

Bombay High Court Ravindra Lalbachan Tiwari And ... vs Smt. Nirmaladevi Vijaynarayan ... on 23 December, 1996 Equivalent citations: 1997 (4) BomCR 75 Author: V Bhairavia Bench: V Bhairavia JUDGMENT V.H. Bhairavia, J.

1. This appeal is directed against the judgment and decree dated 8th January, 1996 passed by the City Civil Court, Bombay, in Short Cause Suit No. 7262 of 1985. 2. Short facts emerge from the record are that the suit was filed against the appellants-defendants by respondent No. 1 - plaintiff No. 2 and the other plaintiff No. 1 for declaration and possession of the suit flour mill viz., Ambika Flour Mill situated at Daulatnagar, Borivli. The plaintiffs are the heirs of deceased Ambika Krishnanand Pandey. It is the case of the plaintiffs that Ambika Krishnanand Pandey, who was originally a native of U.P., came to Bombay in 1948-50 and started serving in Kamla Mills, Lower Parel. His nephews i.e. sons of his brother Chandrika also came later to Bombay and they got employment through their uncle Ambika Krishnanand Pandey. They were staying with said uncle Krishnanand and all the income of their earnings were being given to Ambika Krishnanand Pandey and he was looking after them. They were staying with him like his family members due to the mutual understanding and Trust. It reveals from the record that defendant Nos. 3, 4 and 5 also subsequently came to Bombay and started staying with Ambika Krishnanand Pandey. Ambika Krishnanand Pandey was looking after and managing the said joint family at Bombay, while his elder brother Ramnihut, father of defendant Nos. 3, 4, and 5, was managing the joint family and the agricultural properties at the native place. It is the case of the plaintiffs that the said Ambika Krishnanand Pandey acquired a small portion of land on tenancy basis bearing Survey No. 19, Hissa No. 2 and Survey No. 20 Hissa No. 5 bearing C.T.S. Nos. 59 and 60 admeasuring about 32 feet x 20 feet on a monthly rent of Rs. 40/- and constructed a structure bearing Municipal Assessment No. L-4312 (4C) 19 C.C. situated at Village Asalpha, Taluka Kurla, and started business in the name and style of Ambika Flour Mill in or about 1967 and obtained Municipal licence and permit for running the said flour mill, which is the suit property and which has been more particularly described in the Schedule marked Exhibit 'A' to the plaint. It further reveals that with a view to maintain dignity and peace and to avoid any litigation in the family in future, said Ambika Krishnanand Pandey acquired another premises at Daulatnagar, Jain Mandir Road No. 8, Borivli East, Bombay, in or about 1970 and started the business of flour mill in the name of defendant No. 4, being one of the three sons of Ramnihut Pandey (now deceased). Said Ambika Pandey further acquired another premises in the year 1972 in the name of his youngest brother Rampher at Daulatnagar Road No. 6, Borivli East, wherein another flour mill in the name of Pandey Flour Mill was started. Likewise, in 1980, said Ambika Krishnanand Pandey further acquired another premises at Daulatnagar Road No. 3, Borivli East and started a flour mill in the name of Gomati Chandrika Pandey, one of the two sons of Chandrika Pandey, his brother. It further reveals that since Ramnihut was at the native place, said Ambika Krishnanand Pandey and his two younger brothers Chandrika and Rampher, were bringing the earnings together and out of the said joint earning of the said three brothers and their sons, all the four premises

were acquired and the flour mill businesses therein were managed in separate names as stated above. It also reveals that though said Ambika Krishnanand Pandey was having a flour mill in his name viz., Ambika Flour Mill, he employed defendant No. 2 on monthly salary basis and he continued to serve in Kamla Mill till December 1983. Likewise, defendant Nos. 3, 4 and 5 were carrying on their business of flour mill at Daulatnagar, Jain Mandir Road No. 8, and Rampher was carrying on his business of flour mill at Daulatnagar Road No. 6 and Chandrika Pandey by himself and through his sons Gomati and Sarju was carrying on his business of flour mill in the name of Krishna Flour Mill at Daulatnagar Road No. 3. It also reveals that defendant No. 3 Kalika Ramnihut Pandey was serving in B.E.S.T. as a conductor and he was helping the aforesaid persons in their respective businesses and the premises and he was keeping in his possession all the documents pertaining to the aforesaid four flour mills till the death of Ambika Krishnanand Pandey. It further reveals that said Ambika Pandey had full Trust in defendant No. 3 and, therefore, a joint account was also opened in the names of Ambika Pandey and defendant No. 3 Kalika Ramnihut Pandey and the said joint account was in operation till the demise of Ambika Pandey. The business of the four flour mills was going on very smoothly. It is the case of the plaintiffs that said Ambika Pandey retired from his services in December 1983 and was looking after the business of his flour mill. In full and final settlement of his accounts with Kamla Mills, Ambika Pandey received two cheques, in all for Rs. 38,380.40 towards his provident fund and gratuity, which he gave to defendant No. 3 for being deposited in their joint account. However, defendant No. 3, instead of depositing the same in the joint account, fraudulently opened another Bank account in the joint names of himself and said Ambika Pandey in State Bank of India, Kurla B.E.S.T. Depot Branch, Bombay, and thereafter fraudulently withdrew the said amount under his signature and thereby committed criminal breach of Trust. Therefore, a suit was filed against defendant No. 3. It is the further case of the plaintiffs that after the retirement, Ambika Pandey went to his native place in January 1985 and there he fell sick. The nature of his sickness was a very severe paralytic attack to Ambika Pandey resulting in paralysing of his entire left side of the body from head temple to the toe of the left leg covering left eye, left nose, left ear and left portion of mouth as well as left portion of upper and lower body. Therefore, he was brought to Bombay on 2nd April 1985 by plaintiff No. 1 - wife of Ambika Pandey. It is stated that he stayed for 3-4 days at his said flour mill at Ghatkopar in the rear room of the suit property. Thereafter deceased Ambika Pandey was admitted in Hindu Mahasabha Hospital at Ghatkopar. Plaintiff No. 1- wife was all the time remained beside Ambika Pandey. It further reveals that he took discharge from the said Hospital on 23-4-1985 and was taken to the suit property where the flour mill in question situates and was staying there and the same treatment was continued till 2-8-1985. It is stated that as the health of Ambika Pandey was deteriorating and he was becoming unconscious, he was admitted in Sharda Memorial Hospital at Dahisar East, and after treatment for few hours, as the doctors found no hope of his survival, he was immediately shifted to K.E.M. Hospital on the same day 3-8-1985. On the next day i.e. on

