No court can take a decision based on the figment of imagination of any party. One possibility is to locate the property in Ext.A2 on the eastern side of item No.3 in Ext.A1, reaching almost upto the middle of it from the northern side. Thereafter, a three links wide way is described in Ext.A2. Item

No.2 in Ext.A2 is supposed to be on the southern portion of item No.3 in Ext.A1, extending from western extremity to eastern extremity. Another possibility is that item No.1 in Ext.A2 could be even beyond the eastern boundary of item No.3 in Ext.A1, in which case it will go out of 1st plaintiff's property. It is the consistent case of the 4th defendant that Ext.A2 properties have been sold by the 1st plaintiff through his power of attorney (5th defendant) for consideration. If that be so, it could never be a portion of item No.1 in C schedule, which belongs to the 1st defendant.

24. Learned Senior Counsel for the defendants tried to convince us by showing another sketch, which is said to depict the correct lie of Ext.A2 properties. According to the learned counsel for the plaintiffs, if we identify Ext.A2 property in either way, it will render the remaining property of the 1st plaintiff useless. It is also contended that if Ext.A2 is given effect to, no purpose will be served by the 1st plaintiff retaining ownership over a small portion. The vexed questions could not be established for want of a commission plan and report is a genuine grievance of the plaintiffs. Notwithstanding the grant of a decree for fixation of boundary, we are of the view that it will yield no result in the absence of any reliable material. Therefore, we find that the point raised by the plaintiffs is sustainable and remedial measures will have to be taken in this regard.

Point Nos. (ii) to (iv)

25. As mentioned above, the suit is one for multitudinous reliefs. We have already extracted the prayers in the plaint. Learned counsel for the plaintiffs contended that the primary relief sought in the plaint is recovery of possession of property on the strength of title and the relief of declaration is one only by way of abundant caution. A clear understanding of the real nature of the suit is highly essential for computing the period of limitation applicable to this case. If the suit is viewed as one for declaration, Article 58 of the Limitation Act, 1963 (in short, "the Act") will apply. The said Article reads as follows:

" To obtain any other declaration

Three years

When the right to sue first accrues."

If that be so, the suit instituted in the year 1993 will certainly be barred by limitation. Application of the well settled principles will show that the expression "right to sue first accrues" occurring in the Article can only be viewed as the date on which the impugned document had been executed. It is an indisputable proposition that in some exceptional circumstances, the plaintiff may establish, that the suit is not barred by limitation, by showing that he was totally unaware about the execution of the impugned document and he filed the suit within three years from the date of his knowledge, which could be said to be the date on which the right to sue first accrued. Said principle cannot be stated as a rule, having universal application. In this case, PW1 himself has admitted that he used

to come to his native place at least once in two years. The contesting defendants would, therefore, contend that he was aware of the entire facts then and there. That apart, registration of a document is said to be a constructive notice. These are the situations, which the plaintiffs in this case need to explain to get over the bar of limitation. In order to surmount these difficulties, learned counsel for the plaintiffs would contend that the suit cannot be viewed as a suit for declaration and consequential reliefs and it can be viewed only as a suit for recovery of possession on the strength of title, for which Article 65 of the Act applies. The Article, eschewed of its Explanation, reads as follows:

"For possession of immovable property or any interest herein based on title."

Twelve years

When the possession of the defendant becomes adverse to the plaintiff.

It is the contention of the learned counsel for the plaintiffs that neither the 1st plaintiff nor the 2nd plaintiff had conferred any power on the 5th defendant to assign or to deal with any portion of their land, either for consideration or otherwise. Ext.A2 assignment deed and Ext.A5 agreement were executed by the 5th defendant without any power or authority and so much so, they are void at the inception. Viewing from that angle, the relief of declaration is only secondary in nature and the main relief is recovery of possession of the property on title. If the said documents are void ab initio, they do not create any interest or title on the defendants. According to the learned counsel for the plaintiffs, therefore no declaration should have been sought for, as the documents do not bind the plaintiffs in any manner known to law.

26. Per contra, learned Senior Counsel appearing for the 4th defendant would contend that the suit is hopelessly barred by limitation as the suit is one for declaration and consequential reliefs. According to him, the plaintiffs were aware of the transaction and with their consent, the 5th defendant executed Ext.A2. And at that time, he wielded lawful power to execute the documents.

27. Article 56 of the Act deals with declaration of forgery of an instrument and Article 57 deals with matters relating to validity of an adoption. Article 58 is the residuary Article for matters not falling within Articles 56 and 57 of the Act. It is well settled that Article 58 will apply only to a suit for declaration simpliciter.

28. Right to sue may accrue to a suitor at different points of time. In terms of Article 58 of the Act, the period of limitation would be reckoned from the date on which the right to sue arose first. General principles that the right to sue contemplated under Article 58 of the Act is of the plaintiff himself or of someone through whom the plaintiff claims and the question when the right to sue exactly accrued depends on the facts and circumstances of each case are axiomatic.

