

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF DECEMBER 2019

BEFORE

THE HON'BLE Dr. JUSTICE H.B.PRABHAKARA SASTRY

R.F.A.No.1081 OF 2016

BETWEEN:

Smt.Valliamma,
W/o Yellappa
Aged about 71 years,
Residing at House Old No.269/40,
New No.338, Ashok Nagar,
Kadugondanahalli,
Bengaluru-560 045,
Rep.by GPA Holder/Son
Sri Y.Prabhakaran. .. Appellant

(By Sri Paras Jain, Advocate)

AND:

Sri Dhanpal,
Since deceased, rep.by his LRs.

1. Smt. Vasugi,
Aged about 59 years,
2. Sri Kovalan D.
Aged about 56 years,
3. Sri Elongovan,
Aged about 52 years,

4. Sri Kalai,
Aged about 46 years,

5. Sri Babu,
Aged about 36 years,

All are children of deceased
Sri Dhanpal,
Residing at No.165,
6th Cross, III Stage,
Pillanna Garden,
Bangalore-560 045. .. Respondents

(By Sri G.Janardhana, Advocate
For C/R-1 to R-5))

This Regular First Appeal is filed under Section 96 read with Order XLI Rule 1 of CPC against the judgment and decree dated 10.6.2016, passed in O.S.No.16762/2005, on the file of the IV Addl.City Civil and Sessions Judge, Mayohall Unit, Bengaluru, decreeing the suit for possession and damages.

This Regular First Appeal having been heard and reserved for judgment on 16.12.2019, this day the Court delivered the following:

JUDGMENT

This is the defendant's appeal. The original plaintiff one Sri Dhanpal had instituted a suit against the present appellant arraigning her as defendant in O.S.No.16762/2005, in the Court of learned IV Addl.City

Civil & Sessions Judge, at Mayohall Unit, Bengaluru (CCH-21) (hereinafter for brevity referred to as 'trial Court'), for the relief of vacating and delivery of the vacant possession of the suit schedule property to the plaintiff and also for ordering for demolition of unauthorised construction put up by the defendant on the suit schedule property and for an order for damages at the rate of ₹1,000/- per month till the date of delivery of possession and for costs. During the pendency of the suit, due to the death of the original plaintiff Sri Dhanapal, his legal representatives, who are the present respondents herein came on record and continued the suit.

2. The summary of the case of the plaintiff in the trial Court was that he was an Ex-serviceman and had applied for allotment of a residential site to the Deputy Commissioner, Bengaluru, who in turn, after considering

his request, directed the Block Development Officer (hereinafter for brevity referred to as 'B.D.O.'), Bengaluru, for allotment of a residential site. The B.D.O. by his order dated 18.10.1978, allotted a residential site, which is the suit schedule property bearing No.63 in Survey No.129, situated at A.K.Colony, Kadugondanahalli (Ashok Nagar), Bengaluru, measuring East to West 46' and North to South 36'. The site was allotted for a cost of ₹750/-, which the plaintiff remitted and a Possession Certificate dated 19.10.1978 was issued to him.

It is the further case of the plaintiff that after the suit schedule property was allotted to him, he obtained a licence for putting up a construction on the site and also got the katha made in his name and started paying property taxes. On 6.3.1982, he obtained licence from Kodugondanahalli Village Panchayath and also raised

construction upto lintel level. At that time, the defendant started to interfere in his possession of the suit schedule property on the ground that she had purchased the same from one Sri Chikka Hanumanthaiah, who according to the plaintiff, had no right, title and interest over the suit schedule property. It is the further case of the plaintiff that the husband of the defendant was allotted with site No.40, who had put up a house and is residing with the defendant and their family members. In spite of the defendant already owning a house, just to knock away the suit schedule property from the plaintiff, she had filed O.S.No.18/1982 in the Court of learned XIII Addl.City Civil & Sessions Judge, Bengaluru, on 1.1.1982, for the relief of declaration and permanent injunction against the plaintiff. The said suit came to be dismissed on 17.3.1983. Against which, she preferred RFA (FR) 54/1995, which was subsequently numbered as

RFA.No.485/1997, which also finally came to be dismissed by this Court.