4-8-1985, Ambika Pandey expired in the hospital. It further reveals that after the cremation of her deceased husband on 5-8-1985 at Bombay, plaintiff No. 1 proceeded to her native place on the next day for performing the last rite of her deceased husband. It is stated that the last rite of her deceased husband was performed at the native place on 16-8-1985. Thereafter on or about 20-10-1985 plaintiff No. 1 came to Bombay to her said flour mill viz., Ambika Flour Mill at Ghatkopar and she started residing in the rear room behind the said flour mill. It is the further case of the plaintiffs that when asked about the income and expenses of the Ambika Flour Mill, defendant No. 2, who was employed by deceased Ambika Pandey, told plaintiff No. 1 that she may ask about the accounts to defendant No. 3. Thereupon, plaintiff No. 1 went to defendant No. 3 and demanded some money from him, whereupon she was told that during the illness of deceased Ambika Pandey, defendant No. 1 was looking after Ambika Flour Mill and he was managing the said business and had also paid some money for medical expenses of deceased Ambika Pandey. Therefore, She was told to contact defendant No. 1 for accounts. Accordingly, she contacted defendant No. 1. On contacting defendant No. 1, he told the plaintiff No. 1 that he would have no objection if she stays in the rear room only as she is an old lady. Otherwise, he would throw out her physically and she was further told that she will be removed forcibly in case she fails to go out of the suit premises. It is further stated that on 27-10-1985 at about 3 a.m., while plaintiff No. 1 was in the suit premises i.e. Ambika Flour Mill, defendant Nos. 2 and 3 came to the suit premises and asked plaintiff No. 1 to go out of the suit premises with her belongings. She was given threats that her bones will be broken. It is stated that plaintiff No. 1 immediately contacted plaintiff No. 2 a daughter and her husband and narrated the incident to them. Thereafter plaintiff No. 1 went to the police station in the company of plaintiff No. 2 and her husband and lodged a complaint with the Ghatkopar Police Station which was recorded as N.C. bearing No. 4359 of 1985. It is further stated that after some time, plaintiff No. 1 was called at the said police station and it was disclosed to her in the police station that they (police) cannot do anything as the suit premises had been sold away by her deceased husband Ambika Pandey to defendant Nos. 1 and 2 by executing a registered sale deed. On coming to know about the sale transaction between deceased Ambika Pandey and defendant Nos. 1 and 2, plaintiff No. 1 issued a notice to defendant Nos. 1, 2 and 3 and a complaint was lodged against the said defendants by plaintiff No. 1 for fraudulently getting the alleged sale deed executed by deceased Ambika Pandey and fraudulently getting the said document registered. On that complaint, defendant Nos. 1, 2 and 3 were called at the police station. It further reveals that as the plaintiffs apprehended commission of fraud and forgery, they went to the office of the Sub-Registrar and made enquiries regarding registration of such a document and on inspection it was found that the alleged document was a forged document as the signature of deceased Ambika Pandey was not tallying. Thereafter it is stated in the plaint that a notice was issued to respondent Nos. 1, 2, and 3. As there was no reply to the said notice, a suit was filed. 3. Written statement was filed by the defendants in the said suit, wherein they have contended that the suit flour mill has