29. Learned counsel for the plaintiffs contended that totality of the pleadings raised in the plaint, coupled with the evidence adduced, will make it clear that the plaintiffs at all times asserted their ownership over the property and since a

cloud was cast on their rights by the defendants by creating false and fraudulent documents and also by grabbing possession, the plaintiffs had to approach the court for recovery of possession of the property on the strength of title. Therefore, essentially the suit is one for recovery of possession based on title. He would further contend that Article 58 of the Act has no application to this case. Learned Senior Counsel appearing for the 4th defendant opposed this contention stating that recovery of possession is only a consequential relief flowing from the main relief of declaration. We are unable to agree with these contentions of the contesting defendants for obvious reasons.

30. It is clear from Article 65 of the Act that a right to recover possession of immovable property by a person on the claim of title can be defeated by another person after 12 years if only he establishes that he was holding possession of the property adverse to the person first mentioned. In other words, in a suit for recovery of possession of immovable property based on title, the question of limitation will arise only when the defendant pleads and proves adverse possession for a continuous period of 12 years. The above statement can be amplified by saying that in such a case, if the defendant fails to plead and prove adverse possession for the statutory period, there will be no bar for the plaintiff in getting recovery of possession of the property on the basis of title even after 12 years. The obvious reason is that a claim based on title paramount is a superior claim and it can be defeated only in a manner provided by law.

31. Let us refresh meaning of the phrase "adverse possession". Black's Law Dictionary defines "adverse possession" as the use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious. Apex Court, in a long line of decisions, had considered the legal intent and scope of the expression "adverse possession". Quintessence of the decisions on the point are that adverse possession is essentially a hostile possession, possession in denial of the title of the true owner, that it is a possession of another's land with an intent to hold it and claim it as his own, that it must commence in wrong and must be maintained against right, that it is a possession with animus to hold the property in the possessor's right and against the right of the rightful owner, that it is a possession hostile and exclusive, that it is an invasion of title and that it is a wrongful entry into possession. Animus possidendi is one of the ingredients of adverse possession.

32. Supreme Court in *Amrendra Pratap Singh v. Tej Bahadur Prajapati* (AIR 2004 SC 3782) had occasion to consider the question of adverse possession. Law on the subject has been lucidly pronounced in paragraphs 22 and 23. Relevant extraction reads as follows:

"22. Under Article 65 of the Limitation Act, 1963, a suit for possession of immovable property or any interest therein based on title can be instituted within a period of 12 years calculated from the date when the possession of the defendant becomes adverse to the plaintiff. By virtue of Section 27 of the Limitation Act at the determination of the period limited by the Act to any person

for instituting a suit for possession of any property, his right to such property stands extinguished. The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner, commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title. It is that extinguished title of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and re-enter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

23. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the Doctrine of Adverse Possession. The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognised by doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over property is also capable of being called a manner of "dealing" with one's property which results in extinguishing one's title in property and vesting the same in the wrong doer in possession of property and thus amounts to "transfer of immovable property" in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section."

It is evident from the above statement of law that "adverse possession" is a fact, which is to be specifically pleaded and proved. What is the legal effect of not doing so will be considered infra.

33. Learned counsel for the plaintiffs relied on decisions rendered by various High Courts to urge a proposition that in a suit for declaration and recovery of possession, the relief seeking possession should be reckoned as the substantive relief. Foundation of the plaintiffs' case, borne out from the pleadings and evidence, is that they do not approve Exts.A2 and A5 as valid documents, since they were executed by their agent in excess of his powers. According to the

plaintiffs, the documents are void ab initio. Legal logic deducible is that in such a situation, the plaintiffs need not have asked for a declaration and could have claimed recovery of possession of the property on title. This legal logic is sound and acceptable, as it derives precedential support. Division Bench of the Rajasthan High Court in *Mst. Gulkandi and others v. Prahlad and another* (AIR 1968 Rajasthan 51) considered a case wherein the contention raised by the plaintiff was that certain documents were not binding on him as he was not a party thereto. In that context, the court held that there was no necessity to cancel or set aside those documents and therefore Article 91 of the old Act was not applicable. Further, it is held that Article 144 of the old Act, prescribing a period of 12 years in the case of recovery of possession of property, applied to the case.

34. Division Bench of the Andhra Pradesh High Court in *Pavan Kumar and another v. K. Gopalakrishnan and another* (AIR 1998 Andhra Pradesh 247) held on the facts and circumstances in the case that the suit was essentially and primarily a suit for possession based on title and a mere fact that a declaration of title was also sought therein did not bring it within Article 58 or Article 113 of the Act so as to attract the three years period of limitation. In that case, it was found that the defendant recognised the plaintiff as the predecessor-in-title. It was held that there could hardly be any controversy that a formal declaration of title was sought only by way of an abundant caution. In our view, the facts and circumstances established in this case justify the plaintiffs' contention that here also the declaratory relief is only secondary to the main relief of recovery of possession.

