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IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Reserved on : 26.10.2018

Pronounced on : 22.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.987 of 2000

1. Rama Gounder
2. Vellaiya Gounder ..
Appellants/Defendants

versus

1. Solai Ammal
2. Lakshmi
3. Solai Ammal
4. Kandan
5. Kuppayee
6. Ponnuraman
7. Parvathi ..Respondents
(Respondents 3 to 7 impleaded as Legal
representatives of deceased Govinda Gounder in AS.NO.56/95)

Prayer : Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree of the III Additional District Judge, Salem, passed in A.S.No.56 of 1995 dated 28.04.1999, confirming the judgment and decree of the Principal District Munsif, Salem, passed in O.S.No.99 of 1989 dated 14.09.1994.

For Appellant	: Mr.J.Saravanel
For R1, R3 to R7	: Mr.P. Jagadeesan
For R2	: set exparte

JUDGMENT

This second appeal has been filed by the defendants 1 and 2 against the judgment and decree passed by the III Additional District Judge, Salem in A.S.No.56 of 1995 dated 28.04.1999 confirming the judgment and decree passed by the Principal District Munsif, Salem, in O.S.No.99 of 1989 dated 14.09.1994.

2. The first respondent and her husband Govinda Gounder had filed a suit in O.S.No.99 of 1989 on the file of the Principal District Munsif, Salem, to restrain the defendants by means of permanent injunction from interfering with their peaceful possession and enjoyment of the suit property. The defendants filed a written statement along with the counter claim to declare that they are the owners of the suit property and to grant permanent



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injunction restraining the plaintiffs from interfering with their peaceful possession and enjoyment of the suit property. The learned Principal District Munsif by the Judgment dated 14.09.1994 decreed the suit as prayed for, however, he dismissed the counter claim. Aggrieved by the same, the defendants 1 and 2 filed an appeal in A.S.No.56 of 1995 on the file of the III Additional District Judge, Salem. They also filed applications in I.A.Nos.31 and 32 of 1996 under Order 41 Rule 27 of C.P.C., to receive additional documentary evidence. Likewise, the respondents/plaintiffs also filed an application in I.A.No.223 of 1998 to produce certain documents as additional evidence. The learned III Additional District Judge, Salem, by the judgment and decree and orders dated 28.04.1999 had dismissed the said appeal and also dismissed I.A.Nos.31 and 32 of 1996 and 323 of 1998 and thereby confirmed the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendants 1 and 2 have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the plaint are, in brief, as follows:

The suit property originally belonged to the second plaintiff. He has been in possession and enjoyment of the said property for more than 35 years. Patta has been transferred in his name and he has been paying kist to the Government. He is also owning lands adjacently. He has a land in survey No.6/3. By virtue of the settlement deed dated 06.06.1998, the second plaintiff has settled the suit property in favour of the first plaintiff, who is the wife of the second plaintiff. Since the date of settlement, the first plaintiff is in possession and enjoyment of the suit property. The defendants have nothing to do with the suit property. The plaintiffs were shocked to receive the lawyer's notice dated 22.01.1989, which was sent on behalf of the defendants claiming possession of the suit property. The plaintiffs have sent a reply notice on 29.01.1989 stating all the facts. The nearby land owners wanted the second plaintiff to sell the suit property in their favour in order to convert it into a road. Plaintiffs refused the same. Enraged by the same, the nearby land owners instigated the defendants to claim right over the suit property and accordingly, the defendants issued notice. Further, on 04.02.1989, the defendants attempted to trespass into the suit property. Hence, the plaintiffs are constrained to file a suit for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property.