been purchased by defendants Nos. 1 and 2 by executing registered sale deed on 17-4-1985 and they relied on the said document. The defendants have given a separate purshish stating that they are relying on documentary evidence. 4. It reveals from the record that plaintiff No. 1, an illiterate lady, did not step into the witness box and she has been represented by one Gomati Pandey, her constituted Power of Attorney holder. On the defendant's side, defendant Nos. 1 and 2, who are alleged to have purchased the suit flour mill, have also not stepped into the witness box but on their behalf defendant No. 3 gave oral evidence. Thus, in short, in support of the plaintiff's case, they have examined only one witness viz., P.W. 1 Gomati Pandey. On behalf of the defendants, only defendant No. 3 was examined as D.W. 1. The peculiarity of the trial of this case is that no relevant documents have been produced by either of the parties. Only medical certificate has been produced by the plaintiffs. 5. The learned trial Judge has framed the necessary issues and recorded the evidence of both P.W. 1 and D.W. 1 and after hearing the arguments advanced on behalf of the parties, the learned Judge has decreed the suit by his judgment and order dated 8th January, 1996. Hence this appeal by the appellants-defendants. 6. Heard Mr. Navin Parekh, learned Counsel for the appellants-defendants, and Mrs. Vasundhara Deshpande, learned Counsel for the respondents-plaintiffs. 7. It has been emphatically submitted by Mr. Parekh, learned Counsel for the appellants-defendants, that the learned trial Judge has committed an error in passing the decree in the absence of any evidence regarding fraud and forgery. The learned Counsel had further vehemently submitted that the burden of proof is not discharged by the respondents-plaintiffs and, therefore, the onus of proof is not shifted on the appellants-defendants. It has been submitted that the witness examined on behalf of the plaintiffs in support of the plaint has no personal knowledge and has not stated a word that fraud or forgery has been committed by the defendants. It has been further submitted that no document was brought on record and in the absence of any such document, the allegation of fraud or forgery cannot be held proved and the burden of proof rests on the plaintiffs who allege the same in the plaint. These are the crucial points raised by the learned Counsel for the appellants-defendants while challenging the judgment and decree passed by the trial Court as perverse as it is based on no evidence. In support of his submissions, the learned Counsel has cited the following authorities :- 1. Bharat Dharma Syndicate v. Harish Chandra . 2. A. Raghavamma v. A. Chenchamma, . 3. State of W.B. v. Subimal Kumar Mondal, 4. Lalita James v. Ajit Kumar, . 5. Jagdish Narayan v. Nawabsaid Ahmed Khan, . 6. Moran Mar Beselios Catholicus v. Most Rev. Mar Poulase Athanasices, A.I.R. 1954 S.C. 526. 7. Munir Ahmed v. State of Rajasthan, . 8. Omprakash Berlia and another v. Unit Trust of India and others, . 9. Kanwarani Madha Vati v. Raghunath Singh, . 10. . 11. Ramdeo v. Dulari Devi, . 12. Junilal v. Mt. Halki, A.I.R. 1924 Nagpur 387. 13. A.I.R. 1950 Mad. 1156. On behalf of the respondents-plaintiffs, Mrs. Deshpande, learned Counsel, has cited the following authorities:- 1. A.I.R. 1990 Privy Council 70.(sic) 2. K.C. Kapoor v. Smt. Radhika Devi, 3. Kumbhan Lakshmanma and others v. Tangirala Venkateswaralu and others, . 4. Subbarama Aiyar v. A.P.T. Veerbadra Pillai,

A.I.R. 1921 Madras 464. 5. Ode Ram v. Chhida Singh . 8. Before I deal with the aforesaid authorities, it would be necessary to point out some infirmities in the trial before the trial Court. 9. Though the suit was filed for declaration and possession of the suit property, the document in question viz., the alleged sale deed executed by deceased Ambika Pandey in favour of defendant Nos. 1 and 2 on 17th April, 1985, has not been produced in Court at the time of trial. It is the case of the plaintiffs that the alleged document is a forged one & fraud has been committed by the defendants in getting the said document executed by deceased Ambika Pandey. It is the specific defence of the defendants made out in the written statement that deceased Ambika Pandey did execute a registered sale deed in favour of defendant Nos. 1 and 2 on 17th April, 1985 and they have made an averment in the written statement that they rely on the deed of conveyance. In the list of documents, the defendants have also mentioned the same. The defendants have not produced the original deed of conveyance. However, a typed copy of the said alleged document has been produced by the plaintiffs & that has been marked as Exhibit 'B'. P.W. 1 Gomatiprasad Chandrikaprasad Pandey, the constituted Power of Attorney holder of plaintiff No. 1, has stated in his deposition thus:- "Defendant No. 1 prevented the stay of plaintiff No. 1 at Ghatkopar flour mill as he claimed that he has got a registered document in his favour converting the flour mill in his favour from Ambika Pandey, Plaintiff No. 1 lodged a police complaint at Sakinaka Police Station. Plaintiff No. 1 returned to my residence after she was not allowed to reside in the flour mill at Ghatkopar by defendant No. 1. A legal notice was sent thereafter. Thereafter the suit is filed." Further, it has been deposed by the witness thus:- "Nobody knows, including me, about the alleged registered conveyance of Ghatkopar flour mill as is claimed by defendant No. 1 I was not shown any document of the nature of a conveyance. The said flour mill at Ghatkopar is being managed till today by defendant No. 1. Plaintiff No. 1 is aged 75 years and she is not able to move about on account of old age and frequent ill health. No Will is left by Ambika Pandey." In the beginning, the witness has deposed thus :- "Ambika Pandey used to only know how to sign. Defendant No. 3 was a matriculate. The account was joint as Ambika Pandey used to take help from Kalika to run the account. Ambika Pandey took four flour mills. First was Ambika Pandey Flour Mills, Asalpha Village, Ghatkopar. For the said mill he obtained an open plot of land. He constructed the premises for the mill and obtained licences therefor. The documents relating to the said flour mill at Asalpha Village stood in the name of Ambika Pandey, that includes receipt. The business of that flour mill was commenced in 1967 itself. He continued to work in Kamala Mill. The business of the flour mill was being looked after by defendant No. 3. The collections were handed over by Kalika to Ambika Pandey. The second flour mill is in the name of defendant No. 4 at Borivli. The third is taken in the name of Rampher Krishnanand also at Borivli. The fourth was taken at Borivli in my name. All the collections of other three mills was collected by Ambika Pandey. The reasons for taking the flour mills in various names was on account of the fact that all the earnings were handed over to Ambika Pandey and therefore he took diverse flour mills in the names of the family members. All the

