(2011) 11 MAD CK 0141

Madras High Court (Madurai Bench)

Case No: S.A. (MD) No. 693 of 2009

Dr. Indra Raja and Dr. Paten Raja	APPELLANT
Vs	
John Yesurethinam alias Durai	RESPONDENT

Date of Decision: Nov. 9, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 103
- Constitution of India, 1950 - Article 136, 226, 32
- Evidence Act, 1872 - Section 114, 58, 91, 92
- Registration Act, 1908 - Section 77
- Tamil Nadu Cultivating Tenants Protection Act, 1955 - Section 4B

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: K. Srinivasan, for the Appellant; T.S.R. Venkataramana, for the Respondent

Final Decision: Allowed

Judgement

Honorable Mr. Justice G. Rajasuria

1. This Second Appeal is focused by the original plaintiffs animadverting upon the judgment and decree dated 19.12.2008, passed in A.S. No. 5 of 2008 by the learned Subordinate Judge, Padmanabhapuram in confirming the judgment and decree dated 29.11.2007, passed in O.S. No. 22 of 2006 by the learned Principal District Munsif, Padmanabhapuram.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. A thumb-nail sketch of the germane facts absolutely necessary for the disposal of the Second Appeal would run thus:

The plaintiffs filed the suit for bare injunction based on the averments that the defendant, who is the neighboring land owner to the suit property which belongs to the plaintiffs, is trying to trespass and cause act of waste.

4. The defendant resisted the suit by filing written statement on the ground that the deceased father of the defendant had been in possession and enjoyment of the ''A'' Schedule of the suit properties as a cultivating tenant and on his demise, following his possession, the defendant continued to be in possession as cultivating tenant and in respect of the ''B'' Scheduled property in the plaint he started enjoying it in the same capacity as cultivating tenant directly under the plaintiffs ever since the second plaintiff purchased it and in such a case, the prayer for injunction is a misconceived one. Accordingly, he prays for the dismissal of the suit.

5. During trial, the plaintiffs examined themselves as P.Ws.1 and 2 along with P.W. 3 and marked Exs.A.1 to A.19 on their side. The defendant examined himself as D.W.1 along with D.W.2 and marked Exs.B.1 to 14. The Commissioner Report was marked as Ex. C.1.

6. Ultimately, the suit was dismissed by the trial Court and as against the judgment and the decree of the trial Court, the plaintiffs preferred the appeal, for nothing but to be dismissed.

7. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, the plaintiffs preferred this Second Appeal on various grounds and also suggesting the following substantial questions of law:

(1) Whether the findings of the Courts Below are vitiated in law by its failure to consider the absence of any acceptable evidence on the side of the Respondent that he is a cultivating tenant and enjoying the property as such?

(2) Whether the Courts Below are not correct in law in not adverting to the scope and purport of Section 4 B of Tamil Nadu Cultivating Tenants Protection Act, 1955 read with the provisions of Tamil Nadu Agricultural Lands Records of Tenancy Rights Act 101 of 1969 having regard to the dispute and the claim made by the Respondent?

(3) Whether the Courts Below are right in not adverting to the documentary evidence Ex. A.6, A.8 and A.11 to A.16 corroborating the evidence of P.W. 1 to P.W. 3 regarding the possession and

enjoyment?

(Extracted as such)

8. My learned Predecessor framed the following substantial questions of law:

(1) Whether the Courts below are justified in dismissing the suit for injunction holding that the defendant is a cultivating tenant through his father when under an

earlier compromise decree the father himself handed over the possession to the plaintiffs?

(2) Whether the findings of the Courts below are vitiated in law by its failure to consider the absence of any acceptable evidence on the side of the respondent that he is a cultivating tenant and enjoying the property as such?

(Extracted as such)

9. I would like to fumigate my mind with the principles as found enunciated and enshrined in the following decisions of the Honorable Apex Court:

(i) Hero Vinoth (minor) Vs. Seshammal, .

(ii) Kashmir Singh Vs. Harnam Singh and Another, .

(iii) State Bank of India and others v. S.N. Goya reported in 2009 1 L.W. 1.