35. Orissa High Court in *Rama Pujhari and others v. Gouri Bewa and others* (AIR 2006 Orissa 129) held that a suit in which declaratory and recovery of possession reliefs are claimed on the basis of the contention that the impugned document was void ab initio can only be viewed as a suit predominantly for recovery of possession and Article 65 of the Act applies. Karnataka High Court in *Seshumull M. Shah v. Sayed Abdul Rashid and others* (AIR 1991 Karnataka 273) has held that Article 58 of the Act will not apply for a suit for possession as a consequence of declaration.

36. Supreme Court in *State of Maharashtra v. Pravin Jethalal Kamdar (dead) by Lrs.* (AIR 2000 SC 1099) considered an identical question in a suit for declaration in respect of a right of pre-emption and also for possession. The document impugned in that case was stated to be null and void and on that contention, the plaintiff claimed possession of the property. In that context, Supreme Court held as follows:

"As already noticed, in *Bhim Singhji's* case, (AIR 1981 SC 234) (*supra*) Section 27(1) insofar as it imposes a restriction on transfer of any urban or urbanisable laid with a building or a portion of such building, which is within the ceiling area, has been held to be invalid. Thus, it has not been and cannot be disputed that the order dated 26th May, 1976, was without jurisdiction and nullity.

Consequently, sale deed executed pursuant to the said order would also be a nullity. It was not necessary to seek a declaration about the invalidity of the said order and the sale deed. The fact of plaintiff having sought such a declaration is of no consequence. When possession has been taken by the appellants pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years. When these documents are null and void, ignoring them a suit for possession simpliciter could be filed and in the course of the suit it could be contended that these documents are nullity. In *Ajudh Raj v. Moti S/o. Mussadi*, (1991) 3 SCC 136 : (1991 AIR SCW 1576 : AIR 1991 SC 1600) this Court said that if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eyes of law and is not necessary to set it aside; and such a suit will be governed by Article 65 of the Limitation Act."

37. Upshot of the discussion is that the above principles can be applied to the facts and circumstances of this case and therefore, it can only be held that the predominant nature of the suit is one for recovery of possession of property on the strength of title and declaration is only subservient to the main prayer. That is claimed only to dispel the cloud cast on the plaintiffs' title. So much so, Article 58 of the Act has no application and Article 65 of the Act applies in this case. These points are answered accordingly.

Point Nos. (v) and (vi):

38. In the foregone discussion, we have already seen that the suit is predominantly one for recovery of possession on the strength of title and the suit can be defeated only on establishing that the plaintiffs' right had been lost by adverse possession and limitation as provided in Article 65 of the Act.

39. The proposition that Article 65 of the Act is an independent and substantive provision applicable to all suits for possession of immovable property based on title, i.e., proprietary title as distinguished from possessory title, is well settled through a catena of judicial pronouncements. Legal proposition that when once the plaintiff establishes his title, it is for the defendant to prove that the title of the plaintiff is lost and he has acquired title by adverse possession is equally settled. A person, who claims title by adverse possession, must establish, apart from his exclusive possession that such possession was open, uninterrupted and hostile to the true owner. It must also be established that the hostile possession continued for the statutory period. These are the essential ingredients to constitute a plea of adverse possession. It goes without saying that the claim of adverse possession, being a question of fact, has to be specifically pleaded and proved.

40. Learned author, U.N. Mitra, in the celebrated treatise "Law of Limitation and Prescription" (Tagore Law Lectures - 12th Edition, Vol.2, Page 1430) clearly draws the distinction between possession of a person claiming adverse possession and possession of a squatter. The following quotation will be

profitable:

"A squatter is one who settles on land without title or with a view to acquiring title. He is a person who settles or locates on land enclosed or unenclosed with no bona fide claim or colour of title and without consent of the owner. He is merely an intruder and no matter how long he may continue there, no right in law vests in him. A squatter who does not set up a claim of right cannot plead adverse possession. No length of squatting possession would operate as a good or valid defence in a suit for possession by the true owner. A mere squatter or intruder who does not deny the title of the true owner or set up any right in himself cannot claim to be in adverse possession."

As possession by itself is not enough to create a title, no length of squatter's possession would be a valid defence in a suit for possession against him by the true owner.

41. Let us examine the pleadings and evidence available in the records to assess the merit of plea regarding adverse possession. Defendants 1, 3 and 6 filed a written statement. As argued by the learned counsel for the plaintiffs, most of the contentions raised in the plaint have been admitted by this set of defendants. They have only disputed the allegations in the plaint affecting their interests. None of the ingredients of adverse possession has been pleaded by these defendants and they have not adduced any evidence touching upon the claim of adverse possession.

