

Raju Vs. Vishwanath

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Court : Karnataka Dharwad

Decided On : Dec-13-2023

Judge : Sreenivas Harish Kumar and Ramachandra D. Huddar

Appeal No. : RFA 929/2017

Appellant : Raju

Respondent : Vishwanath

Judgement :

- 1 - NC:

2017. KHC:32878 RFA No.929 of 2017 IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH DATED THIS THE13H DAY OF DECEMBER, 2023 R PRESENT THE HON'BLE MR JUSTICE SREENIVAS HARISHKUMAR AND THE HON'BLE MR JUSTICE RAMACHANDRA D. HUDDAR REGULAR FIRST APPEAL No.929 OF 2017 BETWEEN:

1. RAJU S/O KAPOORCHAND BORANA, AGE:45 YEARS, OCC:BUSINESS, R/AT C/O HANUMAN SWEET MART, NO.3569, SHANIWAR KHOOT, KAKATIVES, BELGAUM-590002.

2. GHEVARCHAND S/O MOTIJI BORANA, AGE:65 YEARS, OCC:BUSINESS, R/AT: C/O HANUMAN SWEET MART, NO.3569, SHANIWAR KHOOT, KAKATIVES, BELGAUM-590002 APPELLANTS (BY SRI. G BALAKRISHNA

SHASTRY AND SRI. CHETAN MUNNOLLI, ADVOCATES) AND:

1. VISHWANATH S/O ISHWARAPPA BALEKUNDRI, AGED ABOUT 58 YEARS, OCC:ENGINEERING CONSULTANCY, R/AT: NO.140/1A, 4TH CROSS, IST N-BLOCK, RAJAJINAGAR, BANGALORE-560010.-. 2 - NC:

2017. KHC:32878 RFA No.929 of 2017 2. MAHADEV S/O. LUMANNA MULIK & MALIK, AGE:MAJOR, OCC:PENSIONER, R/AT III CROSS, SHIVAJINAGAR, BELGAUM-590001 3. SURESH S/O LUMANNA MULIK & MALIK, AGE:MAJOR, OCC:AGRICULTURE, R/AT NO.244/98, GULBAG GALLI, BELGAUM-590001.

4. BABU S/O SOMANNA MULIK & MALIK, AGE:MAJOR, OCC:BUSINESS, R/AT NO.2025/2, GANAPAT GALLI, BELGAUM-590001.

5. SHRI I. KALANJAM, AGE:

54. YEARS, OCC: BUSINESS, R/O:

4. H CROSS, SHIVAJINAGAR, BELAGAVI.

6. SHRI. I. KUBENDRAM, AGE:

50. YEARS, OCC: BUSINESS, R/O:

4. H CROSS, SHIVAJINAGAR, BELAGAVI.

7. SHRI. I. MUHAGAN, AGE:

47. YEARS, OCC: BUSINESS, R/O:

4. H CROSS, SHIVAJINAGAR, BELAGAVI. RESPONDENTS (BY SRI.MRUTHYUNJAY TATA BANGI, ADVOCATE FOR R1; SRI. RAVI S. BALIKAI, ADVOCATE FOR R6 AND R7; NOTICE TO R2 AND R4 IS DISPENSED WITH (V/O/DATED:

21. 1/2019); NOTICE SERVED TO R3 AND R5) THIS REGULAR FIRST APPEAL FILED UNDER SECTION 96 OF THE CODE OF CIVIL PROCEDURE, PRAYING TO SET ASIDE THE JUDGEMENT AND DECREE DATED 28/01/2017 IN OS

No.396/2005 ON THE FILE OF THE III ADDITIONAL SENIOR CIVIL JUDGE AT BELAGAVI, OS No.396/2005 BE - 3 - NC:

2017. KHC:32878 RFA No.929 of 2017 DISMISSED AND THIS APPEAL BE ALLOWED WITH COSTS THROUGHOUT IN THE INTEREST OF JUSTICE. THIS APPEAL, COMING ON FOR HEARING AND THE SAME HAVING BEEN HEARD AND RESERVED FOR PRONOUNCEMENT OF

JUDGMENT

, THIS DAY RAMACHANDRA D. HUDDAR, J, DELIVERED THE FOLLOWING:

JUDGMENT

This is a peculiar case wherein the son has made allegations against his own father arrayed as defendant No.3 (now deceased) of misusing the power of attorney executed in his favour by him for executing the sale deed in respect of suit property in favour of defendant Nos.1 and 2.

2. Being aggrieved by the judgment and decree passed by the III Addl.Sr.Civil Judge and CJM, Belagavi in OS No.396/2005 dated 28.1.2017, defendants have preferred this appeal.

3. In this appeal, defendant nos. 1 and 2 are the appellants, and the plaintiff and defendants nos.4 to 6 are the respondents.-. 4 - NC:

2017. KHC:32878 RFA No.929 of 2017 4. For the purpose of convenience, the parties are referred to as per their rank before the trial Court. Brief facts for the purpose of disposal of this appeal are as under:

5. That plaintiff filed a suit against defendants with a prayer to declare him as absolute owner in possession of the suit properties by holding that the sale deed dated 28.07.2005 purported to have been executed by defendant no.3 in favour of defendant nos. 1 and 2 in respect of suit properties is not binding on him and also for granting consequential relief of permanent injunction against defendants 1 and 2 from interfering with his peaceful possession and enjoyment of suit properties and some other reliefs for which the plaintiff is found entitled.

6. Plaintiff has described the suit properties in the schedule appended to the plaint (hereinafter referred to as `suit properties for the purpose of convenience). According to plaintiff, he purchased CTS no.2025/1B/1F - 5 - NC:

2017. KHC:32878 RFA No.929 of 2017 and 2025/1B/1G from one Smt.Ratnawwa Wife of Krishna Badakundri under registered sale deed dated 05.10.1995. So also, CTS NO.2025/2 and 2025/1B/1H were owned by his grandfather by name Gurusiddappa Shankareppa Balekundri and his grandfather gifted the properties in his favour bearing CTS No.2025/2, 2025/1B/1H, 2025/3, 2025/4A, 2025/5 part of 2025/4B and 2025/4C under registered gift deed dated 25.02.1981. Thus, the plaintiff became the owner of the aforesaid properties.