10. It is palpably and pellucidly clear as per the dictum of the Hon''ble Apex Court that unless any substantial question of law is involved, the question of entertaining a Second Appeal would not arise.

11. Hence, I heard both sides on that line and after hearing both, I have decided the following additional substantial questions of law:

(i) Whether both the Courts below were justified in not placing reliance on the alleged admission made by the first plaintiff herein, in the written statement filed in the previous suit O.S. No. 75 of 1977 filed by the mother of the first plaintiff as against the first plaintiff, the father of the defendant and others and that too after rejection of the plea of the defendant''s father that he was the cultivating tenant under the first plaintiff''s mother?

(ii) Whether there is any perversity or illegality in the findings of the Courts below?

12. All the substantial questions of law are taken together for discussion as they are interlinked and interconnected with one another.

13. Pithily and precisely, tersely and briefly the arguments advanced on the side of the plaintiffs could be set out thus:

(a) Both the Courts below even though took into account the rejection of the plea of the defendant''s father that he was a cultivating tenant under the mother of the first plaintiff herein in respect of the ''A'' scheduled suit property, yet they placed reliance on the written statement filed by the first plaintiff herein as 3rd defendant therein that the father of the defendant herein was a cultivating tenant under the mother of the first plaintiff herein.

(b) Both the Courts below placed reliance on the defendant''s documents blindly as though those documents are capable of establishing and evidencing the possession of the defendant in respect of the suit property, even though none of those

documents refer to the said suit property.

(c) Mere admission that certain items such as Coconuts and honey were sent by the defendant to the plaintiffs, would not lead to the conclusion that there was landlady -tenant relationship between the mother of the first plaintiff and the father of the defendant in the suit property concerned.

(d) In the previous suit O.S. No. 75 of 1977, no doubt only the ''A'' Scheduled property, was found specified, whereas in the present plaint, the ''B'' Scheduled property is also found specified, and that is also an agricultural property purchased by the second plaintiff during the year 2004 only. Whereas the defendant''s father died even in the year 1980 and absolutely, there is nothing to display and indicate as to how the present defendant became a cultivating tenant of the ''B'' Scheduled property even as per his claim.

(e) Once the defendant categorically in the written statement claimed that his possession of ''A'' Scheduled property did not commence independently, but only following the possession of his deceased father, he is very much bound by finding of the Courts in the previous litigation that the defendant''s father was not a tenant in respect of the ''A'' Scheduled property. As such, the alleged admission, made by the 1st plaintiff herein as 3rd defendant therein that the father of the defendant herein was a cultivating tenant was negatived earlier by the trial Court as well as by the appellate Court in those proceedings, and that fact was lost sight of by both the Courts below, which warrants interference in the second Appeal.

14. In a bid to shoot down and mince meat and in addition to torpedo and pulverize the contentions on the side of the plaintiff, the Learned Counsel for the defendant would advance his arguments thus:

The plaint is vague as vagueness could be and no head or tail could be made out it holus bolus, P.W. 3, the relative of the plaintiffs was examined so as to prove a new fact that the plaintiffs were cultivating the lands through P.W. 3. Any amount of evidence without the backing of the pleading should be eschewed. Accordingly, if viewed it is crystal clear that both the Courts below correctly by taking into account the admission made by the first plaintiff herein as 3rd defendant therein about the tenancy right of the father of the defendant herein that he was cultivating tenant in the suit property, decided the case. The onus probandi was on the plaintiffs to prove and establish that as on the date of suit, the plaintiffs were in possession and enjoyment of the suit property. No doubt, the plaintiffs are residing in a house at South Veli Street, Madurai, which is 200 Kms. away from the suit property. In such a case, the plaintiffs could not be have been possession and enjoyment of the suit property and the probabilities are in favour of the defendant''s case. After the purchase of the ''B'' Scheduled property by the second plaintiff, the defendant was asked to be the cultivating tenant in respect of it also. As such, the dismissal of the suit by the Courts below, does not warrant any interference.