outgoings of all the flour mills was being looked after by defendant No. 3.” The witness has further deposed thus :- “All the earnings of all the flour mills were received by defendant No. 3 after Ambika Pandey left Bombay and during his illness.” He has further deposed that the plaintiffs have filled a suit, being Suit No. 7124 of 1987, against defendant No. 3 for recovery of Rs. 40,000/- and that suit resulted into passing of a decree. In his evidence, there is no reference regarding the alleged deed of conveyance. In his cross-examination also nothing has been brought contrary to the averments made in the plaint. 10. It is pertinent to note that defendant Nos. 1 and 2, in whose favour the alleged deed of conveyance has been executed by deceased Ambika Pandey, have not stepped into the witness box. However, on behalf of the defendants, defendant No. 3 Kalikaprasad Ramnihor Pandey stepped into the witness box & deposed thus:- “During his illness his treatment was met by sale of Ghatkopar flour mill. The amount of Rs. 10,000/- was the total consideration which was received by him at his native place, which was paid to him by father of defendant No. 1. Ambika Pandey told me personally that he has received Rs. 10,000/- and sold the flour mill to defendant Nos. 1 and 2. At Bombay treatment of Ambika Pandey was at Ghatkopar Hindu Mahasabha. I got him admitted there. He received a sum of Rs. 20,000/- on the date of registration of agreement between Ambika Pandey and defendant Nos. 1 and 2. I was present at the time of payment of Rs. 20,000/- by cash. The document was lodged for registration on 17-4-1985. The document was prepared by Advocate R.D. Mishra. The instructions were given by Ambika Pandey to prepare such document. He was permitted by the Hospital to go to the Sub-Registrar at Bombay by taking permission from the hospital authority. The persons present at the time of registration were Ambika, defendant No. 2, myself and mother of defendant No. 1. The document was signed by Ambika in my presence.” Further, D.W. 1 has deposed thus:- “.....It is not true that the document was never signed by Ambika Pandey and he did not come for registration thereof. It is not true that Ambika Pandey was not paid the consideration for the flour mill. It is not true that around 17-4-1985 the said Ambika Pandey was mentally deranged.” Witness volunteers that he was in perfect state of mind. Despite his illness, he was able to know as to what is happening in the surrounding and could understand everything. “.....It is not true that the said flour mill at Ghatkopar Asalpha Village was not conveyed to defendant Nos. 1 and 2.” D.W. 1 has further deposed thus:- “We obtained leave from the hospital on 17-4-1985 at about 9.00 a.m. to bring Ambika to the registry office. He was permitted to leave only for that day. He was brought by a local train to V.T. I have no document to show that Ambika was permitted to leave from the hospital on 17-4-1985. From V.T. he was taken by taxi to old Custom House. I do not have the case-paper of Ambika which would show the disease’s treatment, the date of leave, date of admission and discharge and date of death. I paid at Hindu Mahasabha a sum of Rs. 500/- towards the treatment and hospitalisation charges of Ambika. I do not have receipt thereof. Although I got him admitted and obtained his death body, I do not have any case-papers with me. It is not true that my statement about the admission by me is false as I never got him admitted to Ghatkopar

Hindu Mahasabha and I did not obtain his body.” This witness (D.W. 1) has been confronted with the written statement wherein it has been stated thus:- “.....The defendants submit that the first plaintiff had full and absolute knowledge of the suit property having been sold to defendant Nos. 1 and 2 as she personally accompanied deceased Ambika Pandey at the time of execution and registration of the document by deceased Ambika Pandey in favour of defendant Nos. 1 and 2 and the total amount of consideration was received and kept by her.” The witness has stated thus:- “The statement is not correct but the statement made by me from the witness box relating to 17-4-1985, the document and the consideration and execution thereof before Sub-Registrar is correct. I cannot explain the contents recorded above as it is produced from the written statement.” In the last paragraph of his deposition, the witness (D.W. 1) has stated thus:- “.....It is not true that my statement that Ambika was taken away from the Hospital after obtaining leave from the Hospital authorities on 17-4-1985 for execution of the document is false. It is not true that the sale deed in the name of defendant No. 1 as well as defendant No. 2 through his mother at that time is a bogus document. It is not true that the statement that payment of Rs. 30,000/- was effected to Ambika is also false. It is also not true that I desired to grab the suit Chakki as Ambika had no male issues, the wife was illiterate and the daughters had already got married.” 11. This is all the evidence on record. Now, the Court has been called upon to decide the question:- Can reliance be placed on such evidence and can it be held that the plaintiffs have proved their case & can a decree be passed on the basis of such evidence? 12. Mr. Navin Parekh, learned Counsel for the appellants-defendants, has submitted that the plaintiffs have failed to prove the allegation in the plaint regarding fraud and forgery. It has been vehemently submitted that P.W. 1 Gomatiprasad Pandey has no personal knowledge regarding the execution of the deed of conveyance. Whatever evidence that is recorded by the Court of this witness is hearsay evidence. In the absence of any corroborative evidence, no decree could be passed. It has been submitted by Mr. Parekh that the burden of proof is absolutely upon the plaintiffs to prove the plea and allegation in the plaint. The learned Counsel has further submitted that the plaintiffs cannot succeed on account of the lacunae in the evidence of the defendants. The learned Counsel has further submitted that the deed of conveyance was within the knowledge of the plaintiffs as pleaded in the plaint which they failed to bring on record and in the absence of the document in question, the burden of proof of fraud and forgery cannot be held discharged by the plaintiffs. In support of his aforesaid submissions, the learned Counsel has relied on a ruling in *Lalita James v. Ajit Kumar*, wherein it has been held thus:- “It is well settled rule of law that burden of proving his case to obtain a decree from the Court is always on the plaintiff who must adduce reliable and admissible evidence for the said purpose. Section 102 of the Evidence Act contains the broad rule in this behalf and, therefore, provides the legal guidelines in the matter. As a necessary corollary to the aforesaid rule is the rule that the plaintiff must succeed on the strength of his own title and not be sustained by any weakness in the case of defendant.....In the claims based on