5. The averments made in the written statement filed by the second defendant and adopted by the defendants 1, 3 and 4 are in brief as follows:

It is false to state that the suit property originally belonged to the second plaintiff and he has been in possession and enjoyment of the same for more than 30 years. The fact that the second plaintiff is an adjoining owner does not matter in this case to show that he is in possession of the suit property. It is false to state that the patta stands in his name. The suit property is originally a poramboke land. Hence, there cannot be a transfer of patta in favour of the second plaintiff. The second plaintiff had no title, interest or possession to execute a settlement deed in favour of the first plaintiff. Hence the settlement deed dated 06.06.1998 is void in law. The suit property is in the possession and enjoyment of the defendants. They have inherited the same from their father Perumal Gounder. Hence, there is no necessity for them to interfere with the possession because it is already in their possession. The allegation that the neighbouring land owners made a request for converting the suit property as a road, is false. In the year 1948, the father of the defendants 1 to 3 and husband of the fourth defendant viz., Perumal Gounder had purchased 1 acre 97 cents in S.No.6/1 from one Vellayan Gounder under the document No.3232/1948. At that time, there was no proper road on the west of S.No.6/1. Hence, a portion of the land measuring 18 cents was acquired by the Government for making the road on the western side. Having lost 18 cents, Perumal Gounder approached the revenue authorities and wanted some sort of compensation. The authorities showed the present suit property which was lying vacant and asked him to occupy the same. So about 35 years ago, Perumal Gounder had occupied the suit property in S.No.6/1. Subsequently in the year 1980, Perumal Gounder sold one acre and 79 cents in S.No.6/1, to one Lakshmi Ammal and afterwards, the said Perumal Gounder was enjoying the suit property. He died about six months back and after his death, the defendants are in possession and enjoyment of the same.

b) In fact, after very long effort, the Government had granted patta in favour of the Perumal Gounder in the year 1984. Hence, the plaintiffs have no title or interest in the property. After the death of Perumal Gounder, the plaintiffs created a false settlement deed and attempted to trespass into the suit property and hence the defendants filed a caveat in O.P.No.33 of 1989 and also issued a lawyer's notice to the plaintiffs. After receipt of the said notice, the plaintiffs had filed the above suit for injunction with false averments. Hence it has become necessary for the defendants to declare their title over the suit property and also for permanent injunction



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restraining the plaintiffs from interfering with their peaceful possession and enjoyment of the suit property. To avoid multiplicity of litigation instead of filing a separate suit, the defendants filed counter claim to declare their title and hence the defendants prayed to dismiss the suit and to grant a decree in their favour declaring that they are owners of the suit property and also for permanent injunction restraining the plaintiffs from interfering with their peaceful possession and enjoyment of the suit property.

6. Based on the aforesaid pleadings, the learned Principal District Munsif, Salem, framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the second plaintiff examined himself as PW1. Further they have examined 3 more witnesses as PW2 to PW4 and they have marked Exs.A1 to A23 as exhibits. On the side of the defendants, the second defendant was examined as DW1 and they also examined one more witness as DW2. They have marked Exs.B1 to B8 as exhibits. The Advocate Commissioner's report and plan have been marked as Exs.C1 & C2 respectively.

7. The learned Principal District Munsif, Salem, after considering the materials placed before him, found that the plaintiffs are in possession and enjoyment of the suit property, but the defendants are not in possession and enjoyment of the suit property. Accordingly, he decreed the suit as prayed for and dismissed the counter claim. Aggrieved by the same, the defendants 1 and 2 filed an appeal in A.S.No.56 of 1995 on the file of the III Additional District Judge, Salem. They also filed applications in I.A.Nos.31 & 32 of 1996 under Order 41 Rule 27 CPC to receive certain documents as additional documentary evidence. The respondents also filed an application in I.A.No.223 of 1998 under Order 41 Rule 17 to receive certain documents as additional documentary evidence. The learned IIII Additional District Judge, Salem, had dismissed the said appeal and also the aforesaid applications and thereby confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the defendants 1 and 2 have filed the present second appeal.

8. This court at the time of admitting the second appeal had formulated the following substantial questions of law:

"1. Whether the lower courts are justified in granting the equitable relief of injunction in view of the specific finding that the document's evidencing possession were found to be tampered with?

2. Have the lower Courts committed any error in dismissing the counter claim of the



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appellants on a perverse finding relating to title and in the absence of a reply under Order 8 Rule 6E of the Code of Civil Procedure?

3. Whether the lower appellate court is justified, considering the circumstances of the case, in dismissing the petitions filed by the appellants for letting in additional evidences by summoning the appearance of Tahsildar and production of original revenue records?

4. Whether the lower courts are correct in appreciating the evidence both oral and documentary and the report of the Commissioner, in the absence of any pleading by the respondents therefor?"