15. At the outset, I would like to highlight and spotlight the fact that in a suit for injunction, no doubt, there should be clear evidence on the side of the plaintiffs backed by necessary pleadings that as on the date of the plaint, they were in possession and enjoyment of the suit property. The plaintiffs cannot pick holes in the case of the defendant and try to achieve success in the litigative battle.

16. The Learned Counsel for the appellants cited the following decision in support of his contentions:

(i) Municipal Committee, Hoshiarpur v. Punjab State Electricity Board & Ors. reported in 2011 1 L.W. 525. Certain excerpt would run thus:

21. The powers u/s 103 CPC can be exercised by the High Court only if the core issue involved in the case is not decided by the trial court or the appellate court and the relevant material is available on record to adjudicate upon the said issue. (See Haryana State Electronics Development Corporation Ltd. and Others Vs. Seema Sharma and Others,

22. Before the powers u/s 103 CPC can be exercised by the High Court in a second appeal, the following conditions must be fulfilled:

(i) Determination of an issue must be necessary for the disposal of appeal;

(ii) The evidence on record must be sufficient to decide such issue; and

(iii)(a) Such issue should not have been determined either by the trial court, or by the appellate court or by both; or

(b) such issue should have been wrongly determined either by the trial court, or by the appellate court, or by both by reason of a decision on substantial question of law.

If the above conditions are not fulfilled, the High Court cannot exercise its powers u/s 103 CPC. Thus, it is evident that Section 103 CPC is not an exception to Section 100 CPC nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 CPC in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

17. In support of his contention, the Learned Counsel for the respondent cited the following decisions:

(i) Ramjas Foundation v. Union of India reported in AIR 2011 SC (Civil) 147. Certain except from it would run thus:

14. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person

is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case. In Dalglish v. Jarvie 2 Mac. & G. 231, 238, Lord Langdale and Rolfe B. observed: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward. In Castelli v. Cook (1849) 7 Hare, 89, 94 Wigram V.C. stated the rule in the following words: "A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when other party applies to dissolve the injunction, that any material fact has been suppressed or not property brought forward, the plaintiff is told the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go." In Republic of Peru v. Dreyfus Brothers & Company 55 L.T. 802, 803, Kay J. held as under:

I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith in the Court when ex parte applications are made.

The same rule was restated by Scrutton L., J in R. v. Kensington Income Tax Commissioner (1917) 1 K.B. 486. The facts of that case were that in April, 1916, the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington made an additional assessment upon the applicant for the year ending April 5, 1913, in respect of profits arising from foreign possessions. On May 16, 1916, the applicant obtained a rule nisi directed to the Commissioners calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding upon the assessment upon the ground that the applicant was not a subject of the King nor resident within the United Kingdom and had not been in the United Kingdom, except for temporary purposes, nor with any view or intent of establishing her residence therein, nor for a period equal to six months in any one year. In the affidavit on which the rule was obtained the applicant stated that she was a French subject and resident in France and was not and had not been a subject of the United Kingdom nor a resident in the United Kingdom; that during the year ending April 5, 1913, she was in the United Kingdom for temporary purposes on visits for sixty-eight days; that she spent about twenty of these days in London at her brother''s house, 213, King''s Road, Chelsea, generally in company

with other guests of her brother; that she was also in the United Kingdom during the year ending April 5, 1914, for temporary purposes on visits, and spent part of the time at 213, King''s Road aforesaid; and that since the month of November, 1914, she had not been in the United Kingdom. From the affidavits filed on behalf of the Commissioners and of the surveyor of taxes, who showed cause against the rule nisi, and from the affidavit of the applicant in reply, it appeared that in February, 1909, a leasehold house, 213, King''s Road, Chelsea, had been taken in the name of the applicant''s brother. The purchase-money for the lease of the house and the furniture amounted to 4000l., and this was paid by the applicant out of her own money. The accounts of household expenses were paid by the brother and subsequently adjusted between him and the applicant. The Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Divisional Court observed that the Court, for its own protection is entitled to say "we refuse this writ of prohibition without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us". On appeal, Lord Cozens-Hardy M.R. and Warrington L.J. approved the view taken by the Divisional Court. Scrutton L.,J. who agreed that the appeal should be dismissed observed: "and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts -facts, not law. He must not misstate the law if he can help it -the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.