title, the plaintiff who makes such a claim has to prove his subsisting title. This rule is very particularly applied in those cases where the defendant is found to be in possession of the suit property. In *M.M.B. Catholicos v. T. Paulo Avira* A.I.R. 1959 S.C. 31, it was emphasised that it is the strength of the plaintiff's title and not the absence of title in the defendant that matters in a suit for possession. Since this is the suit by purchasers of the property for possession and is contested by the appellants who are admittedly in possession, the onus is on the respondents-plaintiffs to prove that their vendor had the necessary title. The aforesaid ruling though of general application will have to be particularly applied in the instant case as the properties remained joint in the absence of partition between Mrs. Dayabai Lakshmanan and Mrs. Grace Pritabai Morris or their successors-in-interest." Further, in the case of *Bharat Dharma Syndicate v. Harish Chandra*, , it has been observed thus:- "Where a litigant prefers the charges of fraud or other improper conduct against the other party, the tribunal, which is called upon to decide such issues, should compel that litigant to place on record precise and specific details of these charges. Cases of such type will be much simplified if this practice is strictly observed and insisted upon by the Court, even if no objection is taken on behalf of the parties who are interested in disproving the accusations." 13. Mr. Parekh, learned Counsel for the appellants, has relied on another ruling in *Om Prakash Berlia & another v. Unit Trust of India and others*, , wherein it has been observed thus:- "The act requires, first, the production of the original document. If the original document is not available, secondary evidence may be given. This is to prove what the document states. Upon this the document becomes admissible, except where it is signed or handwritten, wholly or in part. In such a case the second requirement is, under section 67, that the signature and handwriting must be proved." In a ruling in *Mostt. Rajwati Devi and another v. The Joint Director, Consolidation, Govt. of Bihar, Patna, and others*, , it has been held thus:- "..... It is now a well settled principle of law that the documents upon which reliance is sought to be placed must be brought on records of the case legally. It is also well settled that documents do not prove themselves. As no witness was examined on behalf of the respondent No. 3 for proving the aforementioned documents, there is absolutely no doubt that there has been a procedural infirmity committed by the respondent in passing the impugned order." 14. In the instant case, admittedly the original alleged deed of conveyance has not been produced in the Court by the parties & the allegation regarding commission of fraud or forgery by the defendants made in the plaint has not been supported by the oral evidence of P.W. 1. These are the infirmities in this case. 15. Before I deal with the arguments of Mr. Parekh, the findings of the learned Judge requires to be looked into & to be considered. As many as eight issues were framed by the learned Judge. Answers to Issue Nos. 4 and 5 are important. The said issues along with the answers are as under :- Issue No. 4: Whether the plaintiffs prove that the document on 17-4-1985 is invalid, illegal and, therefore, should be declared as null and void? Answered in the affirmative. Issue No. 5: Whether the defendants 1 to 5 prove that the said document of 17-4-1985 was validly executed by a competent person & was for valuable consideration & is,

therefore, not illegal, invalid and liable to be quashed and set aside? Answered in the negative. 16. In paragraph 18 of his judgment, the learned Judge has observed thus:- “The case that was sought to be made out by the plaintiffs was with regard to the ownership, possession, use, occupation of the suit Flour Mill and the aspect of possession, ownership, use, occupation and possession were not denied by the defendants. If the ownership of the premises in question with the business thereof was substantiated by the evidence on the part of the plaintiffs and admission on the part of the defendants that the property did belong to Ambika Prasad Krishnanand Pandey, then in those circumstances, the only dispute is whether the document was reportedly executed and whether there is a proper consideration paid therefor. In so far as the document is concerned, the execution and the registration thereof is a matter of serious dispute. The plaintiffs claim that the document could not have been executed by the said deceased Ambika Pandey on 17-4-85 for the simple reason that he was hospitalised between 16-4-85 and 23-4-85. The aspects of hospitalisation are not disputed, what is sought to be made out by the defendants 1 to 5 is that on 17-4-85, the said Ambika Pandey took leave from Ghatkopar Hindu Mahasabha Hospital and was accompanied by the defendant No. 1, mother of defendant No. 2, defendant No. 3 from Ghatkopar to V.T. in a Train and from V.T. to the Old Custom House, Sub/Registrar’s Office in a taxi and that the document was admitted to have been executed before the Officer concerned whereat, the balance consideration of Rs. 20,000/- was paid by defendant No. 1 to the said deceased Ambika Pandey. In so far as the aspects of permission being granted by the Hospital Authorities for leaving the Hospital Premises and attending the Sub-Registrar’s Office at Old Custom House, the claim that is sought to be made by the defendants is based on document Exh. E. The document Exh. ‘E’ is of a doubtful nature and character. If the document cannot be believed, it was reasonable for the defendants to get the said aspect proved from the records of the hospital by either production of the records of the hospital or by examining any such person who had authorised Ambika Pandey to leave the premises of the hospital. As that has not been done, the contention of the defendants that Ambika Pandey visited the Sub/Registrar’s Office at Old Customs House for the purpose of execution and admission of the document on 17-4-85 is therefore not believable. Apart from this, the fact that the consideration is paid in cash is also not substantiated. If the basic aspects of the execution and admission and consideration are ill-founded and are not substantiated, the entire aspect of execution of a document on 17-4-85 is therefore not acceptable to the Court. If these aspects are not believable and are not acceptable to the Court, a question would arise as to how and in what circumstances, the said document came to be executed. If one goes by the evidence on record, it is clear that at times defendant No. 3 signed as Ambika Prasad Krishnanand Pandey or Ambika Krishnanand Pandey, as has been admitted by him to have been signed at Exh. D collectively, if he could sign on such a form impersonating as Ambika Krishnanand Pandey, there is nothing to prevent the Court from inferring that he would have personally signed impersonating as Ambika Prasad Krishnanand Pandey. There is no provision in the Professional Tax Rules of the person whose