9. Heard Mr.J.Saravanavel, learned counsel for the appellants and Mr.P.Jagadeesan, learned counsel for the respondents 1, 3 to 7.

10. Substantial Questions of law 1 to 4:

The learned counsel for the appellants has submitted that the courts below erred in granting relief of permanent injunction without appreciating the evidence in a proper perspective. He further submitted that the first appellate court having held that the suit property continues to remain as poramboke land and that the plaintiff had no cause of action to claim title, ought to have declined the relief of injunction. He further submitted that the first appellate court actually found that Ex.A3 patta has been tampered with and that the entry relating to S.No.6/2 had been found to be inserted, it ought to have held that the respondents have failed to prove the possession. He further submitted that in the absence of any materials in proof of possession, the courts below ought not to have granted the relief of injunction on assumptions. He further submitted that in the absence of any specific pleading by the plaintiffs with regard to the cultivation being done in the suit property, the irrigation through pipelines, burial of dead persons in the suit property and other physical features of the suit property any quantum of oral and documentary evidence as well as the report of the Commissioner is of no use and the courts below ought to have ignored the same. He further submitted that the courts below, failed to appreciate the fact in respect of the counter claim for declaration of title and consequentially, injunction Under Order VIII Rule 6A CPC, the respondents did not chose to file a reply as required under Order VIII Rule 6E CPC and therefore, ought to have allowed the claim of the defendants. He further submitted that the first appellate court erred in holding that the defendants failed to prove their title by



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producing separate patta, assignment or 'D' Card when on the contrary, the defendants had produced patta filed as Ex.B2 and kist receipts as Exs.B4 and 5 and hence, the said finding is perverse. He further submitted that the first appellate court erred in dismissing the petitions filed by the appellants to let in additional evidence for summoning the original revenue records from the office of Tahsildar and to examine the Tahsildar. He further submitted that the relief of injunction being an equitable relief, the court below ought to have dismissed the suit on the ground that the plaintiffs were guilty of falsification of documents and they did not approach the court with clean hands. He further submitted that when the plaintiffs claim absolute right over the suit property and also possession, the courts below ought to have dismissed the suit on the ground that the plaintiffs have not asked the relief of declaration of title and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit filed by the plaintiffs and decree the counter claim.

11. The learned counsel for the appellants in support of the aforesaid contentions, relied upon the following decisions:

1. Anthony Chellappa Vs. Victoria Ammal 1999 -3-LW-608
2. Rajni Rani and another Vs. Khairati Lal and Others (2015) 2 SCC 682.
3. M/s. Ballabh Dass and another Vs. S.B.B.J and others AIR 1997 SCC Online Raj 4: AIR 1997 Raj 199
4. P.V. Kamesh Kumar Vs. Thoti Muniyappa and others SCC Online Kar 10197: (2013) 2 KCCR 1617: (2013) 2 AIR Kant R. 602: 2013 AIR CC 1637
5. S.P. Chengalvaraya Naidu (Dead) by LRs Vs. Jaganath (dead) by LRs and others (1994) 1 SCC
6. Abubakar Abdul Inamdar (dead) by LRs and others Vs. Harun Abdul Inamdar and others AIR 1996 SC 112.
7. Kammavar Sangam, through its Secretary R.Krishnasamy Vs. Mani Janagarajan 1999- 3 -L.W.727
8. V.G. Loganathan Vs. M. Balakrishnan and another 2000 (1) MLJ 373
9. B.A. Rajan @ Antony Raj Vs. Rajapalayam Bhoopalapatti - Viswabrahma Kulathavarkalin- Uravinmurai Pothunala Fund 1999 A I H C 4271

12. Per contra, the learned counsel for the respondents 1 and 3 to 7 has submitted that the defendants before filing the written statement before the court, have not furnished copy of the same to the plaintiffs and further the trial court also did not call upon the plaintiffs to file a reply to the counter claim and only at the time of trial, the plaintiffs came to know that the defendants have set up counter claim and hence they did not file a reply statement to the counter claim. He further submitted that