7. It is the specific case of the plaintiff that the property bearing CTS No.2025/2 was initially leased in favour of father of defendant nos.4 and 5 by name Lumanna Mulik alias Malik. He died leaving behind his sons i.e. defendant nos.4 and 5. He had a brother by name Somanna. He also died survived by his son defendant no.6 Babu. Defendant no.6 claimed to be in possession of the property as a tenant along with defendant nos.4 and 5.-. 6 - NC:

2017. KHC:32878 RFA No.929 of 2017 8. It is the further case of the plaintiff that, as the plaintiff wanted to evict the said tenant from the said property, he filed an ejectment suit against defendant nos.4 and 6 in Small Cause Suit No.24/2003 on the file of the III Addl.Civil Judge(Jr. Dvn.), Belagavi. In the said suit, defendant nos.4 to 6 were impleaded as necessary parties. It is the assertion of the plaintiff that he is working as a Consultant Engineer at Bengaluru. He wanted to initiate the proceedings against defendant nos. 4 to 6 seeking possession of CTS no.2025/2. Therefore, he authorized his father defendant no.3 by executing a Power of Attorney to conduct the court proceedings. Accordingly, in the capacity of power of attorney of the plaintiff, his father i.e. defendant no.3 filed the small cause suit against defendant no.6 in small cause suit No.24/2003. Plaintiff authorized defendant no.3 to conduct court proceedings only. It is alleged that defendant no.1 and 2 are businessmen running a business in Mahadev Arcade under the Name and Style of `Hanuman Sweet - 7 - NC:

2017. KHC:32878 RFA No.929 of 2017 Mart. They have no right, title or interest in the said property.

9. It is alleged by the plaintiff that, defendant no.3 without there being any authority, executed the sale deed in respect of the suit properties in favour of defendant nos.1 and 2 for a consideration of Rs.18,00,000/- on 28.7.2005 styling himself as Power of Attorney holder of the plaintiff. It is alleged that, he never authorized his father defendant no.3 to sell any of his properties including the suit properties in favour of anybody much less, against defendant nos.1 and 2. The said power of attorney was given to him for specific purpose of conducting Court proceedings only in respect of the properties owned by him. Thus, defendant nos.1 and 2 have not acquired any right, title, or interest over the suit properties. It is alleged that sale deed dated 28.07.2005 stated to have been executed by defendant no.3 in favour of defendant nos.1 and 2 did not confer any right, title in their favour. The said sale deed did not - 8 - NC:

2017. KHC:32878 RFA No.929 of 2017 extinguish the title and interest of the plaintiff over the suit properties. The Sub-Registrar ought not have registered the sale deed in favour of defendant nos.1 and 2 executed by defendant no.3. Thus, defendant no.3 misused his power of attorney and executed the sale deed. The contents of the sale deed dated 28.7.2005 are incorrect.

10. It is asserted that, it is the plaintiff who is in actual possession and enjoyment of the suit properties except CTS NO.2025/2. It is in possession of defendant nos. 4 to 6. He is in symbolical possession of the said Property. He never parted with the possession of the northern portion of the property bearing CTS Nos.2025/1B/1H, 2025/1B/1G and 2025/1B/1F to anybody including defendant nos.1 and 2.

11. It is alleged that, based the said sale deed dated 28.7.2005, these defendants are asserting their right over the property. There was no passing of any - 9 - NC:

2017. KHC:32878 RFA No.929 of 2017 consideration in favour of the plaintiff. The plaintiff resisted the illegal acts of defendant nos.1 and 2. After strong protest, defendant nos.1 and 2 went away saying that, they would come after a few days

and dispossess the plaintiff from the suit properties.

12. It is alleged that on 30.11.2005, they tried to interfere with his possession and enjoyment of the suit properties. Immediately, he rushed to the Sub-Registrar Office, Belagavi and made an enquiry. He came to know of the foul play of defendant no.3 defendant nos.1 and 2. He applied for the certified copy of the sale deed dated 28.7.2005. He obtained the same and filed the present suit for the aforesaid reliefs. It is prayed by the plaintiff to decree the suit.

13. Pursuant to the suit summons, contesting defendants 1 to 3 appeared. Defendant nos. 1 and 2 filed the joint written statement and defendant no.3 filed his independent written statement. During the pendency of - 10 - NC:

2017. KHC:32878 RFA No.929 of 2017 the suit, defendant no.3 the power of attorney holder of the plaintiff died.

14. Each and every assertion made by the plaintiff with regard to the execution of the sale deed based upon the alleged power of attorney stated to have been executed by the plaintiff in favour of defendant no.3 is denied. So far as ownership of suit properties with the plaintiff by way of sale deed and gift deed, it is admitted by defendant nos.1 and 2. It is contended that, defendant no.3 as the power of attorney of plaintiff, has executed the valid sale deed in favour of defendant nos.1 and 2. By virtue of the sale deed, they have become the owners of the suit properties. It is further stated that, the plaintiff has demanded to pay Rs.12,00,000/- in cash as advance sale consideration. Prior to the said sale deed, there was agreement of sale in between them. Accordingly, on 31.3.2003 defendant nos.1 and 2 paid Rs.12 lakhs towards advance sale consideration and the plaintiff agreed to sell the suit properties for a sum of Rs.-. 11 - NC:

2017. KHC:32878 RFA No.929 of 2017 32,50,000/-. There was an agreement of sale on 31.3.2003 to that effect. It was the plaintiff who agreed to the terms and conditions incorporated in the said agreement of sale. Now the plaintiff cannot contend that the said sale deed is invalid in the eyes of law and it is not binding on him.

15. The brother of the plaintiff attested the said document as a witness. It is admitted that, plaintiff is resident of Bengaluru and doing consultancy business. Defendant nos.1 and 2 paid the consideration amount by raising a loan from various banks and tendered the amount by way of DD drawn on Daivadnya Sahakara Bank Niyamit, Belagavi to the power of attorney of the plaintiff i.e. defendant no.3. The entire sale consideration of Rs.32,50,000/- was paid and accordingly, defendant no.3 executed the sale deed in the capacity of power of attorney of the plaintiff.-. 12 - NC:

2017. KHC:32878 RFA No.929 of 2017 16. The suit in the present form is not at all maintainable in the eyes of law and the Court has no jurisdiction to try the suit. Valuations made by the plaintiff is incorrect.