It is the further case of the plaintiff that before filing O.S.No.18/1982, the defendant had also filed a case before the Assistant Commissioner seeking revocation of the allotment of the suit schedule property made in favour of the plaintiff by the B.D.O. The said case came to be rejected, against which, she preferred an appeal before the Divisional Commissioner, who also dismissed her appeal on merits and confirmed the order of the Assistant Commissioner.

The plaintiff has further stated in his plaint that suppressing the above facts, the defendant once again filed O.S.No.2410/1997, before the learned XXVII Addl.City Civil Judge, Bengaluru, against the plaintiff for the same relief which was earlier sought by her in

O.S.No.18/1982. The said suit also came to be dismissed with cost on 17.3.1993.

The plaintiff has also contended that he had filed O.S.No.3122/1999 and obtained an order of injunction restraining the defendant from interfering in lawful possession and enjoyment of the suit property. The interim order granted by the Court was confirmed by this Court in MFA.No.3129/2001. In spite of all these orders, the defendant taking advantage of the fact that the suit schedule property was situated adjacent to her family's property and without the knowledge of the plaintiff, made use of the construction put up by the plaintiff on the property up to lintel level and completed a portion of it. The plaintiff was not aware of the same as she was in collusion with the police. Since in the cross-examination of the defendant in O.S.No.3122/1999, the plaintiff came to know about she

putting up a construction in the suit schedule property in the year 1997, he sought for an amendment of the plaint which was not allowed. As such, he withdrew O.S.No.3122/1999 and has preferred the present suit against the defendant.

3. In response to the summons served upon her, the defendant appeared through her counsel and filed her written statement. In her written statement, the defendant denied that the suit schedule property was at any point of time allotted to the plaintiff. She contended that suit was not maintainable since the plaintiff had not reserved any liberty while withdrawing O.S.No.3122/1999 for filing a fresh suit on the same cause of action. The defendant denied that the suit schedule property was allotted to the plaintiff by any authority, including B.D.O. She contended that she had purchased the suit schedule property from one

Sri Chikka Hanumanthaiah under a registered Sale Deed dated 28.1.1978. Though she admitted that site No.40 was allotted to her husband and the said site was adjacent to the suit schedule property, but, denied that the plaintiff has been in possession of the suit schedule property.

The defendant did not deny that she had filed O.S.No.18/1982 and a Regular First Appeal thereafter. However, she denied about the orders said to have been passed by the Assistant Commissioner and Divisional Commissioner and also she filing O.S.No.2410/1997 by suppressing those facts in her plaint in the said suit. She categorically stated that she has been in possession of the suit schedule property and the plaintiff was not at all in possession of the said property despite there being a temporary injunction in his favour. She denied that the construction in the suit schedule property was

put up by her without the same being to the knowledge of the plaintiff. She denied that there was any cause of action in the suit.

The defendant has also made a counter claim in the suit contending that the plaintiff has filed a false suit against her and has played fraud on the Court and is abusing the process of law. The defendant has further pleaded that one of the reason for not filing the appeal within time challenging the decree passed in O.S.No.18/1982 was non-availability of the finance and for the fact that no money lender was ready and willing to give her loan. She stated that she is entitled for huge compensation from the plaintiff at the rate ₹7,500/- per hearing towards advocates fee and ₹500/- for attending the Court per hearing and a lumpsum amount of ₹5 lakhs towards the compensation for mental agony, pain and sleepless nights due to what is going to happen in the Court. She further stated that plaintiff, his wife

and children and anyone claiming under him may be permanently restrained from interfering with peaceful possession and enjoyment of the suit schedule property of the defendant. With this she prayed to declare that the plaintiff is not entitled for any of the reliefs sought for by him in the plaint and his claim over the suit schedule property be rejected and that plaintiff may be further directed to pay towards damages and compensation such amount as the Court deems fit.