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as per Order 8 rule 6E CPC, it is not obligatory for the court to allow the counter claim and it is having discretion to pass order as it thinks fit. He further submitted that the plaintiffs have filed a suit for permanent injunction and they have established that they are in possession of the suit property by adducting oral and documentary evidence. He further submitted that the Advocate Commissioner's report and plan would show that there is no ridge demarcating the suit property from the other lands of the plaintiffs and the crops which were raised in the suit property have been irrigated through pipelines from the well situated in the plaintiffs other lands i.e., in S.No.6/3. He further submitted that the trial court taking into consideration of all the aforesaid facts, came to the conclusion that merely because the plaintiffs failed to file a reply to the counter claim, the court is not bound to allow the counter claim and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere. He further submitted that though the first appellate court observed that Ex.A3 patta was originally granted for S.No.6/3 alone and subsequently S.No.6/2, (suit property) has been inserted, actually no such manipulation has been made by the plaintiffs.

13. He further submitted that admittedly, the defendants' father Perumal Gounder had sold his patta land under Ex.B3 in favour of one Lakshmi Ammal on 11.06.1980 (land situated in S.No.6/1) and thereafter, neither the said Perumal Gounder nor the defendants had any right over the properties which are situated nearer to the land situated in S.No.6/1. He further submitted that the defendants failed to prove that they are having title over the suit property or they are in possession of the same and hence, he prayed to dismiss the second appeal. In support of his contentions, he relied upon the decision in Balraj Taneja and another Vs. Sunil Madan and another, AIR 1999 SC 3381.

14. The suit property is situated in S.No.6/2 of Alagapuum village measuring 0.20.0 hectares = 49 cents within the boundaries; east to itteri west and north of S.No.6/3 and south of Venkatachalam's land. In the counter claim also, the same description given for the property. So it is clear that both the parties are claiming right over the same property.

15. Though the plaintiffs claimed that the suit property is their patta land, to substantiate the same, they have not produced any title deed. They relied upon Ex.A3 patta. The case of the defendants is that the suit property was originally a poramboke land and the Government had taken 18 cents from their patta land which is situated in S.No.6/1 for straightening a road; at that time, their



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father Perumal Gounder made a request with Revenue Authorities to compensate him and accordingly they showed the suit property which is situated in S.No.6/2 to occupy the same and hence the said Perumal Gounder had occupied the suit property in the year 1948 itself and from that date onwards, the said Perumal Gounder was in possession and enjoyment of the same till his life time and after his death, his legal heirs viz., the defendants have been in possession and enjoyment of the same. Their further case is that in the year 1984, the Government gave a patta in favour of Perumal Gounder in respect of the suit property and hence they are having title over the suit property.

16. Since the plaintiffs have not produced any title deed in respect of the suit property and the defendants also have not claimed that the suit property was originally belonged to them, it has to be presumed that the suit property was originally a poramboke land. The first appellate court also found that the suit property is only a poramboke land.

17. If the suit property is the poramboke land, unless it is given by way of assignment, no one can claim title over the said property. In this case, both the parties have not produced any document to show that when and what proceedings the Government had granted patta to them by assigning the suit property in their favour.

18. As already pointed out that the plaintiffs relying upon Ex.A3 claimed that the patta has been granted in favour of the second plaintiff. The defendants relying upon Ex.B2 claiming that patta has been granted for the suit property in favour of Perumal Gounder. Ex.B2 is the chitta extract for the fasli year 1394, in which, it is stated that in S.No.6/1 measuring 0.72.5 hectares and S.No.6/2 measuring 0.20.0 hectares and patta number for the said land is 584 and the same is in the name of Perumal Gounder S/o. Vellayan Gounder. The Gregorian year for the fasli year 1394 is 1984. The said fact has been admitted in the appeal memorandum also.

19. Admittedly, the said Perumal Gounder had purchased 1.97 acres in S.No.6/1 under Ex.B1 sale deed dated 17.08.1948. The said Perumal Gounder had sold 1.79 acres in favour of one Lakshmi Ammal under Ex.B3 dated 11.06.1980. According to the defendants, the remaining 18 cents was taken away by the Government for straightening the road. So, it is clear that what was purchased by the said Perumal Gounder under Ex.B1, was subsequently, disposed of by the said Perumal Gounder himself on 11.06.1980 itself. But in Ex.B2 (chitta) which was issued in the year 1984 contains S.No.6/1 also. So, it is clear that Ex.B2 does not reflect the true facts. Further, even



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according to the defendants, the suit property (S.No.6/2) originally a poramboke land and only under Ex.B2, patta was granted in favour of Perumal Gounder. Since the said land was a poramboke land, unless the said land is assigned by the Government, the defendants cannot claim that a patta has been granted by the Government in favour of Perumal Gounder.