(ii) Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, . Certain except from it would run thus:

11. The general principles as to when a mere 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.

11.1. 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.

11.2. 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.

11.3. 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 the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the 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.

(iii) Manicka Gounder & Another v. Lakshmi Ammal reported in 2002 3 L.W. 281. Certain except from it would run thus:

32. It has been held in Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, a party could be given relief based on the categorical admission of the other party in the witness box. The admission the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

(iv) Thimmappa Rai v. Ramanna Rai reported in (2007) 5 MLJ 1245 (SC). Certain except from it would run thus:

23. An admission made by a party to the suit in an earlier proceeding is admissible as against him. Such an admission being a relevant fact, the courts below in our opinion were entitled to take notice thereof for arriving at a decision relying on or on the basis thereof together with other materials brought on record by the parties. Once a party to the suit makes an admission, the same can be taken in aid, for determination of the issue having regard to the provisions of Section 58 of the Evidence Act.

(v) Rajeswari Ammal v. Arunachalam reported in 2010 (1) MWN (Civil) 137. Certain except from it would run thus:

18. In so far as the plea of fraud and misrepresentation is concerned, the trial Court has correctly found that the plaintiff has miserably failed to prove the same. The plaintiff was assisted by her second husband Vibhuthi Veeramuthusamy and her counsel. The trial Court on a consideration of evidence on record was pleased to hold that the said fact has not been proved. When a party alleges undue influence and fraud, the onus is on the party to prove the same. Similarly, u/s 114(e) of the Indian Evidence Act, a presumption is made in favour of the document which has been duly registered. There is also a presumption that all the official acts done by the authority are true unless the same is proved otherwise. In the present case, the recitals clearly stipulate that the amount has been received by the plaintiff in the presence of Sub-Registrar. The Sub-Registrar has also been examined as P.W. 3 and he has also spoken about the same. Moreover, there is an admission by the plaintiff that she has received the amount as mentioned in Ex. A1, which is contrary to her very own pleading that she has not received a part of the consideration. It is also well known that u/s 92 of the Indian Evidence Act, a party to a document who admits

the same cannot give evidence contrary to the same. Further, an admission made by the party is the best form of evidence. The Hon''ble Supreme Court was pleased to hold in the judgment reported in 2007 (3) MLJ 467 Bhandari Construction Company Vs. Narayan Gopal Upadhye a passage is extracted hereunder for useful reference:

15. When the terms of the transaction are reduced to writing, it is impossible to lead evidence to contradict its terms in view of Section 91 of the Evidence Act. There is no case that any of the provisos to Section 92 of the Act are attracted in this case. Why the case that was sought to be spoken to by the respondent was not set up by him in the complaint was not explained. The case set up in evidence was completely at variance with the case in the complaint. There was no evidence to show that the consideration was to be Rs. 9,00,000/- , especially, in the light of the recitals in the registered agreement. There was also no document to show the payment of Rs. 4,00,000/- by way of cash. Hence, this was no evidence to show the balance amount due under the agreement after the admitted payment of Rs. 5,00,000/- was paid. The affidavit produced before the State Forum and the evidence of the colleague of the respondent is clearly inadmissable and insufficient to prove any such payment. Thus, the case set up by the respondent in his evidence was not established. It is in that situation that the District Forum, taking note of the payment of Rs. 5,00,000/- and the failure of the respondent to encash the cheque for Rs. 5,00,000/- that was returned by the company, ordered the complainant to pay the balance amount due under the transaction as evidenced by the written instrument and take delivery of the premises in question and in the alternative, gave him the option to take back the sum of Rs. 5,00,000/- with interest. Neither the State Commission, nor the National Commission has given any sustainable reason for differing from the conclusion of the District Forum. A mere suspicion that builders in the country are prone to take a part of the sale amount in cash, is no ground to accept the story of payment of Rs. 4,00,000/- especially when such a payment had not even been set up in the complaint before the District Forum. Not only that, there was no independent evidence to support the payment of such a sum of Rs. 4,00,000/- except the ipse dixit of the respondent. The affidavit of the Bank employee filed in the State Commission cannot certainly be accepted as evidence of such a payment. Payment of such a sum had clearly been denied by the company. The respondent had, therefore, to prove such a payment. His case that the purchase price was Rs. 9,00,000/- , itself stands discredited by the recitals in the agreement dated 27.07.1997 in which the purchase price was recited as Rs. 7,75,000/- . Not only that, the respondent did not have a receipt for evidencing the payment of Rs. 4,00,000/- and if the amount was paid on 05.07.1997 or 08.07.1997, as claimed by him, he would certainly have ensured that the payment was acknowledged in the agreement for sale executed on 27.07.1997. The agreement for sale actually speaks of his obligation to pay the balance to make up Rs. 7,75,000/- after acknowledging receipt of Rs. 5,00,000/- . The respondent is not a layman. He is a practicing advocate. According to him, he specializes in documentation. He cannot, therefore,