42. 4th defendant in his written statement emphatically supported Ext.A2 assignment deed. According to him, the document was lawfully executed by the 5th defendant, who was the duly constituted power of attorney of the 1st plaintiff. It is also contended that the 1st plaintiff had received consideration for the same. It is clear from the pleadings and evidence adduced by this defendant that he claims derivation of title from the 1st plaintiff. Ext.A5 is a registered agreement executed between the parties to the suit agreeing to hold separate portions of the building. In this document, the 5th defendant is said to have represented both the plaintiffs. A registered power of attorney is said to have been executed by the 2nd plaintiff in favour of the 5th defendant, as seen mentioned in Ext.A5. It is very important to note that this power of attorney too was not produced. Learned counsel for the plaintiffs contended that defendants 6 and 7 cannot claim any right on the property by virtue of Ext.A5, because it is only purported to be an agreement, which does not confer any title on them. This contention is indisputable. As mentioned above, glaring improbability in the defendants' case is that they claimed legitimacy to Exts.A2 and A5 on the basis of two powers of attorney, executed by plaintiffs 1 and 2 separately; but none of them has been produced to support their contention. Instead, the defendants would contend that it was for the plaintiffs to produce the powers of attorney to establish their case that the 5th defendant had no requisite power. In paragraph 12 of the written statement, the 4th defendant has raised a plea that he was enjoying the property as his own, adverse to the plaintiffs and as such he had

perfected his title by adverse possession. Except this bland averment in the written statement, that too, without any specific details required to constitute adverse possession, we find no other material to support this claim. 4th defendant when testified as DW2 failed to assert his claim based on adverse possession. His evidence taken in entirety do not reveal the essential ingredients of adverse possession to hold that the plaintiffs' claim for recovery of possession is barred by adverse possession and limitation.

43. Supreme Court in *Indira v. Arumugam and another* (AIR 1999 SC 1549) in clear terms held that a plaintiff cannot be non-suited unless the defendant proves adverse possession for the prescriptive period. Following quotation will be useful for our purpose:

"It is, therefore, obvious that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited."

In this case, it is pertinent to note that the 4th defendant has not produced any relevant document, except his title deed, viz; Ext.A2, to show that he was enjoying the property as the owner, subsequent to Ext.A2 purchase. Documents like basic tax receipts, building tax receipts, electricity bills, etc. might have some bearing on his claim. But nothing is produced to assert his claim. Further he has not produced any document to show that he also contributed to the cost of building construction. Still further, he has not produced any document to show that he used to receive rent from the building tenants or he himself occupied the building. In the absence of any relevant pleading, coupled with complete lack of evidence, it can only be held that the 4th defendant failed to discharge his burden of pleading and proving the requisites of adverse possession. In that situation, if the plaintiffs succeed in proving that the 5th defendant had no power conferred on him to sell the property and if adverse possession could not be proved, the position of the 4th defendant will be akin to that of a squatter and the aforementioned principle of law applies to his case. Therefore, these points are decided in favour of the plaintiffs by holding that the contesting defendants failed to plead and prove adverse possession. So much so, the period of 12 years prescribed in Article 65 of the Act for a suit for possession on the strength of title has no application to this case. In other words, this suit is maintainable even after 12 years, prescribed in Article 65 of the Act, for the reasons stated above.

Points Nos. (vii) and (viii)

44. These points are very crucial for the ultimate decision of this case. The definite case of the plaintiffs is that the 1st plaintiff executed a power of attorney in favour of the 5th defendant only for the purpose of facilitating building construction and he never authorised the 5th defendant to sell any portion of his property. That power of attorney was attested by the authorised officer in the Indian Consulate in Dubai. 2nd plaintiff had executed a power of attorney in

favour of the 5th defendant even before purchase of the property. It was intended to enable him to develop the property. None of the parties has a case that the 2nd plaintiff's property had been sold by the 5th defendant using the power of attorney executed by her. However, defendants 6 and 7 claim rights on the basis of Ext.A5 agreement in which the 2nd plaintiff was represented by the 5th defendant. It is the case of the plaintiffs that the 5th defendant had no authority, and in fact he had no business, to deal with the 2nd plaintiff's property as well.