20. The first appellate court has observed in its judgment that in Ex.A3, S.No.6/2 has been inserted. Learned counsel for the respondents contended that the said finding is incorrect. According to him, S.Nos.6/2 and 6/3 were mentioned by the Revenue Authorities even at the time of issuing the said patta. This court is of the view that there is no necessity to go into the question whether in Ex.A3, S.No.6/2 has been inserted or not, because as already pointed out that both the parties have not produced any documentary evidence to show that the Government had assigned the suit property (S.No.6/2) in favour of any of them. Both the parties claimed title based on certain entries made in the Revenue records. The plaintiffs are claiming title on the basis of Ex.A3 patta, whereas the defendants are claiming title based on Ex.B2 chitta. But based on the aforesaid documents, title cannot be declared, unless they produce the proceedings issued by the Government with regard to the assignment of the suit property.

21. It is to be pointed out that in the above suit, the defendants set up a counter claim in the written statement, but the plaintiffs have not filed any written statement to the said counter claim. According to the plaintiffs, the defendants have not furnished copy of the written statement before filing in the court and the trial court also did not call upon them to file written statement to the said counter claim. Even if they had no knowledge about the filing of the counter claim, at the initial stage, at least they should have aware of the said counter claim at the time of trial. But even after coming to know about the counter claim, the plaintiffs have not filed any written statement to the said counter claim.

22. In Anthony Chellappa Vs. Victoria Ammal (cited supra) this court has held that as the plaintiff has not filed any written statement disputing the counter claim and she being the ultimate beneficiary of the improvements made by the defendant to the property, the trial court is correct in decreeing the counter claim.

23. In Rajni Rani and another Vs. Khairati Lal and Others, (cited supra), the Hon'ble Supreme Court has held that the order of dismissal of counter claim amount to decree. Unless it is challenged by way of an appeal, the



order passed in respect of counter claim has become final.

24. In M/s. Ballabh Dass and another Vs. S.B.B.J and others, (cited supra), the High Court of Rajasthan (Jaipur), has held that the objections to the filing of the counter claim under Order VIII Rule 6 must be raised in the reply or written statement to the counter claim by the plaintiff. Further, it was held that if no such reply or written statement is filed and the counter claim is set down for issues or trial, the plaintiff cannot then make the application for striking off the counter claim.

25. In P.V. Kamesh Kumar Vs. Thoti Muniyappa and Others (cited supra), the High Court of Karnataka has held that Order VIII Rule 6E of CPC confers power on the court in case of default by the plaintiff to file a reply to the counter claim to decree the counter claim or pass such order as the court deems fit and proper. It also held that no doubt, the counter claim may not be automatically be decreed or order could be passed, however, the defendant in support of the counter claim has produced the order passed by the Land Tribunal and Appellate Authority to show that he is the owner of the property. Further the record of rights and the documents show that he was in possession. Further, schedule property shown in counter claim is not even claimed by the plaintiff. Under the said circumstances, the High Court of Karnataka has held that having regard to the evidence, it is clear that the defendant is the owner in possession of the schedule property as mentioned in the written statement.

26. In S.P. Chengalvaraya Naidu (dead) by LRs Vs. Jagannath (dead) by LRs and Others (cited supra), the Hon'ble Supreme Court in paragraph No.5 has observed as follows:

"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than



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not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

27. In Abubakar Abdul Inamdar (dead) by LRs and others Vs. S. Harun Abdul Inamdar and others (cited supra), the Hon'ble Supreme Court in paragraph No.5 has observed as follows:

"It is true that some evidence, basically of Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and drawing inference from the evidence produced on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High Court requiring no interference at our end. "

28. In Kammavar Sangam, through its Secretary R.Krishnasamy Vs. Mani Janagarajan (cited supra), this court in paragraph No.24 has held as follows:

24. Once it is found that the plaintiff has no title, the question of granting the relief of the basis of possessory title may not arise since the appellant herein is having better title. As against the true owner or as against the person having better title, a person claiming possessory title cannot get injunction.