name appearing on the Notices must necessarily sign in person paying and sign his own personal name. The reasons for signing on those form by defendant No. 3 as if it is signed by Ambika Prasad Krishnanand Pandey would be an aspect against defendant No. 3, and therefore, the Court is forced to infer that the document dated 17-4-85 must have been signed by defendant No. 3 impersonating as Ambika Prasad Krishnanand Pandey. In these circumstances, the entire tenure of the document, the nature of its execution, the time of its execution, the admission therefore before the Sub-Registrar of Assurances at Bombay, Old Custom House is all of a dubious character. The document, its execution, the consideration and all aspects relating thereto are therefore not believable. If all these aspects are not believable, the case that is sought to be made out by the plaintiffs that the document is a bogus, invalid and improper document must be believed. Consequently, the case of the defendants 1 to 5 or any person claiming through them that the document dated 17-4-85 is properly executed cannot be believed and must be totally discarded. The legal defence which are sought to be trotted out by the learned Counsel for defendants 1 to 5 that the document is not sought to be declared as invalid is of no legal consequence. The entire tenor of the plaint is that the document dated 17-4-85 is a bogus document, much be construed to be considered as a prayer for the purpose of granting the reliefs and the Hon'ble Supreme Court has come to the conclusion that the entire plaint must be taken into consideration while granting the reliefs and the reliefs if not suitably worded can certainly be modified by the Court. The Court has now come to a firm conclusion that the validity, tenacity and the execution and consideration relating to document dated 17-4-85 is beyond doubt and in these circumstance, the case that is sought to be made out by the plaintiffs must be believed and the case of the defendants or any person claiming through them therefore be discarded." I am in full agreement with the findings of the learned Judge. 17. So far as the question of burden of proof as raised by the learned Counsel Mr. Parekh viz., that the plaintiff must first prove the fact of fraud and forgery by producing documents in the Court and in the absence of any such document, it cannot be held that the allegation in the plaint is held proved. Section 101 of the Evidence Act reads thus:- "Burden of proof, - 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." 18. In the instant case, the plaintiffs have come with a case that the suit property Ambika Flour Mill was owned by deceased Ambika Pandey & it was in his exclusive possession and occupation. After the death of Ambika Pandey, defendant Nos. 1 to 3 did not allow the plaintiffs to enter into the suit premises and gave threats to throw her out forcibly. A criminal complaint to that effect was also filed and plaintiff No. 1 came to know at Police Station that the suit flour mill had been purchased by defendant Nos. 1 and 2 from deceased Ambika Pandey by executing a deed of conveyance in favour of defendant Nos. 1 and 2. It is the case of the plaintiffs that they tried to find out the truth by going to the Sub-Registrar's office and seeking inspection of the document. From there they came to know that though the deed of conveyance was registered at the Sub-Registrar's Office, the signature appearing thereon of deceased Ambika Pandey