plead ignorance about the existence of the recital in the agreement. He cannot plead ignorance of its implications.

(vi) Udhyakumar v. Krishnamoorthy reported in (2008) 6 MLJ 597. Certain except from it would run thus:

18. Lower Appellate Court reversed the findings of trial Court mainly on the ground that defendants have not established that plaintiff surrendered possession to Muthukumar, who in turn surrendered the possession to Madam. Lower Appellate Court also observed that to substantiate the defence plea, Muthukumar was not examined nor did the defendants proved surrender of possession, Lower Appellate Court fall in error in saying that defendants should have examined Muthukumar to prove that the plaintiff is out of possession.

(vii) Bothumani v. K. Rameena reported in 2010 (2) CTC 262. Certain except from it would run thus:

31.It should be borne in mind that injunction is an equitable relief. For seeking the relief, one must come to court with clean hands. Suppressing the material facts no one can seek the equitable relief. It has been made clear from the evidence that the first respondent in both the second appeals has no title to the property and she is also not in possession and enjoyment of the suit property. In such circumstances, she is not entitled to seek the equitable relief. Even a person having title is not in possession and enjoyment of the property he should file a suit only for a declaration of title and recovery of possession and a person who is not in possession cannot maintain a suit seeking injunction in respect of possession and enjoyment with the false averments that he is in possession and enjoyment of the property, even if the said person is the absolute owner of the property.

(viii) Chellathurai v. Perumal Nadar reported in 1998 MLJ 567. Certain except from it would run thus:

12. The plaintiff, except for the production of Ex. A-1, has not adduced any evidence to show that he is in possession. Exs.A-2 to A-4 are only documents that came into existence subsequent to the institution of the suit. Even according to the plaintiff, he has put up a Temple and he is worshipping there. When the access to the plaint schedule property is through the admitted property of the Samudhayam, and the property on the West and East also admittedly belonging and is lying in one block to the Samudhayam, it can be inferred that they are in possession of the defendants. When the property is not separated by any boundary and when there is continuous construction of sheds which pass through both the properties, it also show that all these items can be in the possession of only one person. Plaintiff has no explanation as to how the defendants put up the construction in W1, W2, W3, W4 encroaching into his property.

13. The lower appellate court has found fault with the trial court stating that it has decided the suit as one for declaration of title. The criticism made by the lower appellate court is not correct. For the purpose of proving possession, a detailed discussion is made by the trial court, mainly relying on the Commissioner''s Report and Plan. At the same time, the lower appellate court disbelieved the evidence of the defendant regarding the oral agreement for sale, which, according to me, is irrelevant. Merely because the defendant has failed to prove his case, it does not follow that the plaintiff is in possession. As I said earlier, in a suit for injunction the burden is only on the plaintiff to prove that he is in exclusive possession of the property. In this case plaintiff has miserably failed to prove the same.