29. In V.G.Loganathan Vs. M.Balakrishnan and another, (cited supra), this court has held in paragraph Nos.17 and 18 as follows:

"17. From the facts stated above, it is clear that by suppressing real facts before Court first respondent has obtained an undue advantage by filing collusive suit and forcibly dispossessed third person who was admittedly in possession of the building. I make it clear that I am not concerned about the right of petitioner whether he is licensee or only lessee. I am only pointing out that petitioner



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was in possession/occupation of the building.

18. When first respondent has suppressed material facts before Court and Court was also misled by that misrepresentation or fraud, I feel that it is a fit case to set aside the judgment and also orders in all the interlocutory applications."

30. In B.A.Rajan @ B. Anthony Raj Vs. Rajapalayam Bhoopalapatti - Vishwabramha Kulathavarkalin - Uravinmurai Pothunala Fund, (cited supra), this court in paragraph No.19 has observed as follows:

"19. Even though in a suit for injunction, possession alone is material, and not the character of possession, while granting an equitable relief, the question whether the plaintiff or petitioner herein has come to Court with clean hands will have to be considered by the Civil Court. While considering the same, whether the petitioner herein has brought a false case, is of relevant consideration. For the said purpose, the character of possession is also material. Once the Court holds that the petitioner has come with a false case, the equitable relief is not to be granted even though he may be in possession. Why the Court refused the relief of injunction in spite of the fact that the petitioner is in possession, and also the falsity of the case that he is not a tenant were rightly considered by the Courts below."

31. In Balraj Taneja and another Vs. Sunil Madan and another (cited supra), the Hon'ble Supreme Court in paragraph No.29 has observed as follows:

29. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff





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in the plaint are treated to have been admitted, whether judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. In this case, the defendants claimed title over the suit property based on the entry made in Ex.B2 (Chitta). As already pointed out that in Ex.B2, the property which was already sold by the defendants' father Perumal Gounder also mentioned and under the said circumstances, no reliance can be placed upon the said document. Further, admittedly the suit property was a poramboke land and in such a case, when the defendants claimed that a patta has been granted in favour of Perumal Gounder, they should have produced the proceedings issued assigning the said land in favour of Perumal Gounder, but they have not produced any such proceedings. In the absence of any such evidence, merely because in Chitta (Ex.B2), an entry has been made that patta stands in the name of Perumal Gounder does not enure any right in favour of the defendants. Therefore, merely because the plaintiffs failed to file a written statement for the counter claim, the court is not bound to allow the counter claim.

34. There is no quarrel with regard to the proposition of law that the person who is coming to the court must come with clean hands. In this case though, the first appellate court has observed that in Ex.A3, S.No.16/2, has been inserted, but the learned counsel for the respondents/plaintiffs stoutly challenged the said observation. Further, the defendants have not raised the said plea before the trial court. Without giving any opportunity to the plaintiffs to deny the allegation that in Ex.A3 S.No.6/2 has been inserted, the first appellate court ought not have made any such observation. Because it was not the case of the defendants before the trial court that some corrections have been made in Ex.A3.

35. The Advocate Commissioner's report and plan would clearly show that there is no demarcation between the land situated between S.No.6/2 (suit property) and S.No,6/3 (the plaintiffs' other properties). Further the aforesaid report and plan also show that in both the lands, groundnut crops raised and the said crops have been irrigated through the pipelines from the well situated in S.No.6/3. There is no explanation from the defendants that if the suit property is in their possession, what is the source of irrigation. From the physical features mentioned in the Commissioner's report and plan, the court can infer that the possession of the suit property is only with the plaintiffs.