was found to be forged as deceased Ambika Pandey was illiterate and was able to sign only and they, therefore, felt that it was not the signature of deceased Ambika Pandey and the said document has been created by the defendants with a view to grab the property of deceased Ambika Pandey. Under this impression and apprehension, they filed the instant suit and sought a declaration that the said document alleged to have been executed is illegal and invalid and fraud and forgery has been committed by the defendants. Further, the defendants have filed their written statement and it has been categorically stated that deceased Ambika Pandey has executed a deed of conveyance on 17-4-1985 for a consideration of Rs. 20,000/- and the said amount of Rs. 20,000/- was paid at the office of the Sub-Registrar to deceased Ambika Pandey. It is also categorically stated that leave was obtained from hospital for taking deceased Ambika Pandey to the Sub-Registrar's Office at Old Customs House. Defendant No. 3 has deposed before the Court that though he was present at the time of signing the document, he has not witnessed the said document. It reveals from the record that defendant No. 3 was a man of confidence of deceased Ambika Pandey and deceased Ambika Pandey was treating him as his son. Not only that, the Bank Account was also opened in their joint names. Despite this, defendant No. 3 did not sign the document as a witness. At one stage he says that he was present at the time of execution of the deed of conveyance at the Office of the Sub-Registrar, but at the same time he says that he did not sign as a witness to the said document. He has gone to the extent of saying that deceased Ambika Pandey had signed in his presence. He has further deposed that he himself managed to bring Ambika Pandey to the office of the Sub-Registrar from the hospital after obtaining permission from the hospital authorities. In his oral evidence he has deposed that as Ambika Pandey was in need of money because of medical expenses, he had sold the suit flour mill to the defendants. In his cross-examination, when confronted with the statement in the written statement that plaintiff No. 1, the widow of deceased Ambika Pandey, was present at the Sub-Registrar's Office and Rs. 20,000/- were paid to Ambika Pandey in her presence, the witness has admitted that plaintiff No. 1 was not present in the Office of Sub-Registrar. These are the infirmities in the evidence of this witness. 19. In view of the aforesaid oral evidence of P.W. 1 and D.W. 1 & the infirmities in his oral evidence, the question is as to whom the burden of proof rests under the above facts and circumstances? In the ruling in (Kumbhan Lakshman and others v. Tangirala Venkateswaralu and others, reported in 1949 Privy Council 278, it has been observed thus:- "What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as 'shifting'. The burden of proof on the pleadings never shifts, it always remains constant. These two aspects of the burden of proof are embodied in sections 101 and 102 respectively of the Indian Evidence Act. This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back

again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background.” 20. In another ruling in Ponnalagu Konan and others v. Sinniah Odayan & others, reported in A.I.R. 1921 Madras 462, it has been observed thus:- “Burden of proof is however often of a shifting character and may change from one party to the other as facts are proved which render the case of one party more probable than that of the other.” In another ruling in Baliram v. Kumalja, reported in A.I.R. 1924 Nagpur 367, it has been observed thus:- “.....It is not always necessary that the party who has the burden must himself lead evidence. It is open to him to sustain the onus cast upon him by the facts which he may elicit by cross-examination of the other party’s witnesses.” 21. In the instant case, it is an admitted fact that the title of the plaintiffs is not disputed. It is an admitted fact that deceased Ambika Pandey had acquired the suit property i.e. Ambika Flour Mill and it was running in his name. The Municipal licence & permission was in his name. After the death of Ambika Pandey, his heirs ought to have owned that property under the Hindu Succession Act. Therefore, it is construed that the burden of proving the right and title is vested in the original owner of the property is not disputed by the defendants. Thus the burden of proof under section 101 of the Evidence Act is proved to be discharged by the plaintiffs. Now, the question is as to whether the property, which admittedly was owned by deceased Ambika Pandey had been transferred during his life time under the deed of conveyance in favour of defendant Nos. 1 & 2 & they acquired the property under the Transfer of Property Act? It is also alleged that the consideration for the transfer of the suit property has also been paid. Therefore, the question is as to who is required to discharge this burden of proof? Whether the transfer of property was validly done under the deed of conveyance? 22. As regards section 101 of Law of Evidence, it is well settled law that the burden of proof is cast upon the party who claims the right over the suit property. In the instant case, admittedly, the suit property was of the ownership of deceased Ambika Pandey. Therefore, the burden of proof is presumed to be discharged by the plaintiffs. Now, the onus is shifted upon the defendants to prove that the suit property was validly purchased by them by executing the deed of conveyance. The deed of conveyance is not brought on record by either party. In the plaint, it is alleged by the plaintiffs that the alleged deed of conveyance is a forged document. Mr. Parekh learned Counsel for the appellants-defendants, has submitted that since the document in question is not brought on record and the allegation of fraud and forgery has not been proved, the burden of proof is not discharged by the plaintiffs and, therefore, the suit must fail. It is not possible to agree with the submission of the learned Counsel that the plaintiffs have failed to discharge their burden regarding allegation of fraud and forgery. It is an admitted fact that the deed of conveyance is not brought on record by either party but it is pleaded in the plaint that the