(ix) Iqbal Mohammed Bijili Vs. K. Arumugam and Others, . Certain except from it would run thus:

28. An analysis of Section 77 of the Registration Act indicates that it can be invoked only to secure the relief of registration of document, and not for a comprehensive suit for specifically enforcing the agreement by directing the defendant to register the sale deed and for possession. This is clear from Kalavakurti Venkata Subbaiah Vs. Bala Gurappagari Guruvi Reddy, .

29. The only question in this second appeal is whether the respondents are entitled to the relief of injunction on the basis of possession. In the circumstances stated above, I am of the opinion that the respondents have not come to Court with clean hands. They have deliberately suppressed the earlier suits fearing that, it would clearly show that the appellant was not co-operating with them for registration of sale deed. The mere fact that they have managed to obtain mutation of their names in the revenue records cannot help them when this was effected only after the compulsory registration of the sale deed, consequent to the decree passed by the Court in favour of the respondents. They have not chosen to get into the box, but they put their father into the box that did not know anything about the factual aspects and in fact deposed contrary to the clear recitals in Exs.A-1 and A-2 that they were put in possession on the date of Exs.A-1 and A-2.

(x) Vedavalliammale and Others Vs. Venkataraja and Others, . Certain except from it would run thus:

28. Admittedly, the plaintiff Ramaraja was not in possession of the suit property at the time of filing of the suit in the year 1982. As such, the suit filed by the plaintiff Ramaraja for declaration that he is the legal heir of the deceased Kannusamy, without seeking the relief of possession, is not maintainable. Inasmuch as, the first defendant Vedavalliammale purchased the suit property from the absolute owner Thayanayagy Ammal as per sale deed Ex. A-4 dated 11.7.1959, she became the rightful owner and as such, the said sale deed Ex. A-4 is not null and void.

17. A mere poring over and perusal of the above decisions would unambiguously and unequivocally highlight and spotlight the fact that the burden is on the plaintiff

to prove his case in a suit for injunction; they virtually stress the maxim ''He who seeks equity must do equity and he who comes to equity must come with clean hands''. If the plaintiffs in the injunction suits approach the Court with false facts and suppression of facts, certainly the Court will not grant the equitable and discretionary relief of injunction. Those precedents also indicate and convey the point that admission is a reliable piece of evidence if it is a genuine admission in the eye of law.

18. Here, it has to be seen as to whether the approach of the Courts below was correct.

19. Unambiguously and unequivocally the judgment dated 26.02.1979 in O.S. No. 75 of 1977, which was the suit filed by Alice, the mother of the first plaintiff herein, was rendered by the Sub Court, Padmanabhapuram. The defendant''s father Issac was arrayed as D5 therein, who contended that he was a cultivating tenant in respect of the ''A'' Schedule property referred to herein. No doubt, the present first plaintiff was D3 therein. According to the learned Senior Counsel for the plaintiffs herein, there was ill-will and spite between the first plaintiff herein and her mother, the plaintiff therein, so the former filed such written statement, as against Alice. But the Courts below in the previous suit rejected the claim of Issac, the 5th defendant, viz. the father of the defendant herein that he was the cultivating tenant in respect of ''A'' schedule property. It is therefore, palpably and pellucidly clear that earlier the competent Court decreed the suit in the favour of the mother of the first plaintiff herein that the defendant''s father was not a cultivating tenant and he was not in possession of the ''A'' Scheduled property In such a case, glaringly and plainly, both the Courts below were not justified in relying on the alleged admission made in the written statement of the first plaintiff herein (the 3rd defendant therein) that defendant''s father was a cultivating tenant.

20. The learned Senior counsel for the plaintiffs has also brought it to my notice that the said Issac preferred an appeal in A.S. No. 103 of 1979 and as evidenced by Ex. A.17 -the Certified copy of Judgment the said appeal was dismissed. Wherefore, in the previous proceedings, the present defendant''s father Issac had lost his claim that he was a cultivating tenant in respect of the ''A'' Schedule property. In this factual matrix, I am at a loss to understand as to how both the Courts below simply upheld the contentions of the defendant herein that his father Issac continued to be in possession of the ''A'' Schedule and on his death in the year 1980, the defendant started occupying it, despite the judgment of the Courts below in the earlier suit that the defendant''s father was not a cultivating tenant in the suit ''A'' Schedule property. As such the approach of the Courts below in placing reliance on the alleged admission in the previous proceedings, which ended against the defendant''s father, is perverse and antithetical to the well established principles of law.