4. Based on the pleadings of the parties, the trial Court framed the following issues :

1. *Whether the plaintiff proves that he has valid title to the suit schedule property?*
2. *Whether the plaintiff proves that he was in lawful possession of the suit schedule property as per the possession certificate dated 19.10.1978?*
3. *Whether the plaintiff proves the defendant's possession over the suit schedule property is*

unlawful, and it came to his knowledge during the year 2004?

4. *Whether the defendant proves that she has been in possession and enjoyment of the suit schedule property as the absolute owner by virtue of the registered sale deed dated 28.01.1978 executed by Sri Chikka Hanumaiah?*
5. *Whether the suit is barred by limitation?*
6. *Whether the suit is barred by Res-judicata?*
7. *Whether the suit is not maintainable seeking delivery of possession without seeking the relief of title?*
8. *Whether the paid court fee is sufficient?*
9. *Whether the plaintiff is entitled for the relief of delivery of possession of the suit schedule property after demolishing the unauthorized construction over it?*
10. *Whether the defendant is entitled for the relief of permanent injunction with respect of the suit schedule property as sought for?*
11. *To what decree or order?*

The plaintiffs on their behalf got examined the 2nd plaintiff Sri Kovalan as PW-1 and got marked documents from Exs.P-1 to P-18. On behalf of the defendant, her General Power of Attorney Holder and son by name Sri Y.Prabhakaran was examined as DW-1 and documents from Exs.D-1 to D-73 were got marked.

After hearing arguments from both side, the trial Court by its impugned judgment and decree dated 10.6.2016 while answering issue Nos.1, 2, 3 and 9 in the affirmative and issue Nos.4, 5, 6, 7, 8 and 10 in the negative, decreed the suit of the plaintiff and dismissed the counter claim of the defendant. It is against the said judgment and decree, the defendant has preferred this appeal with a prayer to dismiss the suit filed by the plaintiff and to decree the counter claim filed by her.

5. Lower Court records were called for and the same are placed before this Court.

6. Heard the arguments of the learned counsel from both side and perused the materials placed before this Court, including the memorandum of appeal and the impugned judgment and lower Court records.

7. For the sake of convenience, the parties would be referred to as per their ranks before the trial Court.

8. In view of the above, the points that arise for my consideration are :

(1) *Whether the plaintiff has proved that he has better title to the suit schedule property as against the defendant's alleged title over it?*

(2) *Whether the plaintiff has proved that the defendant's possession over the suit schedule property is unlawful?*

(3) *Whether the plaintiff is entitled for the relief of vacant possession of the suit schedule property?*

(4) *Whether the defendant is liable to be directed for demolition of the construction put by her on the suit schedule property?*

(5) *Whether the plaintiff is entitled for damages?*

(6) *Whether the suit is barred by time?*

(7) *Whether the judgment and decree under appeal deserves any interference at the hands of this Court?*

9. In view of the fact that the pleading of the defendant, as well as the evidence of DW-1 to the effect that the then Government of Mysore acquired 3 acres 27 guntas of land in Survey No.129 of Jodi Kadugondanahalli Village vide Gazette Notification dated 4.2.1955, for the distribution of the sites to the siteless Scheduled Caste persons, since has not been denied by the plaintiff, on the other hand, the plaintiff also through Exs.P-1 and P-4 since has reiterated the same as a fact, it remains undisputed that land to an extent of