45. Both sides would contend that the other side has the responsibility to produce materials to show that the 5th defendant had no power to execute either Ext.A2 or Ext.A5 so as to bind the respective plaintiffs. As stated above, both sides did not produce the disputed powers of attorney. Plaintiffs have taken a stand that they were never in possession of the powers of attorney after executing them, since they were entrusted with defendants 3 and 5 collectively. No copy of the power of attorney executed by the 1st plaintiff in the name of the 5th defendant was available with the plaintiffs is their definite case. They would also contend that it was impossible to get a certified copy of the same. Their definite version is that in spite of demands, neither the 3rd defendant nor the 5th defendant returned the power of attorney. The 1st plaintiff ultimately resorted to the extreme step of cancelling the power of attorney, executed by him, in favour of the 5th defendant. On the basis of these assertions, it is contended by the plaintiffs that it was for the 4th defendant and other defendants, who are benefited by the illegal and unauthorised action of the 5th defendant, to produce the powers of attorney in order to show that the 5th defendant had the requisite power to execute Exts.A2 and A5. Per contra, learned Senior Counsel for the 4th defendant would contend that Ext.A2, being a registered document, has to be given the sanctity provided by law and it is too late for the plaintiffs to contend that the 5th defendant had no authority to execute Ext.A2. It is also contended that the provisions in the Registration Act and the Rules and also the presumptions under the Evidence Act should not be ignored in this case.

46. Further contention raised on behalf of the 4th defendant is that there is no definite pleading in the plaint that the 5th defendant did not return the original powers of attorney to the plaintiffs. We may at the outset reject this contention for the reasons that the entire averments in the plaint taken together will definitely indicate that the plaintiffs did not get back the powers of attorney and the 3rd defendant, who could have raised such a contention in the written statement, because serious charges were levelled in the plaint against him and the 5th defendant, failed to take such a plea. Above all, the 5th defendant did not contest the case. PW1's unchallenged evidence also fortify this case. Hence, we cannot presume that the plaintiffs were in possession of the original powers of attorney.

47. Learned Senior Counsel for the 4th defendant vehemently argued that it is for the plaintiffs to prove that the 5th defendant had no authority to execute

Ext.A2 and the burden lies entirely upon them. Section 101 of the Evidence Act, 1872 deals with the burden of proof. The said Section says that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. It further says that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. This Section is based on the rule that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. As a general principle, it can be stated that a negative fact is usually incapable of proof. The rule that the burden rests on the person who makes the affirmative allegation is not an all pervasive rule. There are many exceptions to this proposition. There can be burden on the person who has a negative assertion to make in some cases. For example, a promisee alleging nonperformance of a contract has to prove the facts asserted. But, in this case, the definite stand taken by the plaintiffs in the pleading as well as at the time of evidence is that they did not authorise the 5th defendant to execute an assignment deed with respect to any portion of their property, as they never intended to sell the property. This contention is probalised by the fact that as per Ext.A1, the plaintiffs and defendants 1 and 2 jointly purchased the property on 23.06.1975 and admittedly their intention was to develop the property by constructing a multi-storied building. Undisputedly, a commercial building with five stories was constructed thereon. It has also come out in evidence that the property is in an important locality in Kottayam Municipal Town. In the wake of a specific assertion by the plaintiffs that they never intended to sell any portion of the property, it becomes incumbent on the 4th defendant to show that on 03.04.1978, the 1st plaintiff had expressed his intention to sell away a portion of the property through his agent, the 5th defendant, in favour of him as per Ext.A2. Except his interested testimony as DW2, no other evidence - either oral or documentary - was brought on record to probalise his case that there was some reason for the 1st plaintiff to assign the property to him.

48. Learned Senior Counsel for the 4th defendant placed reliance on Sections 102 and 103 of the Evidence Act, 1872 too. Section 102 of the Evidence Act says that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 103 of the Evidence Act is to the effect that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Based on Section 103 of the Evidence Act, learned Senior Counsel would contend that the provisions in the Registration Act and Rules cast a responsibility on the plaintiffs to establish that the 5th defendant had no authority to execute Ext.A2. We are unable to agree to this line of thinking. This aspect shall be considered in the succeeding paragraphs. We are of the view that going by the principles in the Evidence Act, the burden of proving that the 5th defendant had lawful authority and power to execute Exts.A2 and A5 on behalf of the plaintiffs rests squarely on

the 4th defendant. We hold so because when there is a definite challenge made against the authority of the 5th defendant to execute Ext.A2, it becomes the burden of the propounder of the document to show that he had the power. If the 4th defendant, who asserts title to the property through Ext.A2, fails to adduce enough evidence to uphold the genuineness of the document, certainly his contentions should fail. This is a case wherein the plaintiffs cannot be compelled to prove a negative fact. It is to be remembered that they are not challenging execution of Ext.A2 or Ext.A5, but the authority of their agent to execute the documents is in dispute. In any view of the matter, the burden of proof to show that the 5th defendant had sufficient power to execute the document squarely lies on the 4th defendant.