17. So far as defendant no.3 is concerned, he admits the contents of the written statement of defendant Nos.1 and 2 and according to him, in the capacity of the power of attorney of the plaintiff, he executed the sale deed in favour of defendant nos.1 and 2. Earlier to that, there was an agreement of sale. It was dated 31.3.2003. Defendant nos. 1 and 2 paid the entire consideration amount to the plaintiff. Thus, according to defendant no.3, he was the power of attorney holder of the plaintiff authorized to alienate the properties of plaintiff, therefore in that capacity, he executed the sale deed in favour of defendant nos.1 and 2 in respect of suit properties. The alleged incident dt:

30. 11.2005 has not taken place. It is concocted story of the plaintiff to deprive the defendant nos.1 and 2 to get their rights in - 13 - NC:

2017. KHC:32878 RFA No.929 of 2017 the suit properties. The baseless allegations have been made by the plaintiff against defendant nos.1 and 2 and also on defendant no.3. Thus, it is prayed by defendant nos. 1 to 3 to dismiss the suit. So far as other defendants are concerned, they have not filed any written statement.

18. Based upon the rival pleadings of both the parties, the learned trial Court framed in all 9 issues. They read as under: ISSUES1 Whether plaintiff proves that he had authorized his father/defendant No.3 only to conduct the proceedings on

his behalf in respect of his properties?.

2. Whether the plaintiff proves that, sale deed dated 28-7-2005 is not binding him and that, he is the absolute owner of suit properties?.

3. Whether plaintiff proves his lawful possession over the suit properties as on the date of suit?.

4. Whether the plaintiff proves the alleged interference of defendants?.

5. Whether defendants prove that, plaintiff entered into agreement of sale on 31.03.2003 for sale of suit property for Rs.32,50,000/- and received - 14 - NC:

2017. KHC:32878 RFA No.929 of 2017 Rs.12,00,000/- as advance sale consideration?.

6. Whether the defendant No.1 and 2 prove that, on the instructions of the plaintiff, defendant No.3 executed the registered sale deed after receiving balance consideration of Rs.18,00,000/- through D.D. and Rs.2,50,000/- in cash?.

7. Whether defendants prove that, C.F. paid is insufficient and suit is not properly valued?.

8. Whether the plaintiff is entitled for decree?.

9. What decree or order?.

19. Before the learned trial Court, to substantiate the case of the plaintiff, plaintiff himself entered into the witness box as PW.1. He got marked Ex.P1 to P50 and closed plaintiffs evidence.

20. To rebut the evidence of the plaintiff, one Raju S/o. Kapoorchand Borana i.e. defendant no.1 entered the witness box as DW.1. On behalf of defendants 1 and 2, Ex.D1 to D34 were marked.-. 15 - NC:

2017. KHC:32878 RFA No.929 of 2017 21. On closure of the evidence of both the side, on hearing the arguments and on perusal of the oral and documentary evidence, the learned trial Court answered issue Nos. 1 to 5 and issue no.8 in the

affirmative and issue nos. 6 and 7 in the negative and ultimately decreed the suit as prayed for. It is this judgment and decree that has been challenged before this Court by preferring this appeal by defendant nos. 1 and 2.

22. The learned counsel for the appellants Sri G.Balakrishna Shastry with all vehemence submits before the Court that, defendant no.3 was the power of attorney holder of the plaintiff-his own father and in that capacity, he sold the suit properties in favour of defendant nos. 1 and 2. The vesting of ownership of the suit properties with the plaintiff prior to execution of the sale deed is admitted. It is contended that, the trial Court without considering the sale deed dated 28.7.2005 as a valid document, has wrongly decreed the suit believing the version of the plaintiff. The trial Court has committed - 16 - NC:

2017. KHC:32878 RFA No.929 of 2017 grave error and failed to note that there was a valid sale deed dated 28.7.2005 after receiving the balance sale consideration on the instructions of the plaintiff to defendant no.3. It was the plaintiff who authorized defendant no.3 to execute the sale deed. In that capacity, he executed the sale deed on 28.7.2005. On that day, plaintiff received the balance sale consideration amount of Rs.20,50,000/- of which, Rs.18,00,000/- by way of DD and balance Rs.2,50,000/- by way of cash through his father i.e. defendant no.3, - General Power of Attorney.

23. It is further submitted that, there was an Execution Case No.627/2008 filed by the plaintiff for execution of decree passed in OS No.96/2008 on the file of Prl.Civil Judge (Jr.Dvn.), Belagavi seeking possession of the suit properties in the occupation of the tenants. In that, the appellants filed an application by invoking the provisions of Order XXI Rule 99 of CPC for restoration of possession. There the evidence of plaintiff was recorded.-. 17 - NC:

2017. KHC:32878 RFA No.929 of 2017 24. In the said evidence, the plaintiff (PW.1) has admitted that his father has received the balance sale consideration amount. He has denied about the fact of execution of the sale deed.

25. Thus, it is submitted by the counsel for the appellants that, when the plaintiff has not disputed about receipt of balance sale consideration amount, now he has

no voice to say that he has not authorized defendant no.3, his own father, to execute the sale deed in favour of defendant nos. 1 and 2. Ex.P5 - certified copy of the sale deed is produced by the plaintiff himself. Plaintiff did not cancel the sale agreement as per Ex.D4. The conducts of the plaintiff do establish that, he is not an honest person. He wanted to extract more money by filing the suit. So far as other Civil Proceedings between the plaintiff and others is concerned, it is admitted. The main contention of the appellants is that, in view of the execution of sale deed by defendant no.3, these - 18 - NC:

2017. KHC:32878 RFA No.929 of 2017 defendant nos. 1 and 2 have become the owners of the suit properties. Therefore, the plaintiff can not maintain the suit. It is submitted that the learned trial Court has committed a grave error in decreeing the suit of the plaintiff as prayed for. Defendant nos. 4 to 6 surrendered the actual possession in favour of defendant nos. 1 and 2 by executing the surrender deed dated 30.3.2008 vide Ex.D34 as per the Surrender Deed. It is defendant nos. 1 and 2 who are in possession of the suit properties by virtue of said surrender deed. The very prayer made by the plaintiff is incorrect. The trial Court has erroneously held that defendant nos. 1 and 2 have failed to prove that defendant no.3 has executed the sale deed on receipt of Rs.18,00,000/- by way of DD and Rs.2,50,000/- by way of cash. As a grave error has been committed by the trial Court, amongst other grounds stated in the appeal memo, the learned counsel submits that the appeal filed by defendant nos. 1 and 2 deserves - 19 - NC:

2017. KHC:32878 RFA No.929 of 2017 to be allowed and suit of the plaintiff is liable to be dismissed.

26. In support of his submission, he relied upon the pleadings, oral and documentary evidence produced by both side and also provisions of Indian Contract Act, 1872 and following judgments:

1. R. L. PINTO AND ANOTHER V.P.F - AIR 2001 KAR1412. CLIFFORD GEORGE PINTO V. M.R.SHENAVA AND OTHERS - AIR 2005 KAR16727. As against this submission, the learned counsel for the respondents Sri Mruthyunjay Tata Bangi, Advocate for R1 and Sri. Ravi S. Balikai, Advocate for R6 and R7 advanced their respective arguments.

28. The counsel for the respondent no.1 has submitted that, the trial Court has rightly decreed the suit of the plaintiff. It is submitted that, as there was no power given to defendant no.3 to alienate the suit - 20 - NC:

2017. KHC:32878 RFA No.929 of 2017 properties, but even then, Defendant no.3 executed the sale deed without any power. It is submitted by the counsel for the respondent no.1 that, the learned trial court has given sound reasons to decree the suit of the plaintiff. It is submitted that, plaintiff never empowered his own father to execute the sale deed. The power of attorney executed for the limited purpose of conducting the court proceedings in respect of properties owned by him. In that capacity, with limited power defendant no.3 initiated the court proceedings. There was no permission or power given to defendant no.3 to execute the sale deed. It is submitted that, the learned trial court has considered the evidence placed on record both oral and documentary threadbare and has rightly come to the conclusion that defendant no.3 has misused the power vested in him to conduct the court proceedings and has executed the sale deed exceeding his powers. In support of his submission, he too relied upon the evidence placed on record, the oral and documentary and relied upon the - 21 - NC:

2017. KHC:32878 RFA No.929 of 2017 judgment rendered by the Honble Supreme Court in Mrs. Umadevi Nambiar v. Thamarasseri Roman Catholic Diocese rep. by its Procurator Devssias son Rev. Father Joseph Kappil1.

29. It is submitted by learned counsel Shri. Ravi Balikai for other respondents that the trial court has committed illegality in passing a decree.

30. We have given our anxious consideration to the arguments of both side advocates and meticulously perused the records. The points that would arise for our consideration are as under:

1. Whether the finding of the trial Court that defendant no.3 was not empowered to execute the sale deed in favour of defendant nos.1 and 2 is incorrect?.

2. If so, whether, the judgment and decree passed by the trial Court requires interference by this Court?. 1 2022 Live Law (SC) 338 - 22 - NC:

2017. KHC:32878 RFA No.929 of 2017 3. What order?.

31. Before advertng to the other aspects of the case, let us analyze the events that have taken place in this case. So far relationship between the plaintiff and defendant no.3 is concerned, it is admitted. Plaintiff is the son of defendant no.3.

32. As per the case of the plaintiff, he executed a general power of attorney as per Ex.P41. A certified copy of it is produced at Ex.P15 dated 03.05.1997. As a power of attorney of plaintiff, it was defendant no.3 who filed the suit in OS No.256/1997 against Lumanna Malik and Babu S/o. Somanna Malik for permanent injunction restraining the defendants from putting up any construction or causing damage or removing him from the suit property. To that effect, the plaintiff has produced Ex.P16 the certified copy of the judgment passed in OS NO.256/1997 dated 4.12.2006 by the IV Addl.Civil Judge (Jr.Dvn.)JMFC, Belagavi. Also defendant no.3 filed Small Causes Suit No.24/2003 against - 23 - NC:

2017. KHC:32878 RFA No.929 of 2017 defendant nos. 4 to 6 for eviction from of CTS NO.2025/2. It is stated by the plaintiff that, he had instructed his father defendant no.3 to file the said suit. It is a fact that, plaintiff sold CTS No.2025/1-B/1-F, 2025/1-B/1-G, 2025/1-D/1-F, 2025/4-B and 2025/4-C to one Ayyathurai Subbainavar through power of attorney holder Zia Jafar Sajan. The said sale deed is dated 07.08.2003. On the same day, the plaintiff independently sold CTS Nos. 2025/4-A, 2025/3 and 2025/2 situated at Ganapat Galli, Belagavi to him during the subsistence of Power of Attorney in favour of defendant No.3. As per Ex.D4 the plaintiff executed agreement of sale on 31.3.2003 in favour of defendant No.2 and father of defendant no.1 agreed to purchase the suit properties for sale consideration of Rs.32,50,000/-. Plaintiff received Rs.12,00,000/- advance sale consideration. He also agreed to evict defendant nos. 4 and 5, the tenants from the portion of the suit property and hand over the actual - 24 - NC:

2017. KHC:32878 RFA No.929 of 2017 physical possession at the time of execution of the sale deed within seven months.

33. It is the allegation of the defendants No.1 and 2 that, they have paid balance consideration of Rs.18,00,000/- through Demand Draft and cash of Rs.2,50,000/- to defendant No.3.

34. It is a fact stated by appellants-defendant nos. 1 and 2 that, defendant no.3, on 28.7.2005, executed the sale deed in respect of suit property as a Power of Attorney holder of the plaintiff. The said document is marked at Ex.P5. Through his father, he filed a suit in OS No.96/2008. The plaintiff obtained the decree in the said suit against defendant nos. 4 to 6. He also filed Execution Petition No.627/2008 as per Ex.P19. Plaintiff filed application as Exp.20 for breaking open the lock and pulling him in possession of suit property As per Ex.P23, the Court bailiff handed over the possession of CTS No.2025 to the plaintiff by breaking open the lock. Plaintiff - 25 - NC:

2017. KHC:32878 RFA No.929 of 2017 leased the suit property to one Kubendran S/o.S.Iyyadurai Nadar who purchased the southern portion as per Ex.P6. Defendant nos. 1 and 2 also filed application in Execution Petition by invoking the provision of Order XXI Rule, 99 and 100 of CPC on 6.12.2008 seeking delivery of actual possession of the suit property as per Ex.P25. To that, plaintiff filed objections as per Ex.P26. Defendant no.3 died during the pendency of the suit and the death extract is produced as per Ex.P8. These are all the events that have taken place in respect of the properties.