3 acres 27 guntas in Survey No.129 of Jodi Kadugondanahalli Village was acquired by the then Government of Mysore for distribution of free sites to Scheduled Caste persons. However, according to the plaintiff, the total number of sites initially formed in the said land was only 62 and thereafter, two more sites were formed in the same land in the available vacant space and one of it, bearing Site No.63, was allotted to the plaintiff, who was granted with the said site and was put in possession of the same. On the other hand, the contention of the defendant is that the total number of sites formed in the land bearing Survey No.129 was not 62, but, it was 64. The subsequent formation of alleged two sites in the same survey number were excluding the 64 sites which were initially formed. Out of those 64 sites initially formed, site No.63 was allotted to one Sri Chikka Hanumanthaiah, as such, allotting the very same site with number 63 to the plaintiff would not at all

arise. The defendant purchased the said site No.63 from Sri Chikka Hanumanthaiah. Thus, the very fundamental dispute between the parties in the suit is about the formation of a site said to be bearing No.63 in Survey No.129 of Kadugondanahalli Village and its allotment was whether to Chikka Hanumanthaiah or to the plaintiff. It is keeping this fundamental dispute also for consideration, the evidence led by both side is required to be analysed.

10. PW-1 in his examination-in-chief filed in the form of affidavit evidence has reiterated the contentions taken up by the plaintiff in his plaint. He has reiterated that Site No.63 in Survey No.129 of Kadugondanahalli Village, Ashok Nagar, Bengaluru, was allotted to their father - original plaintiff, at a cost of ₹750/-. He has also stated that the plaintiff has been put in possession of the said site allotted to him, with respect to which,

apart from paying the property taxes, he has also obtained a licence to put up a construction, however, off late, he noticed that the defendant has put up some construction in the very same site in the year 1997. He has further stated that since his prayer to carry out the amendment in the Original Suit No.3122/1999, which was filed by him and pending against the defendant, wherein he wanted to amend the prayer, including the relief of possession, came to be rejected, he withdrew the said suit and has preferred the present suit. In his support, he got marked documents from Exs.P-1 to P-18.

Ex.P-1 is the certified copy of the order passed in VPC.31/1979-80, in the Court of Assistant Commissioner, Bengaluru South Taluk, Bengaluru and dated 28.4.1980, Ex.P-2 is the certified copy of an endorsement issued by the very same Court in the very

same case stating that the appeal has stood dismissed, Ex.P-3 is the certified copy of an order passed in the Court of the Divisional Commissioner, Bengaluru Division in VPC.RP.No.4/1980-81 and dated 4.12.1981, Ex.P-4 is the certified copy of the judgment in O.S.No.18/1982, passed on 17.3.1993, in the Court of the learned XIII City Civil & Sessions Judge, at Bengaluru, Ex.P-5 is the certified copy the decree passed in O.S.No.18/1982, Ex.P-6 is the certified copy of the decree in RFA.No.485/1997, passed by this Court on 14.7.1997, Ex.P-7 is the certified copy of the order passed on Issue No.5 and IA.No.7 in O.S.No.2410/1997, by the Court of learned XXVII Addl.City Civil Judge, at Bengaluru, Ex.P-8 is the certified copy of the decree in O.S.No.2410/1997, Ex.P-9 is an endorsement dated 28.7.2001 issued by Kadugondanahalli Police Station to the plaintiff, Ex.P-10 is the copy of the complaint by the plaintiff to the Commissioner, Corporation of City of Bengaluru and

dated 22.1.2004, Ex.P-11 is a copy of the complaint by the plaintiff to the K.G.Halli Police Station, Bengaluru, Ex.P-12 is the certified copy of the Official Memorandum dated 18.10.1978, of the B.D.O., Bengaluru North, Yelahanka, Bengaluru, Ex.P-13 is the certified copy of Hakku Patra (Possession Certificate) shown to have been signed on 19.10.1978 by the B.D.O., Bengaluru North Taluk, Ex.P-14 is the photocopy of three property tax receipts said to be pertaining to the suit schedule property and paid by the plaintiff, Ex.P-15 is the certified copy of the building licence shown to have been issued by the Village Panchayat, Kadugondanahalli in favour of the plaintiff, Ex.P-16 is the certified copy of an endorsement issued by Bengaluru Mahanagara Palike, dated 30.2.2002, Ex.P-17 is the certified copy of the judgment in O.S.No.3122/1999, dated 26.5.2010, passed by the learned 27th Addl.City Civil Judge, Bengaluru, and Ex.P-18 is the certified copy of the

judgment dated 12.9.2003 passed by this Court in MFA.No.3129/2001.