36. At this juncture, it would be relevant to refer to the decision in Chelladurai and 5 others Vs. Perumal Nadar 1998-3-LW-119 wherein this court in



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paragraph No.9 has observed as follows:

"9. According to me, Ex.C-1 report and Ex.C-2 plan will have a great bearing in deciding the issue in this case. Unfortunately, the lower appellate court has not taken into consideration that material evidence, except for a mere statement that a Commissioner's report has been filed. There is no discussion about Exs.C.-1 and C-2 report and plan. Why I am referring to Ex.C-1 report is because, nobody has got any objection to the lie of the property as identified by the Commissioner. It is an impartial report even according to both parties, and the same has been prepared by an independent person. All the other piece of evidence are interested. I am not saying for a moment that the Commissioner's report has to be relied on for the purpose of proving possession. I am relying on the Report and Plan only for the purpose of proving the physical features of the property, from which certain inference can be drawn."

37. From the aforesaid decision, it is clear that though the Advocate Commissioner's report and plan cannot be relied upon for the purpose to prove possession, they can be relied on for the purpose of proving physical features of the property from which certain inference can be drawn. In this case, as already pointed out that the Commissioner's report and plan would clearly show that there is no demarcation between the suit property and the other properties of the plaintiffs. Further, the crops in the suit property were irrigated from the well situated in other properties of the plaintiffs. Therefore, it can be inferred from the aforesaid physical features that the plaintiffs are in possession of the suit property.

38. It is also to be pointed out that even before filing of the suit, the defendants have sent lawyer's notice claiming right over the suit property. In such a case, the plaintiffs should have filed the suit for declaration of their title over the suit property. Even though both the parties claimed title over the suit property, as already pointed out that they have not produced any documentary evidence to show that the suit property was assigned in favour of any of them by the Government. Under the said circumstances, it would be relevant to refer to the decision in Anathula Sudhakar VsP. Buchi Reddy (2008) 4 SCC 594 wherein the Hon'ble Supreme Court in para-13, 13.1, 13.2, 13.03 and 14 has observed as follows:

"13. The general principles as to when a mere



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suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be



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sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title."

39. From the aforesaid decision, it is clear that the prayer for declaration will be necessary if the denial of title by the defendant or challenge to the plaintiff's title raising the cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. It is further clear that an action for declaration is the remedy to remove the cloud on the title to the property. It is also clear that Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. It is also clear that the plaintiff may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title..

40. In this case though the plaintiffs have set up a title over the suit property based on Ex.A3 patta, they have not asked the relief for declaration of title. As already pointed out that even before filing of the suit, the defendants have sent a lawyer's notice claiming right over the suit property. Further in the written statement also, they claimed that the said Perumal Gowder got patta in his name in respect of the suit property and in such a case, the plaintiffs should have amended the plaint



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including the prayer for declaration but the plaintiffs have not taken any steps for amending the plaint. In view of the aforesaid decision of the Hon'ble Supreme Court, the plaintiffs should have amended the plaint for declaration of title. Further as per the aforesaid decision, the plaintiff may file a suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title. Further in this case, the defendants though set up counter claim and asked for declaration and injunction, they also have not filed any documentary evidence to show the assignment of patta in favour of either Perumal Gounder or in their favour. Under the said circumstances, this court is of the view that instead of dismissing the suit giving liberty to file a fresh suit for declaration and consequential relief, the matter can be remanded back to the trial court to enable the plaintiffs to amend the plaint for declaration. Further, since the defendants for the first time disputed the genuineness of Ex.A3 before the first appellate court, it is open to both the parties to adduce additional oral and documentary evidence as to whether any assignment was granted by the Government in favour any of them.

41. In the result, this second appeal is allowed. No costs. The Judgments and decrees passed by the courts below are set aside. The matter is remanded back to the trial court with liberty to the plaintiffs to amend the plaint including the relief of declaration of title. The defendants also entitled to file additional written statement. It is open to the parties to adduce additional oral and documentary evidence with regard to the assignment of the suit property by the Government in favour of any of them. The trial court is directed to dispose of the suit and counter claim in accordance with law after giving sufficient opportunity to both the parties to adduce further oral and documentary evidence.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

gv

To

1. The III Additional District Judge, Salem.
2. The Principal District Munsif, Salem,
3. The Section Officer,
V.R. Section, High Court, Madras.

+1cc to Mr.P.Jagadeesan, Advocate SR.No. 27425

S.A.No.987 of 2000

A.SK(17/10/2019)