alleged document of deed of conveyance is a fraudulent document and forgery has been committed. The question, therefore, is as to whether the allegation of fraud and forgery is to be proved by direct evidence or by circumstantial evidence? Following the view taken in the ruling reported in A.I.R. 1924 Nagpur 367 supra, it is to be noted here that in the instant case, P.W. 1 has been examined on behalf of the plaintiffs as the constituted power of attorney of plaintiff No. 1. Plaintiff No. 1, the widow of Ambika Pandey, is admittedly an illiterate lady. Further, the power of attorney holder (P.W. 1) has no personal knowledge regarding the transaction which took place between Ambika Pandey and the defendants. In this connection, it is necessary to consider the view taken in the ruling in Ramdeo v. Dulari Devi, wherein it has been observed thus:- Head note 'B' : "Evidence Act (1 of 1872) sections 67, 16, 101 - Execution of document - Onus to prove - Protection available to pardananashin lady is equally available to illiterate person Agreement to sale executed by illiterate person Burden to prove its execution is on person in whose favour it is executed." 23. In the examination-in-chief and in the cross-examination of D.W. 1 i.e. defendant No. 3, he has stated that he was the confident nephew of deceased Ambika Pandey and had a joint family account with the said deceased and he was looking after all the affairs. He has admitted that a piece of land in survey No. was purchased by deceased Ambika Pandey and he constructed a flour mill which was named as Ambika Flour Mill. He has also fairly stated in his oral evidence that deceased Ambika Pandey had three brothers and the sons of his elder brother were staying with him as one family. Deceased Ambika Pandey purchased four flour mills in the individual names of his two brothers, nephew and himself with a view to avoid any dispute or confusion regarding the family property. The suit flour mill admittedly was run in the name of deceased Ambika Pandey. He has also admitted that after the retirement of deceased Ambika Pandey, he had fallen sick at native place and was brought to Bombay for treatment. He has stated that deceased Ambika was admitted in Hindu Mahasabha Hospital on 8-4-1985 as an indoor patient and he remained there as such till 23-4-1985. It emerges from the record that his physical condition was so deteriorating as he was suffering from paralysis, was not able to move on his own and not even able to speak. It is the specific defence of the appellants-defendants that deceased Ambika Pandey took leave from the hospital on 17-4-1985 and he was taken to the Office of the Sub-Registrar. D.W. 1 deposed that Rs. 20,000/- were paid to him at the Office of Sub-Registrar & the said amount was kept by him. He further deposed that deceased Ambika Pandey was in need of money because of medical expenses. He further deposed that Ambika Pandey, told him that he had sol Ambika Flour Mill to defendant Nos. 1 and 2 and that Rs. 10,000/- was paid to him at the native place as a part consideration towards the sale of the said flour mill but no documentary evidence has been produced by the defendant in support of this statement. 24. Therefore, the question is as to whether deceased Ambika Pandey was in need of money for his medical treatment? And had he left the hospital for going to the office of the Sub-Registrar on 17-4-85? 25. It emerges from the record of evidence that the deceased Ambika Pandey was financially better off; P.W. 1 has categorically stated that deceased Ambika

Pandey was not in need of money for his medical treatment, he was physically paralysed and was admitted in Hindu Mahasabha Hospital on 8-4-1985 and was discharged on 23-4-1985. He was not in a position to walk or speak during that period. Mr. Parekh, learned Counsel for the appellant-defendants, has vehemently submitted that the evidence of P.W. 1 is hearsay evidence cannot be accepted as a conclusive evidence. One more infirmity in the evidence of D.W. 3 is that D.W. 3 is one of defendants who have signed the written statement and in the written statement there is a specific averment made by the defendants that Rs. 10,000/- were paid to deceased Ambika Pandey at his native place and Rs. 20,000/- were paid to deceased Ambika Pandey in the office of the Sub-Registrar and at that time plaintiff No. 1, the widow of Ambika Pandey, was present and Rs. 20,000/- were kept with her. In the oral evidence, defendant No. 3 has stated that except deceased Ambika Pandey, nobody was present and Rs. 20,000/- were paid to deceased Ambika Pandey which he had kept with him. Further, he has stated that though he was present at the Sub-Registrar's Office, he did not sign as a witness to the deed of conveyance. Therefore, I am not impressed by his oral evidence. It is a well settled principle of law that the burden of proof is cast upon the party who claims that in whose favour the document has been executed by the other side. Now, the defendants along with their written statement had given a list of documents stating that they rely on the said documentary evidence and in the said list of documents, the deed of conveyance alleged to have been executed by deceased Ambika Pandey in favour of the defendants 1 and 2 on 17-4-1985 is the first document which they relied. However, they did not produce the same in the Court. Under these circumstances, the burden of proving the document is upon the defendants and not upon the plaintiffs. Therefore, the argument of Mr. Parekh, the learned Counsel for the appellants-defendants, is not sustainable. In A.I.R. 1949 Privy Council 278, it has been observed thus:- "Head note 'B' : Burden of proof on pleadings never shifts- Initial burden to prove prima facie case is on plaintiff, defendant to adduce rebutting evidence - After entire evidence Tribunal not in a position to decide which version is true - Tribunal to hold that party on whom burden lay did not discharge it - Otherwise burden recedes into background." 26. In the instant case, it is the defence that the suit property Ambika Flour Mill had been purchased by defendant Nos. 1 and 2 from deceased Ambika Pandey by executing a deed of conveyance. It is the case of the plaintiffs that the said deed of conveyance is not a genuine and valid document as deceased Ambika Pandey was not physically fit to move from the hospital and had not signed the alleged deed of conveyance. The defendants ought to have proved the document by adducing necessary evidence from the Office of the Sub-Registrar to the effect that deceased Ambika Pandey had come to the office of Sub-Registrar on 17-4-1985 and signed the deed of conveyance in the presence of the Sub-Registrar in favour of defendant Nos. 1 and 2. In my opinion, the defendants have failed to discharge their burden. As against this, the plaintiffs have successfully proved their case as regards the ownership of the suit Flour Mill, by direct evidence as well as by circumstantial evidence. The circumstances of the case falsifies the defence story that deceased Ambika Pandey was in need of money, leave was

taken from the hospital authority, he was taken to the Office of Sub-Registrar by defendant No. 3, there Rs. 20,000/ were paid to him & the said amount was kept by deceased Ambika Pandey with himself. It is open to the Court to draw an adverse inference against the defendants as they have failed to produce in the Court the deed of conveyance which is admittedly in their favour & which they have relied on in their written statement. In the result, the appeal fails and the same is dismissed with costs. On oral request of Mr. Parekh, learned Counsel for the appellants, the operation of the order is stayed for six weeks from the date of signing of this order.