PW-1 was subjected to a detailed cross-examination from the defendant's side, wherein he adhered to his original version. He reiterated that original plaintiff been the actual allottee of the suit schedule property. He was confronted with the documents from Exs.D-2 to D-6.

11. DW-1 also in his examination-in-chief filed in the form of affidavit evidence has reiterated the contentions taken up by the defendant in her written statement. He has reiterated that the plaintiff had filed an Original Suit for injunction in O.S.No.3122/1999 and at the stage of the final arguments in the suit, the plaintiff withdrew the said suit by filing a memo without reserving any right to file fresh suit. Since it is thereafter the present suit has been filed, the same is

not permissible under the law. He further stated that among the sites formed in Survey No.129 of Kadugondanahalli Village, the defendant's husband was allotted with site No.40 which was adjacent to site No.63. The site No.63 was allotted to one Sri Chikka Hanumanthaiah and site No.34 was allotted to one Sri Ramaswamy, who is none other than the elder brother of plaintiff-Dhanpal. He further stated that the contention of the plaintiff that site No.63 was allotted to him was absolutely false. Sri Chikka Hanumanthaiah being the original allottee of said site No.63, sold the same to the defendant under registered Sale Deed dated 28.1.1978. Since then, it is the defendant who is in peaceful possession and occupation of the said site. He further stated that the letter of the B.D.O. dated 18.10.1978, which is at Ex.P-12, refers to some portion which has been left over after distribution and said left over space has been lying vacant. He further stated

that allotment of site No.63 was made by the then Government of Mysore to Chikka Hanumanthaiah in the year 1955 and Possession Certificate was issued in favour of Chikka Hanumanthaiah by Kadugondanahalli Village Panchayath, which allotment has not been revoked till date.

In his support, DW-1 got marked a certified copy of the plaint in O.S.No.3122/1999, filed by the deceased plaintiff against the defendant at Ex.D-1, a certified copy of the memo filed in the said O.S.No.3122/1999 was marked at Ex.D-2, Ex.D-3 is the certified copy of the Official Memorandum for allotting site to deceased plaintiff, Ex.D-4 is the certified copy of the order passed in O.S.No.3122/1999, passed on an interlocutory application, Ex.D-5 is the certified copy of the order dated 18.1.2005, passed by this Court in Writ Petition No.49130/2004, Ex.D-6 is the certified copy of the

deposition of the plaintiff Dhanpal as PW-1 in O.S.No.3122/1999, Ex.D-7 is the certified copy of the General Power of Attorney executed by the defendant Smt.Velliamma, Ex.D-8 is the certified copy of the Gazette Notification dated 24.3.1955, Ex.D-9 is the Layout plan, Ex.D-10 is the Possession Certificate with respect to site No.63 shown to have been issued in favour of Sri Chikka Hanumanthaiah, Ex.D-11 is the building licence in favour of Chikka Hanumanthaiah issued by Kadugondanahalli Group Panchayath, Bengaluru, Ex.D-12 is an extract of a register maintained by Kadugondanahalli Group Panchayath showing an endorsement that katha was allotted in favour of Chikka Hanumanthaiah, Ex.D-13 is the original Sale Deed dated 28.1.1978, which is shown to have been executed by Sri Chikka Hanumanthaiah in favour of the defendant with respect to site No.63, Ex.D-14 is a register extract of Kadugondanahalli Group Panchayath,