35. To decide this appeal, keeping in mind the aforesaid factual events, we have to assess oral and documentary evidence. As this is the first appellate Court, it is the duty of the first appellate Court to re-appreciate the facts as the last fact finding Court.

36. PW.1 is none other than the plaintiff in this case. He has reiterated the plaint averments in his - 26 - NC:

2017. KHC:32878 RFA No.929 of 2017 evidence on oath. He has been intensively cross- examined by the counsel for the defendant nos. 1 and 2. So far execution of the agreement of sale in favour of defendant nos.1 and 2 on 31.3.2003 is concerned, plaintiff PW.1 admits in the cross-examination dated 05.01.2016. He

admits that, he agreed to sell suit properties for a consideration of Rs.32,50,000/-. He also admits that, he received Rs.12,00,000/- as balance consideration amount from one Borana. He admits that, there is an endorsement for receipt of Rs.12,00,000/-.He admits that defendant nos. 4 to 6 were tenants under him and they used to pay rent at the rate of Rs.20/- per month. He admits that, after eviction of defendant nos.4 to 6 from the suit properties, it was agreed by him to hand over the possession of the said tenanted properties to defendant nos. 1 and 2. It is suggested to him that, defendant nos. 4 to 6 were not evicted from the schedule properties in which they were tenants. It is further stated by PW.1 that, he asked his father to get the sale deed - 27 - NC:

2017. KHC:32878 RFA No.929 of 2017 cancelled. So far as proceedings in EP No.627/2008 is concerned, PW.1 admits that, there is no prayer for cancellation of the agreement of sale before the Executing Court by him. He deposes ignorance of the receipt of Rs.18,00,000/- by way of DD so also receipt of Rs.2,50,000/- by cash. He gave a guessing answer stating that, his father might have executed the sale deed as his power of attorney in favour of defendant nos.1 and 2. He admits that he had not paid tax in respect of the suit properties to the Corporation from 2005. Though intensive cross-examination is directed to PW.1, he is consistent that, without any power, his father executed sale deed in favour of defendant nos.1 and 2 which is illegal according to him.

37. So far as documentary evidence produced by the plaintiff, he has produced CTS extract from Ex.P1 to P4 in respect of the suit properties in which what we find is, initially the name of the plaintiff was appearing and thereafter the name of defendant nos. 1 and 2 were - 28 - NC:

2017. KHC:32878 RFA No.929 of 2017 entered. Ex.P5 is the sale deed which is challenged in the suit.

38. On scrupulous reading of this Ex.P5 the certified copy of the sale deed, it shows that, defendant no.3 Ishwarappa S/o. Gurusiddappa Balekundri sold the property on behalf of the plaintiff Vishwanath as his Power of Attorney. But, this certified copy of the sale deed is not accompanied by the copy of the power of attorney which is mandatory under the provisions of The Registration Act, 1908

with regard to registration of the document before the Sub-Registrar. To show that there was an agreement of lease dated 5.12.2008 executed by plaintiff in favour of tenants by name Kubendran Nadar, it is produced at Ex.P6. To show that, in the tenanted property, a cloth shop was being run, photographs were also produced but, they were not marked. Ex.P7 is the decree passed in OS NO.96/2008 filed by the plaintiff through his power of attorney against tenants Mahadeva, Suresha, Babu. In the said suit, defendants remained - 29 - NC:

2017. KHC:32878 RFA No.929 of 2017 exparte and the suit was decreed as prayed for. Ex.P8 is the death extract of defendant No.3 Ishwarappa who died on 3.9.2014 during the pendency of the suit. Ex.P9 is another gift deed in Marathi Language and the translation of which is produced at Ex.P9(a). It was executed by power of attorney of plaintiff i.e. defendant no.3. Ex.P.10 is another sale deed in favour of the plaintiff executed by Ratnawwa in respect of the properties stated supra. Ex.P11 is the agreement of lease. Ex.P12 is the certified copy of plaint in OS NO.256/1997 which shows that it was plaintiffs father i.e., defendant no.3 who filed that suit as a power of attorney against Lumanna Malik and Babu S/o.Somanna Malik for eviction. In that, Ex.P13 written statement was filed by defendant nos. 1 and 2. Ex.P15 is the power of attorney set up by defendant nos.1 and 2.

39. On scrupulous reading of the contents of this power of attorney, we find that there is no clause empowering defendant no.3 to execute the sale deed in - 30 - NC:

2017. KHC:32878 RFA No.929 of 2017 favour of anybody much less, in favour of defendant nos.1 and 2. The learned counsel for the appellants/defendant nos. 1 and 2 relied upon the said power of attorney stating that, these is a general clause mentioned in the power of attorney which empowered defendant no.3 to execute the sale deed. The clauses in the Power of Attorney reads as under: CLAUSES MENTIONED UNDER GENERAL POWER OF ATTORNEY (EX.P.15) 1. To look after the day-to-day affairs of my property about its repairs, maintenance, collect on of rents, payment of taxes and other dues on my behalf.

2. To appear and act either personally or through an agent in all courts, civil, Revenue, Criminal and before all authorities, tribunals and offices of the Government including semi- government bodies, Tax - 31 - NC:

2017. KHC:32878 RFA No.929 of 2017 authorities, local authorities and individuals including arbitrators and Tribunals of all kinds.

3. To sign, verify the complaints, written statements, claims and objections and memorandum of all kinds and to present them in courts.

4. To appoint advocates or other practitioners, agents, attorneys to appear and act in the courts including tribunals and other authorities in connection with my above said property and to sign the vakalathnama and to swear to all affidavits.

5. To compromise, compound or withdraw the cases in respect of my said property on my behalf.

6. To file applications, to file and receive back the documents, to deposit and withdraw money, to obtain refund of stamp duty or court fee in and from courts of any offices.-. 32 - NC:

2017. KHC:32878 RFA No.929 of 2017 7. To file applications, obtain any interim order, and to file execution petitions and to sign and verify applications, if any, in any courts or offices.

8. To receive any money due to me in the decree and to apply for inspection of documents and inspect the documents and records.