49. Learned counsel for the plaintiffs raised a contention that this is a case in which adverse inference should be drawn against the 4th defendant under Section 114, Illustration (g) of the Evidence Act. It says that the court may presume that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The court has, certainly, a vested discretion in the matter of drawing or not drawing adverse inference, depending on the facts and circumstances in each case. Unmindful of the facts and circumstances, adverse inference must always be drawn is not the law (see-Jagjith Singh v. State of Haryana - AIR 2007 SC 590). However, in this case the 4th defendant has to shoulder the burden of proving that the 5th defendant had the requisite power to execute Ext.A2, binding the 1st plaintiff. He did not discharge the burden effectively. Further, the recitals in Ext.A2 show that a copy of the challenged power of attorney had been given to the assignee (4th defendant). Except stating some flimsy explanations, the 4th defendant has no valid reason for not producing the copy of the impugned power of attorney. It is to be remembered that a copy of an unregistered power of attorney handed over to the assignee at the time of sale, being a very valuable document strengthening the sale, would be preserved as a permanent record by any prudent person. Hence, we are of the view that this is a fit case to draw an adverse inference against the 4th defendant that he intentionally withheld the power of attorney in the name of the 5th defendant as it was unfavourable to him. Similar is the case with the power of attorney said to have been executed by the 2nd plaintiff in favour of the 5th defendant. Although the learned Senior Counsel for the 4th defendant produced a copy of the said power for our perusal, we are not inclined to rely on that as there was no explanation for the party for not producing the same before the trial court and proving the same and also that it was not produced in accordance with Order 41, Rule 27 of the Code. As these difficulties could not be surmounted by the defendants, that contention also fails.

50. Another point argued by the learned Senior Counsel on behalf of the 4th defendant is that the contentions of the plaintiffs are hit by Sections 91 and 92 of the Evidence Act, 1872. Sections 91 and 92 of the Evidence Act deal with exclusion of oral by documentary evidence. Section 91 of the Evidence Act speaks about evidence of terms of contracts, grants and other dispositions of

property reduced to the form of document. This Section forbids proving the contents of a document otherwise than by the writing itself. Section 92 of the Evidence Act forbids admission of any evidence for the purpose of contradicting, varying, adding to or subtracting from the terms such document. A three Judge Bench of the Supreme Court in *Bai Hira Devi and others v. Official Assignee of Bombay* (AIR 1958 SC 448). has lucidly explained the principles underlining in Sections 91 and 92 of the Evidence Act. The excerpt hereunder will be useful.

"..... The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule." This best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. In a sense, the rule enunciated by Section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.

5. Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under Section 91; in other words, it is after the document has been produced to prove its terms under Section 91 that the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. It would be noticed that Sections 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. Since Section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under Section 91, it may be said that it makes the proof of the document conclusive of its contents. Like Section 91, Section 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that Section 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as

between the parties or their representatives in interest that the rule enunciated by Section 92 about the exclusion of oral agreement can be invoked."

51. Principles above stated have been followed by the Apex Court in *Roop Kumar v. Mohan Thedani* (AIR 2003 SC 2418). Supreme Court in *R. Janakiraman v. State* represented by Inspector of Police, CBI, SPE, Madras ((2006) 1 SCC (Cri) 442) has laid down the proposition that Section 92 is supplementary to Section 91 of the Evidence Act and corollary to the rule contained in Section 91 of the said Act. It was also held that the rule contained in Section 92 of the Evidence Act will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, Section 91 may apply to strangers also. Again it was held that the bar under Section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what it purports to be. To put it differently, the bar is to oral evidence to disprove the terms of a contract, and not to disprove the contract itself.

52. In the case on hand, the contention raised by the plaintiffs is that the 5th defendant did not and could represent the 1st plaintiff in Ext.A2 document since he was not authorised by the power of attorney to assign any portion of the 1st plaintiff's property. So much so, the bone of contention is that Ext.A2 does not bind the 1st plaintiff nor his interest in the plaint schedule property because it was executed by a stranger or a third person without any lawful authority. In that sense, it is contended that the 1st plaintiff is stranger to Ext.A2. Hence the plaintiffs would contend that Ext.A2 is void ab initio. The same is applicable in the case of Ext.A5 too. In these factual settings, the contention raised by the learned Senior Counsel that plea raised by the plaintiffs is hit by Sections 91 and 92 of the Evidence Act is legally unsustainable. The plaintiffs have every right to challenge the genuineness of the documents. They can legally challenge the power of the 5th defendant to execute Exts.A2 and A5. Such contentions are not hit by Section 91 or Section 92 of the Evidence Act. As we have already found that non-production of the disputed powers of attorney is a serious blemish in the defendants' case, they cannot canvass a proposition that the contentions now raised by the plaintiffs are hit by Section 91 or Section 92 of the Evidence Act. No bar is cast either by Section 91 or Section 92 of the Evidence Act in such a situation. Therefore, the contention of the 4th defendant based on the above provisions in the Evidence Act cannot be accepted.