showing the name of the defendant with respect to property No.871, Ex.D-15, Ex.D-16 and Ex.D-17 are three property tax payment receipts standing in the name of the defendant, Exs.D-18 to D-28 are telephone bills standing in the name of the defendant, Exs.D-29 to D-46 are the electricity bills and receipts showing the name of the defendant in them, Ex.D-47 is a copy of the complaint shown to have been given by the defendant with the Director General of Police, Bengaluru and dated 7.5.2003, Ex.D-48 is an endorsement issued to the defendant by the Police Inspector, Kadugondanahalli Police Station and dated 18.8.2003, Ex.D-49 is a copy of the complaint by the defendant to the Circle Inspector, Kadugondanahalli, Bengaluru, Exs.D-50 and D-51 are the two Encumbrance Certificate with respect to site No.63, Ex.D-52 is an endorsement dated 16.7.2001, issued by the Mahanagara Palike, Bengaluru, Ex.D-53 is the tax paid receipt and Exs.D-54 and D-55 are the tax

assessment acknowledgement letters in the name of the defendant, Ex.D-56 is the Ration card, Ex.D-57 is the power sanctioning letter issued by KPTCL and dated 23.6.2001, Ex.D-58 is the certified copy of order on IA.1 in O.S.No.18/1982, dated 10.11.1983, Ex.D-59 is the extract from the Property Register Card issued by the office of the Assistant Director, Land Records, City Survey, Bengaluru-01, Ex.D-60 is the P.T. Sheet No.1114, issued by the very same office, Ex.D-61 is the copy of the P.T. sheet sketch, Ex.D-62 is the spot inspection notice, Ex.D-63 is the endorsement issued to Sri T.Hanumaiah and dated 5.1.1976, by the City Survey Department, Ex.D-64 is the Possession Certificate with respect to site No.64, Ex.D-65 is the notice regarding change of rights issued by the City Survey Office, Ex.D-66 is the General Power of Attorney executed by the defendant in favour of DW-1, Ex.D-67 is the Mysore Gazette dated 24.3.1955, Ex.D-68 to Ex.D-71 are the

tax paid receipts standing in the name of the defendant, Ex.D-72 is the electoral voters list for the year 1996 and Ex.D-73 is the certified copy of the Sale Deed dated 20.11.1978, executed by one Sri T.Hanumaiah in favour of one Sri Thayamma with respect to site No.64.

DW-1 was subjected to a detailed cross-examination from the plaintiff's side, wherein, for many questions put to him, he has answered that he does not know.

12. In the light of the above pleadings and evidence of the parties, it was the argument of learned counsel for the appellant that site No.63 could not be allotted to the plaintiff, because, in the Layout, already site No.63 was formed and allotted to Chikka Hanumanthaiah. The two sites, if ordered to be formed by the Block Development Officer in the vacant land, was after the site No.64. As such, the plaintiff could not

have been allotted with site No.63. He further submitted that the plaintiff while withdrawing O.S.No.3122/1999, did not reserve any liberty which was required under Order XXIII Rule 1 (4) of CPC. He also submitted that the suit for possession filed by the plaintiff is barred by time. It was his further contention that the plaintiff should have approached the Block Development Officer and ascertained the location and identity of the site said to have been allotted to him, which he failed to do. He brought to the notice of the Court that Exs.P-12 and P-13, upon which the plaintiff has relied upon in the trial Court, does not mention the site number as '63' in them. He further submitted that the plaintiff had never been in possession of the suit schedule property. Learned counsel also submitted that the plaintiff ought to have sought for the relief of possession in his earlier suit itself and that he withdrawing his suit in O.S.No.3122/1999 without

reserving liberty to file fresh suit is hit by Order II Rule 2 and Order XXIII Rule 1(4) of CPC.

Further submitting that the plaintiff has not approached the Court with clean hand and has played fraud upon the Court, learned counsel for the appellants relying upon several judgments of the various Courts, including the Hon'ble Apex Court in his support, prayed for allowing the appeal and dismissal of the suit. Those judgments will be referred at the relevant place hereafterwards.

13. Learned counsel for the respondents/plaintiffs in his argument submitted that the appellant/defendant herself had sought for cancellation of allotment of the site in favour of the plaintiff before the Assistant Commissioner as per Ex.P-1 in 1980. Thus, she has accepted the allotment of suit schedule property in favour of the plaintiff. He further submitted that since

the Assistant Commissioner rejected her petition, she approached the Divisional Commissioner in the form of a Revision as per Ex.P-3, which also came to be dismissed. The said order was not challenged by her. As such, the allotment of the suit schedule property in favour of the plaintiff has reached its finality.