9. To produce or summons or to receive back any documents.

10. To appear before all courts or offices and to give evidence in my name and on my behalf.

11. To prefer any appeal/appeals against the judgment and decree relating to my above said property to engage advocates for that purpose on behalf.

12. To appear or lodge any complaint before the police.-. 33 - NC:

2017. KHC:32878 RFA No.929 of 2017 Generally, to do, execute and perform all and agree act, matter and thing whatsoever in any way necessary or expedient to be done in respect of my above said property.

40. The general clause, states that the power of attorney can execute and perform all and every act, matter and thing whatsoever in any manner necessary and expedient to be done in respect of the suit property. So this does not mean that defendant no.3 was really empowered to execute the sale deed. In all, there are 12 clauses in Ex.P15. Even the plaintiff is not disputing the contents of Ex.P15. His only grievance is that he had not empowered his father to execute the sale deed.

41. Ex.P16 is the judgment passed in OS No.256/1997 wherein the suit was decreed for eviction. Voluminous documents are produced by the plaintiff to show the proceedings initiated by his father as his PA - 34 - NC:

2017. KHC:32878 RFA No.929 of 2017 holder in OS No.256/1997, the copy of the plaint, order sheet, as well as Execution Petition No.627/2008.

42. Even the Judgment passed in OS No.96/2008 passed by the Civil Judge (Jr. Division) was challenged before the appellate Court in RA No.248/2008 which was dismissed by the appellate Court. The certified copy of the same is produced as per Ex.P30. The other documents are also produced by the plaintiff to show that several proceedings have taken place between the plaintiff and other defendants, JDRs, etc., 43. So far as oral evidence of defendant nos. 1 and 2 is concerned, defendant no.1 has come before the trial Court and deposed in line with the contents of written statement. So many suggestions are directed to DW.1, but he has denied all the suggestions. The only consistent defence of defendant nos. 1 and 2 is that, it was defendant no.3 being the power of attorney of the plaintiff executed the sale deed. It is a valid sale deed.-. 35 - NC:

2017. KHC:32878 RFA No.929 of 2017 Filing of the criminal complaint against plaintiff has also been spoken to by DW.1 in his evidence on oath. It is their case that, entire sale consideration of Rs.32,50,000/- was paid and therefore, they became the owners of the suit properties by virtue of the sale deed which is impugned in the suit. Though lengthy cross- examination is directed, they

remained consistent in their evidence to state that by virtue of the sale deed, they became the owners of the said suit properties.

44. Amongst the documents produced by the defendants, Ex.D4 is agreement of sale executed by plaintiff independently. This agreement of sale Ex.D4 was not executed by the power of attorney of the plaintiff. It is an admitted document between both the parties. So far as power of attorney is concerned, this power of attorney is marked at Ex.P15. It is dated 3.5.1997, whereas, the agreement of sale was entered into by the plaintiff with defendant 1 and 2 on 31.3.2003. That means, Ex.D4 agreement of sale came into existence subsequent to - 36 - NC:

2017. KHC:32878 RFA No.929 of 2017 power of attorney executed by the plaintiff in favour of defendant no.3. If really the plaintiff had authorized his father to execute the sale deed to alienate his properties, he would have asked his father to execute the agreement of sale. But, Ex.D4 was independently executed by plaintiff in favour of defendant nos. 1 and 2. So, the conduct of the plaintiff shows that, he never authorized defendant no.3, his father to execute sale deed in favour of anybody much less, in favour of defendant nos.1 and 2. Therefore, he independently executed the agreement of sale Ex.D4 in their favour.

45. The contents of Ex.D4 show that, within 7 months, defendant nos.1 and 2 had to pay the balance consideration amount and get the sale deed executed. In case of failure, the advance sale consideration amount paid to the extent of Rs.12 lakh would be forfeited.

46. Evidently, defendant nos. 1 and 2 have not taken any steps to get the sale deed executed in their - 37 - NC:

2017. KHC:32878 RFA No.929 of 2017 favour from plaintiff independently. Several proceedings were initiated. When plaintiff independently executed the agreement of sale Ex.D4 in favour of defendant nos.1 and 2, what made defendants nos. 1 and 2 to get the sale deed directly from defendant no.3 is not explained by defendants No.1 and 2. They would have directly contacted the plaintiff to execute the sale deed. No doubt, in this case defendant no.3 has filed written statement admitting the claim of defendant nos. 1 and 2. He has not supported his own son.

But, he died during the pendency of the suit. Merely because he denied the case of the plaintiff, that does not mean that his version is to be accepted. So first of all, as stated supra, power of attorney marked in this case stated to have been executed by the plaintiff in favour of defendant no.3 did not empower defendant no.3 to execute the sale deed.

47. So far as receipt of advance sale consideration amount is concerned, plaintiff admits. But though defendant no.3 knew that, he was not empowered to - 38 - NC:

2017. KHC:32878 RFA No.929 of 2017 execute the sale deed and only he was permitted to initiate the court proceedings in respect of the properties owned by the plaintiff, exceeding his power he executed sale deed by receiving the sale consideration amount. It is not the case of the plaintiff that, he had received the entire consideration amount stated in the agreement of sale. He disputes the same. He deposed ignorance of payment of the same through DD or by cash. Thus, the burden is on the defendant nos. 1 and 2 to prove that they paid the said sale consideration amount. Defendant No.3 is no more to prove the receipt of balance consideration alleged to have been paid by defendant nos.1 and 2. Pleadings in written statement of defendant no.3 have remained without any proof. So the factual evidence spoken to by DW.1 cannot be accepted with regard to the payment of the entire consideration amount in favour of plaintiff through defendant no.3. The very getting the execution of sale deed in their favour by the power of attorney who is not empowered attracts the - 39 - NC:

2017. KHC:32878 RFA No.929 of 2017 provisions of Indian Contract Act, 1872 as well as the Power of Attorney Act, 1882.

48. Now we have to read the provisions of Indian Contract Act, 1872 as well as the provisions of Power of Attorney Act, 1882.