21. No doubt, the admissions in the pleadings in the previous proceedings can be pressed into service in the subsequent proceedings, but it should be strictly as per the procedures known to law. But, here simply by based on Ex. A.15, the certified copy of the judgment of the trial Court in O.S. No. 75 of 1977, the defendant attempted to rely on the admission of the first plaintiff herein. The trial Court went tangent in placing reliance on Ex. A.15, marked on the side of the plaintiffs to hold that the defendant proved the admission of the first plaintiff made in the written statement filed by her, while she was arrayed as D3 in the earlier suit.

22. I would like to point out that that was not the method to prove the admission made in a different proceeding, in the present suit.

23. this Court is concerned with the larger issue as to whether such placing reliance on the alleged admission of the first plaintiff herein, (third defendant therein) itself is tenable?

24. Both the Courts below in the earlier suit negatived the claim of the father of the defendant that he was the cultivating tenant. So, the answer at once is clear that such reliance on the admission cannot be entertained.

25. The judgments cited on the side of the defendant are all relevant to a case involving similar set of facts. But here there is different kettle of fish. A precedent could be applied only in consimili casu and not in matters where factually that is distinguishable. Wherefore, the precedents cited cannot be adhered to and adapted in this case.

26. Not to put too fine a print on it, the defendant placed himself in a straight corner, so to say the contention of the defendant is that he has been continuing as cultivating tenant following his deceased father. The Courts below were not justified in placing reliance on the admission of the first plaintiff herein in the previous suit as D3, despite the judgments rendered by the earlier competent Courts as against the father of the defendant herein. As such, I am having no hesitation to hold that both the Courts below were wrong in relying on the alleged admission of the first plaintiff herein in rendering the judgments.

27. The trial Court no doubt referred to all the exhibits marked on the side of the defendant and held that those documents were sufficient to hold that the father of the defendant was a cultivating tenant in respect of ''B'' Scheduled property and following that the defendant has been in possession and enjoyment of the property concerned.

28. The Learned Counsel for the defendant inviting the attention of this Court to Exs.B.1 to B.3 would develop his arguments thusly:

The said documents unambiguously and unequivocally, obviously and axiomatically highlight and spotlight that the defendant is not a stranger to the plaintiffs. No doubt those documents would reveal that there was some relationship between the

plaintiffs and the defendant, but none of those documents could evince and evidence that the defendant is in possession of the property. Ex. B.4 is the receipt showing that a sum of Rs. 964/- was paid by the plaintiffs for preventing soil erosion. But, in that the defendant''s name is not shown as the person who paid the amount on behalf of the plaintiffs or as tenant under them but he produced only the receipt. From that no conclusion could be arrived at all that the defendant is a cultivating tenant. Ex. A.8, refers to a bunch of lorry receipts and as per them, honey and coconuts were sent to the first plaintiff by the defendant. However, the learned Senior Counsel for the plaintiffs would submit that even though the first plaintiff as P.W. 1 admitted those receipts, yet she never admitted that those items emerged from the suit property and it cannot be visualized that they were produces of the suit property and consequently, sent by the defendant to the first plaintiff towards lease amount etc.

29. The written statement is niggard, bereft and shorn of details relating to the quantum of lease and the manner of having paid the lease rent to the plaintiffs. The Learned Counsel for the defendant would submit that in this suit those narrations are absolutely not required. I cannot countenance such an argument for the foregoing reason that Ex. B.8 series were marked to display and demonstrate as though the defendant had sent coconuts and honey towards lease rent. There is no iota or shred, shrad or jot, miniscule or molecular extent of evidence to establish and prove as to how the lease rent was paid to the mother of the first plaintiff after the death of the father of the defendant during the year 1980 and there is also nothing to indicate and project as though lease rent was paid ever since 1997, the year in which the first plaintiff''s mother died. Wherefore, there is no clear picture as to the stand of the defendant. The Courts below failed to consider all these aspects, but simply placed reliance on the documents filed on the side of the defendant, which are ex-facie and prima-faice not referring to the suit property and held that the defendant has been in possession of the property as a tenant.