Learned counsel further submitted that the appellant has also instituted a suit in O.S.No.18/1982, for the relief of declaration of her title with respect to the suit schedule property. She had also challenged the grant made in favour of the plaintiff. However, the trial Court negatived the same after holding that the grant made in favour of present respondents/deceased plaintiff as valid. Aggrieved by the same, she preferred an appeal in this Court in RFA.No.485/1997, which also came to be dismissed as per Ex.P-6. In spite of the same, the appellant has filed O.S.No.2410/1997, on the file of the 17th Addl.City Civil Judge, Bengaluru, seeking

the very same relief which she had sought earlier in O.S.No.18/1982. However, the said plaint came to be rejected at the application of the present respondent/deceased plaintiff as not maintainable. Against the said judgment, the present appellant preferred RFA No.69/2004, before this Court, which confirmed the declaration decree passed in O.S.No.18/1982 and remanded the matter to the trial Court to decide with regard to possession.

Learned counsel further submitted that the present respondent/deceased plaintiff filed O.S.No.3122/1999, for the relief of permanent injunction. However, since the present appellant illegally entered and put up construction in the suit property, he sought for an amendment of the plaint seeking possession of the suit property. Since his request for amendment was rejected, he withdrew the said suit and has preferred the

present suit bearing No.16762/2005, for the relief of possession of the suit schedule property.

Learned counsel further submitted that the present appellant/defendant by her act in challenging the allotment of the suit schedule property to the plaintiff is now estopped from contending that she is the allottee of the said site. He further submitted that there cannot be an approbate and reprobate in a matter by the same party. He also submitted that, had really the vendor to the defendant i.e., Chikka Hanumanthaiah been allotted the suit site on 4.12.1955, then, the delay of six years caused in issuing him the Possession Certificate, which was in the year 1961, would create a serious doubt in the case of the defendant. He highlighted that the defendant has not produced any document, including the allotment letter, to show that the suit site was allotted to Sri Chikka Hanumanthaiah.

He further stated that Village Panchayath had no authority to issue the alleged Possession Certificate in favour of Sri Chikka Hanumanthaiah.

Learned counsel further submitted that in Survey No.129 of Kadugondanahalli, originally the total number of sites that were formed were only 62, the remaining two sites were formed at later stage as site No.63 and No.64, out of which, site No.63 was allotted to the plaintiff. This can be gathered by a perusal of the alleged Layout plan. Learned counsel also disputed the alleged Layout plan at Ex.D-9 by contending that had the Government formed the Layout, the Village Panchayath has no role to approve the Layout plan. He also submitted that the alleged possession of the suit site by the defendant is purely an interim measure and her possession is based upon interim orders that have been continuously in force in various litigations.

As such, the present suit is filed for the relief of possession. The said relief since was not prayed in the previous suit of the plaintiff which was instituted for a different cause of action, either Order II Rule 2 or Order XXIII Rule 1(4) of CPC which was agitated by the appellant, is not applicable in the case on hand. In his support, he relied upon several of the judgments, which would be referred to at relevant place hereafterwards.

14. Learned counsel for the appellant/defendant in his argument in the beginning submitting that the plaintiff must succeed or fail in proving his title on the strength of his own case, but, not the weakness of the other, relied upon two reported judgments of Hon'ble Apex Court. The first of which is in the case of **Brahma Nand Puri –vs- Nelci Puri, since deceased, represented by Mathra Puri and another, reported in AIR 1965 SC 1506.** The said appeal before the Hon'ble Apex Court was with respect to an ejectment suit, wherein in Para-8

of its judgment, the Hon'ble Apex Court observed that, the plaintiffs suit being one for ejectment, he has to succeed or fail on the title he established and if he cannot succeed on the strength of his title, his suit must fail, notwithstanding that the defendant in possession has no title to the property.