49. No doubt, it is argued by the counsel for the appellants-defendant nos. 1 and 2 that, in view of the law laid down by this Court relating to the provisions of Indian Contract Act, 1872, in ruling No.1 stated supra, when the sale deed was executed by third defendant in favour of defendant nos. 1 and 2, unless it is proved by the plaintiff that it is a forged document, it cannot be declared as null and void. In this

case, execution of power of attorney is admitted but there is no power or authorization given by the plaintiff to execute the sale deed. It is argued that the conduct of the plaintiff in ratification of the said sale deed amounts to his consent of executing the sale deed. The ratio laid down in the said - 40 - NC:

2017. KHC:32878 RFA No.929 of 2017 judgment cannot be justifiably made applicable to the present facts of the case.

50. On the other hand, learned counsel for the plaintiff relied upon the judgment of Supreme Court of India in the case of MRS. UMADEVI NAMBIAR CASE² It is laid down that the power of attorney as an agent of the principal and when there is unauthorized sale made by the agent, it will not tantamount to principal parting with the possession. The said principle laid down reads as under: 14. The reasoning given by the High Court for holding that the appellant ought to have challenged the alienations, is that the appellant was out of possession. Here again, the High Court failed to appreciate that the possession of an agent under a deed of Power of Attorney is also the possession of the Principal and that any unauthorized sale made by the agent will not tantamount to the Principal parting with possession.

51. The provisions of the Power of Attorney Act, 1882 defines power of attorney as on. Instruments 2 Supra note 1 - 41 - NC:

2017. KHC:32878 RFA No.929 of 2017 empowering a specified person to act for and in the name of the person executing it.

52. Basically a person gives another person a legal right to present himself as his representative to perform specific tasks on his behalf. This instrument is commonly used by non-resident Indians (NRIs) as it may not be possible for the NRIs to visit to the country of origin at the given time because of his/her business or personal work.

53. Owing to convenience, a Power of Attorney is handy for extremely busy people, such as businessmen and people who cannot perform various personal and professional tasks.

54. There are two types of power of attorney i.e. one is General Power of Attorney (GPA). It confers power on the agent to perform routine tasks on behalf of the principal Special Power of Attorney (SPA) that gives an agent the power to perform specific tasks. While GPA - 42 - NC:

2017. KHC:32878 RFA No.929 of 2017 grants broad powers to a representative, a SPA talks about a specific act that the representative can carry out, on behalf of the principal. If you grant someone a GPA, they can pay your utility bills, collect rents on your behalf, manage and settle disputes, or carry out all bank related work, while acting as your representative.

55. On the other hand, if an NRI has to sell his property in a village, they would get it done through an agent here by way of an SPA.

56. With regard to validity and empowerment of power of attorneys to sell the property, the Honble Supreme Court in Suraj Lamp & Industries Private Limited (2) Through director. v. State of Haryana and Another³, has laid down the law as under:

20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of 3 (2012) 1 SCC656- 43 - NC:

2017. KHC:32878 RFA No.929 of 2017 attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (Section 1- A and Section 2, Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

21. In State of Rajasthan v. Basant Nahata this court held : (SCC pp. 90 and 101 paras 13 and

52) 13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to

manage the affairs of the principal generally conferring necessary authority upon - 44 - NC:

2017. KHC:32878 RFA No.929 of 2017 another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience. * *

52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers of Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by - 45 - NC:

2017. KHC:32878 RFA No.929 of 2017 reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney-holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

57. The aforesaid judgment of the Honble Apex Court is of a three-Judge Bench which after interpreting various provisions of the law concerning property sales, held that sale of immovable property through sale agreement, will, general power of attorney is not valid. The Honble Supreme Court as stated supra has held that, these type of transactions are not transfers or sales and such transactions cannot be treated as completed transfers or conveyances. However, the Bench said that the judgment will not affect genuine transactions under - 46 - NC:

2017. KHC:32878 RFA No.929 of 2017 the general power of attorney. To avoid such transactions, Bench asked the States to reduce the stamp duty to encourage the registration of sale deeds.

58. In this case, defendant no.3 being the father of plaintiff was just empowered to deal with the property and there is no power given under the GPA to alienate or create sale of the properties owned by the plaintiff. No doubt, the seller of the immovable properties in these indirect sales after receiving agreed consideration, delivers the possession of the said property and executes some or all of the documents like irrevocable GPA, the SPA etc., But when there is no clause permitting the defendant no.3 to sell the suit properties, the very sale deed by defendant no.3 in favour of defendant nos. 1 and 2 cannot be termed as valid in view of the law laid down in Suraj Lamp Industries case by the Honble Apex Court.-. 47 - NC:

2017. KHC:32878 RFA No.929 of 2017 59. So far as sale is concerned, Section 5 of the Transfer of Property Act, 1882 defines `Transfer of Property. It reads as under:

5. Transfer of property defined- In the following sections transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons, [or to himself]. and one or more other living persons; and to transfer property is to perform such act. [In this section living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.].

60. Section 54 of the Transfer of Property Act, 1872 defines `Sales as `Sale is a transfer of ownership in exchange of price paid or promised or part-paid and part promised. Such transfer in the case of tangible immovable property of the value of Rs.100/- or upwards or in the case of reversion or other intangible thing, can be made only by registered instrument.-. 48 - NC:

2017. KHC:32878 RFA No.929 of 2017 61. In this appeal, a long deal of argument has been advanced before us by the defendants alleging that defendant no.3 was really empowered to execute the sale deed etc, But, in view of strict provisions of Power of Attorney Act, 1882 defendant no.3 was not at all empowered to execute any sale deed in the manner stated by him.