53. Another important point to be considered in this context is the effect of registration of Exts.A2, A4 and A5. It is relevant to note that Ext.A4 is a correction deed dated 10.11.1980 executed by the 8th defendant in favour of the 2nd plaintiff. Consistent case of the plaintiffs in this regard is that they never

sought for any correction or clarification and Ext.A4 was caused to be executed by the 8th defendant at the instance of other contesting defendants in order to defraud the plaintiffs. It is also contended that as there was no mistake in the description of property in Ext.A1, there was no occasion for the 8th defendant to correct any aspect in respect of the 2nd plaintiff's property. It is the case of the plaintiffs that they do not claim any right under Ext.A4 and they never asked for such a correction deed from the 8th defendant. It is interesting to note that the 8th defendant, or any other defendant for that matter, came forward to explain the purpose of executing Ext.A4 without any demand from the side of the plaintiffs. Therefore, it can only be said that the recitals in Ext.A4 are shrouded by mystery and suspicion, which have not been dispelled by the 8th defendant.

54. In Chapter X of the Indian Contract Act, 1872, various aspects on the topic "agency" have been dealt with. Sections 186 and 187 of the Contract Act deal with the agent's authority which may be express or implied. The law is clear that the authority is said to be express when it is given by words spoken or written. The authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case. A specific case of the plaintiffs is that the 1st plaintiff has not authorised the 5th defendant to execute any assignment deed in respect of his property.

55. Law on the point is well settled that a power of attorney is a document which has to be strictly construed. Stated differently, in case any question arises as to the agent's power, the courts are bound to look into the power of attorney to find out whether any power had been conferred by the principal on the agent to do a particular act. General words in the power of attorney cannot be understood or interpreted completely disregarding the intention of the principal gatherable from the terms in the document. Speciality of this case is that the disputed powers of attorney executed by the plaintiffs, constituting the 5th defendant as the agent, have not been produced by any of the parties. So, a court cannot and shall not interpret a document which is not available in the records. We have already seen that withholding the power of attorney in favour of the 5th defendant, on the basis of which Ext.A2 was executed, is fatal to the case of the 4th defendant. Therefore, the question remains to be considered is whether registration of Exts.A2, A4 and A5 will enure to the benefit of the contesting defendants.

56. Section 32 of the Registration Act, 1908 enumerates the persons who can present documents for registration. Object of Section 32 of the Registration Act is to prevent some outsider from presenting a document for registration with which he has no concern and in which he has no interest. It is also clear that this Section applies to all documents presented for registration irrespective of whether registration is compulsory or optional.

57. Section 33 of the Registration Act, 1908 enlists powers of attorney recognisable for the purpose of Section 32 of the Act. It says that if the principal

at the time of executing the power of attorney resides in any part of India to which the Act is applicable, a power of attorney executed before and authenticated by the Registrar or Sub Registrar is recognisable under Section 32 of the Registration Act. If the principal at the aforementioned time resides in any part of India in which the Registration Act is not in force, then a power of attorney executed before and authenticated by a Magistrate can be used under Section 32 of the Act. If the principal at that time does not reside in India, a power of attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice Consul, etc. can be used under Section 32 of the Act. In this case the power of attorney in dispute, falls within the category mentioned in Section 33(c) of the Registration Act. Section 34 of the Registration Act mentions about the enquiry before registration to be done by the registering officer. Learned counsel for the plaintiffs relying on Section 34(3) (c) of the Registration Act contended that the registering officer should have taken steps to satisfy himself, in the case of any person appearing as a representative, assign or agent, of the right of such person so to appear in the enquiry. Plaintiffs contended that in this case, the Registrar failed to discharge his duty properly and failed to conduct an enquiry into the authority of the 5th defendant to execute such a document. It is the further case of the plaintiffs that on going through Ext.A2, it can be seen that the Sub Registrar concerned failed to issue a certificate mandated by Section 60 of the Registration Act. Learned counsel for the plaintiffs placed reliance on Rule 106 of the Registration Rules (Kerala) as well. It reads as follows:

"(i) When a person presents or admits execution of a document for another under a power-of-attorney, the Registering Officer's endorsement should state the date and place of attestation of such power.

(ii) When the presentation and the admission of execution of a document are made by an agent under a power-of-attorney reference to the authority under which the agent acts shall be given in the endorsement of admission of execution, the fact that the presenting party is an agent being entered after his signature below the endorsement of presentation.

(iii) The endorsement of presentation, made on a document under Section 88(2) and Rule 29(ii) shall mention the number and date of the covering letter with which it is presented and the designation of the Government Officer or other person concerned.

After the presentation, endorsement is made the Registering Officer shall endorse on the document that he is satisfied that the document is executed by the Officer mentioned therein, after referring to the Officer concerned (if necessary under Section 88(3))."