30. While observing as supra, I am not oblivious of the cardial principle that "Actori incumbit onus probandi" (The burden of proof rests upon the plaintiff).

31. The learned Senior counsel for the plaintiff would submit that admittedly and unassailably the plaintiffs happened to be the owners of the suit property and in such a case, it has to be held that the possession follows title and over and above the evidence adduced on the side of the plaintiffs nothing more is required to prove their possession.

32. I would like to observe that P.W. 3 was examined as though he was the person who was cultivating the suit property and also looking after it on behalf of the plaintiffs, who are at Madurai, but there is no reference to it in the plaint. Plaint is not an encyclopedia of facts of the plaintiff''s case, even then, material averments should be there keeping in consonance with the maxim "Juiciest judicare secundum allegata et probata." (It is the proper role of a judge to decide according to the

allegations and proofs.) It is for the Courts below to consider these aspects also.

33. The Learned Counsel for defendant inviting the attention of this Court to the cross-examination of P.W. 1, would stress upon the fact that the first plaintiff made a categorical admission that the defendant was in possession of the suit property as on the alleged untoward incident that took place in the year 2006 in the suit property.

34. The relevant excerpt from the cross-examination of the P.W. 1 would run thus:

35. The learned Senior counsel for the appellants/plaintiffs would expound and explain that based on such a stray sentence, the Court cannot be called upon to give a finding that the defendant had been possession and enjoyment of the suit property. I would like to accept the argument advanced on the side of the appellants/plaintiffs that a stray sentence should not be relied on for rendering judgment as to whether the defendant had been in possession and enjoyment of the suit property or not.

36. The learned Senior counsel for the plaintiffs would submit that no doubt P.W. 1 (first plaintiff) in her deposition at one point time stated that the defendant was a stranger, but that it does not mean that the defendant was a total stranger to the family of the plaintiffs, but he was a stranger to the suit property.

37. The Learned Counsel for the defendant also has invited the attention of this Court to the summons issued to his client by the Income Tax Department to give evidence in connection with the probe relating to plaintiffs liability to pay wealth tax concerning the suit property and that also in no way would highlight that the defendant was a tenant in the suit property.

38. The Courts below wrongly applied the principle of onus probandi which is initially on the plaintiffs, but whenever the defendant made any specific plea, it is also for him to prove the same. The onus of proof is ambulatory and not static. As such, both the Courts below misdirected themselves and they were very much carried away by the alleged admission of the first plaintiff herein in the written statement filed in the previous suit in O.S. No. 75 of 1977.

39. Hence, the substantial questions of law and the additional substantial questions of law are answered as against the defendant to the effect that the approach of the Courts below is perverse and illegal in holding that the defendant is a cultivating tenant through his father ignoring the evidence as against the defendant, adduced by the plaintiff and the Courts below were not justified in placing reliance on the alleged admission made by the first plaintiff herein, in the written statement filed in the previous suit O.S. No. 75 of 1977 filed by the mother of the first plaintiff as against the first plaintiff, the father of the defendant and others and that too after rejection of the plea of the defendant''s father that he was the cultivating tenant under the first plaintiff''s mother.

40. On balance, the judgment and decree of the first appellate court is set aside and the matter is remitted back to the first appellate Court, which is the last Court of fact with the following directions:

The first appellate Court shall give due opportunity to both sides to adduce additional evidence and thereafter upon hearing both sides and by applying the correct provisions of law decide the appeal suit within three months from the date of receipt of a copy of this order. The first appellate Court is expected to decide the appeal untrammeled and uninfluenced by any of the observations made by this Court on the merits of the case. Both sides shall co-operate with the first appellate Court for speedy disposal of the matter, for which they shall appear before it on 29.11.2011.

42. In the result, the Second Appeal is allowed to the extent indicated above. No costs.