62. Further, in a recent judgment of Honble Supreme Court in the case of Ghanashyam vs. Yogendra Rathi⁴, while dealing with the case with regard to agreement of sale, it is observed as under:

14. In connection with the general power of attorney and the will so executed, the practice, if any, prevalent in any State or the High Court recognizing these documents to be documents of title or documents conferring right in any immovable property is in violation of the statutory law. Any such practice or tradition prevalent would not override the specific provisions of law which require execution of a document of title or transfer and its 4 2023 Livelaw (SC) 479 - 49 - NC:

2017. KHC:32878 RFA No.929 of 2017 registration so as to confer right and title in an immovable property of over Rs.100/- in value. The decisions of the Delhi High Court in the case of Veer Bala Gulati Vs. Municipal Corporation of Delhi and Anr. following the earlier decision of the Delhi High Court itself in the case of Asha M. Jain Vs. Canara Bank and Ors. holding that the agreement to sell with payment of full consideration and possession along with irrevocable power of attorney and other ancillary documents is a transaction to sell even though there may not be a sale deed, are of no help of the plaintiff-respondent inasmuch as the view taken by the Delhi High Court is not in consonance with the legal position which emanates from the plain reading of Section 54 of the Transfer of Property Act, 1882. In this regard, reference may be had to two other decisions of the Delhi High Court in Imtiaz Ali Vs. Nasim Ahmed and G. Ram Vs. Delhi Development Authority which inter-alia observe that an agreement to sell or the power of attorney are not documents of transfer and as such the right title and interest of an immovable property do not stand transferred by mere execution of the same unless any documents as contemplated under Section 54 of the Transfer of Property Act, 1882, is executed and is got registered under Section 17 of the Indian Registration Act, 1908. The decision of the Supreme Court in Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr (2009)7SCC363 also deprecates the transfer of - 50 - NC:

2017. KHC:32878 RFA No.929 of 2017 immovable property through sale agreement, general power of attorney and will instead of registered conveyance deed.

63. Learned counsel for the respondent-plaintiff submits that when there is no power given to defendant no.3 to alienate the suit property, this transfer by ostensible owner is not a sale in favour of defendant nos. 1 and 2. Therefore, the counsel for the plaintiffs relied upon the provisions of Section 41 of Transfer of Property Act. It reads as under:

41. Transfer by ostensible owner-Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.-. 51 - NC:

2017. KHC:32878 RFA No.929 of 2017 64. The Honble Supreme Court has also given a legal maxim *Nemo dat quod non habet* - No one can confer a better title than what he himself has in the case of *MRS. UMADEVI NAMBIAR* in para-17 to 19 of the said judgment, it is held that:

17. We do not know how the ratio laid down in the aforesaid decisions could be applied to the advantage of the respondent. As a matter of plain and simple fact, Exhibit A1, deed of Power of Attorney did not contain a clause authorizing the agent to sell the property though it contained two express provisions, one for leasing out the property and another for executing necessary documents if a security had to be offered for any borrowal made by the agent. Therefore, by convoluted logic, punctuation marks cannot be made to convey a power of sale. Even the very decision relied upon by the learned counsel for the respondent, makes it clear that ordinarily a Power of Attorney is to be construed strictly by the Court. Neither *Ramanatha Aiyars Law Lexicon* nor Section 49 of the Registration Act can amplify or magnify the clauses contained in the deed of Power of Attorney.

18. As held by this Court in Church of Christ Charitable Trust and Educational Charitable Society vs. Ponniamman Educational Trust, (2012) 8 SCC706 the document should expressly authorize the agent, (i) to execute a 5 Supra note 1 - 52 - NC:

2017. KHC:32878 RFA No.929 of 2017 sale deed; (ii) to present it for registration; and (iii) to admit execution before the Registering Authority.

19. It is a fundamental principle of the law of transfer of property that no one can confer a better title than what he himself has (*Nemo dat quod non habet*). The appellants sister did not have the power to sell the property to the vendors of the respondent. Therefore, the vendors of the respondent could not have derived any valid title to the property. If the vendors of the respondent themselves did not have any title, they had nothing to convey to the respondent, except perhaps the litigation.

65. Thus, if this position of law is applied to the present facts of the case, there was no power at all given to defendant no.3 to sell the suit properties in favour of defendant nos. 1 and 2. Even the procedure of registration is also not properly followed. Under the provisions of The Registration Act, 1908 and Rules Section 34 (3)(a), (b), (c) and Sec.32(a) a duty is cast on the Sub-Registrar (Registering Officer). This Section 34(3)(a) enjoins upon the Registering Officer to enquire whether or not such a document was executed by persons by whom it purports to have been executed.-. 53 - NC:

2017. KHC:32878 RFA No.929 of 2017 Section 34(3)(b) further makes it duty to satisfy himself as to identify the persons appearing before him and alleging that they have executed the document.

66. That means it is to be read along with Section 32(a). The duty of Registering Officer extends only to enquire and find that such person is a person who has executed document and be satisfied about identity of the person.

67. There is no mention either in the sale deed or in any other document to show that the provisions of the Registration Act have been followed by defendant no.3.

Therefore, if all these factual features coupled with position of law are read together, plaintiff is right in claiming the relief of declaration that, there is no power given to defendant no.3 to alienate the property and beyond his powers, defendant no.3 has acted and sold the property to defendant nos. 1 and 2.-. 54 - NC:

2017. KHC:32878 RFA No.929 of 2017 68. The learned trial Court, after assessing the evidence placed on record by both the side, has rightly come to the conclusion that, there is no power vested with defendant no.3 to sell the properties to defendant nos. 1 and 2 and he has acted beyond his powers.

69. At the cost of repetition, it can be stated that, when defendant nos. 1s father and defendant no.2 entered into agreement directly with the plaintiff and there was an agreement of sale to that effect, what prevented the defendants from getting the sale deed directly executed from the plaintiff is a mystery. There is no explanation to that effect either in their pleadings or in their evidence. If that is so, probably to deprive the plaintiff of his legitimate share in the suit properties, defendant Nos. 1 and 2 must have ventured to get the sale deed from defendant no.3. The very conduct of defendant no.3 has to be taken into consideration that he filed a consenting written statement in favour of defendant nos. 1 and 2 and he is no more now to speak - 55 - NC:

2017. KHC:32878 RFA No.929 of 2017 the real truth before the Court. Therefore, the learned trial court has evaluated the evidence in proper perspective and has rightly come to the conclusion to decree the suit in favour of plaintiff.

70. We do not find any factual or legal error being committed by the trial Court in decreeing the suit of the plaintiff. Therefore, the points raised supra have to be answered in favour of the plaintiffs and against the defendant nos. 1 and 2. Consequentially, the appeal filed by the defendants 1 and 2 is liable to be dismissed. Judgment and Decree passed by the trial Court is required to be confirmed and now the following:

ORDER

(i) The appeal filed by defendants-appellants is dismissed. (ii) Judgment and decree passed in OS No.396/2005 is confirmed with costs throughout.-. 56 - NC:

2017. KHC:32878 RFA No.929 of 2017 (iii) Send back the Trial Court records along with copies of this judgment forthwith. Sd/- JUDGE Sd/- JUDGE SK/-

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