Learned counsel for the plaintiffs seriously challenged the procedure adopted for the registration of Ext.A2. According to him, none of the mandatory provisions in the Registration Act or the Rules mentioned above have been complied with and

therefore, no sanctity can be attached to Ext.A2 merely because it underwent registration. It is also argued by the learned counsel that the endorsements under Rule 106 of the Registration Rules (Kerala) have not been made in Ext.A2, which indicated the failure to comply with the statutory requirements. Learned Senior Counsel for the 4th defendant countered this argument by relying on Section 114, Illustration (e) of the Evidence Act. It says that the court may presume that judicial and official acts have been regularly performed. As in the case of many other presumptions, this is also a rebuttable one. Besides, the presumption is only in respect of regularity of judicial and official acts. By extending this provision, it can never be held that the executant (5th defendant) had valid power and authority for executing Ext.A2 document. That is a fact which will have to be proved by adducing cogent evidence. The irregularities in the matter of registration pointed out by the learned counsel for the plaintiffs make it clear that the 4th defendant cannot take shelter under the said presumption. Learned counsel for the plaintiffs contended that the fraud played on the plaintiffs by the 5th defendant, conjointly with other contesting defendants, is evident from the preponderance of probabilities. It is true that no presumption under Section 114, Illustration (e) of the Evidence Act can be drawn in respect of a fraudulent transaction. The plea of fraud played and collusion between the contesting defendants are probabalized by the evidence in the case. Preponderance of probabilities also favour the plaintiffs' case. In spite of severe challenge against Exts.A2, A4 and A5, non-examination of the Sub Registrar or the Scribe or anyone involved in the preparation, execution or registration of the said documents is a major lacuna in the defendants' case. Merely because those documents were registered, we cannot sanctify them without sufficient proof. Therefore, this contention of the contesting defendants also has to fail.

58. To conclude these points, it can be held that the burden lies on the contesting defendants to prove that the 5th defendant had the requisite power and authority to execute Exts.A2 and A5 documents. Non-production of the powers of attorney executed by plaintiffs 1 and 2 separately in the name of the 5th defendant is fatal to the case of the contesting defendants. The fact that Exts.A2 and A5 are registered documents will not salvage the situation in favour of the contesting defendants. Merely for the reason that Exts.A2 and A5 were registered, it cannot be presumed, discarding the inherent improbability in the defendants' case, that they were lawfully executed by the 5th defendant with due power. Abstinance of the 5th defendant from court is an admitted fact. Both sides accuse each other, based on Exts.A6 to A9 letters, that the 5th defendant abstained from court to help the other. However, the preponderance of probabilities would show that the 5th defendant stayed away as he had no defence to make. Therefore, these points are decided against the defendants.

Point No.(ix)

59. Learned counsel appearing for contesting defendants (other than the 4th defendant) seriously challenged the finding of the trial court directing rendition of

accounts in respect of the rent and profit derived by the deceased 3rd defendant from the portion of the building owned by the plaintiffs. Admittedly, well before adducing evidence in this case, the 3rd defendant expired. 2nd defendant testified as DW1. As mentioned above, she could not controvert the plaintiffs' allegations in respect of non-receipt of profits from the building. The court below has considered the oral evidence in this regard correctly and found that the 3rd defendant was having the responsibility to account for. The liability of his legal heirs is limited to the estate inherited by them from the deceased 3rd defendant. We find no legally justifiable reason to interfere with the finding of the court below in respect of deceased 3rd defendant's liability to render accounts. Hence this point raised in the cross-objection is decided against the cross-objectors.

Point (x)

60. We have already seen that there is complete lack of materials for fixation of boundary. We are aware of the principle that remission of a matter to the trial court shall not be done as a matter of course. But, in this case we are compelled to remit the issue relating to demarcation of the properties and putting up boundary to the trial court. As these aspects are factual issues, we are unable to do justice between the parties without any evidence. Other claims can be settled in view of our findings made above. Findings on various points lead us to conclude that the plaintiffs are entitled to get the reliefs prayed in the plaint and we mould the reliefs as follows:

(i) It is hereby declared that Exts.A2 and A5 are fraudulent documents created by the 5th defendant in the name of the 4th defendant without any authority and they do not bind the plaintiffs and the plaint B schedule properties and also that Ext.A4 executed by the 8th defendant has no legal effect on the plaintiffs' right. It is further declared that the plaintiffs have title over plaint B schedule property.

(ii) Plaintiffs are entitled to recover possession of the portion of B schedule and the portion of building thereon included in Ext.A2 from the defendants.

(iii) The relief of demarcating the eastern boundary of plaint B schedule property and the building portion therein and putting up boundary is remitted back to the trial court for fresh disposal after affording the parties an opportunity to adduce evidence and also to take out a commission for proper adjudication.

(iv) Cross Objection filed by defendants 1 and 2 is hereby dismissed.

(v) Defendants 1, 2 and 4 together shall pay the cost of the plaintiffs throughout.

61. All pending interlocutory applications will stand closed.