15. The second judgment is in ***Punjab Urban Planning & Development Authority –vs- Shiv Saraswati Iron & Steel Re-Rolling Mills***, reported in ***[(1998) 4 SCC 539]***, wherein in the matter of a suit for specific performance of a contract, the Hon'ble Apex Court was pleased to observe that the plaintiff, instead of proving his own case fully, cannot take advantage of weakness in defendant's case.

The principle enunciated in the above judgment is settled principle of law, as such, while analysing the present case, the above principle laid down by the

Hon'ble Apex Court that the plaintiff's case should stand on its own leg, but, not on the weakness of the other side, will be borne in mind.

16. Learned counsel for the appellant while submitting that the burden of proving the title is always upon the plaintiff, has relied upon three judgments of Hon'ble Apex Court.

The first judgment is in ***Ramchandra Sakharam Mahajan -vs- Damodar Trimbak Tankasale (Dead) and others, reported in [(2007) 6 SCC 737]***, wherein the Hon'ble Apex Court with respect to Sections 5 and 34 of the Specific Relief Act, 1963, in a suit for recovery on the strength of the title, was pleased to observe that, in such kind of suits, the burden of proof is on the plaintiff to establish that title. For appreciating the case of title set up by the plaintiff, the Court was also entitled to consider the rival title set up by the defendants. But,

the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree.

The second judgment is in ***Sebastiao Luis Fernandes (Dead) through LRs. and others -vs- K.V.P.Sahstri (Dead) through LRs. and others,,*** reported in ***[(2013) 15 SCC 161]***, wherein the Hon'ble Apex Court with respect to a suit for declaration of title and cancellation of registration of title of defendants, observed that the initial burden of proof to establish ownership is on the plaintiff and the same cannot be placed on defendants.

The third judgment on the proposition relied upon by the appellant is in ***Union of India and others -vs- Vasavi Co-operative Housing Society Limited and others,*** reported in ***[(2014) 2 SCC 269]***, wherein the Hon'ble Apex Court with respect to a suit for declaration

of title and possession, was pleased to observe that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against them, in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited.

The above principle enunciated by the Hon'ble Apex Court which are the settled principles of law would

also be borne in mind while appreciating the evidence in the case on hand.

17. Learned counsel for the appellant/defendant in his argument submitted that the endeavourance of the Court must be discovery of truth. In that connection, he relied upon the following judgments :

In ***Maria Margarida Sequeira Fernandes and others -vs- Erasmo Jack De Sequeira (Dead) through LRs.***, reported in ***[(2012) 5 SCC 370]***, wherein at Paragraph-33 of its judgment, the Hon'ble Apex Court was pleased to observe as below :

" The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system

will acquire credibility only when people will be convinced that justice is based on the foundation of the truth."

In ***Dalip Singh -vs- State of Uttar Pradesh and others***, reported in ***[(2010) 2 SCC 114]***} the Hon'ble Apex Court was pleased to observe as below :

" For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Goutam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, the post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in

the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

The learned counsel for the appellant drew the attention of this Court to Paragraphs-21 and 24 of the judgment in ***A.Shanmugam -vs- Ariya Kshatriy Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, Represented by its President***, reported in ***AIR 2012 SC 2010***, wherein the Hon'ble Apex Court was pleased to observe as below :

" 21. *This case demonstrates widely prevalent state of affairs where litigants raise disputes and cause litigation and then obstruct the progress of the case only because they stand to gain by doing so. It is a matter of common experience that the Court's otherwise scarce resources are spent in dealing with non-deserving cases and unfortunately those who were waiting in the queue for justice in genuine cases usually suffer. This case is a typical example of delayed administration of civil justice in our Courts. A small suit, where the appellant was directed to be evicted from the premises in 1994, took 17 years before the matter was decided by the High Court. Unscrupulous litigants are encouraged to file frivolous cases to take undue advantage of the judicial system.*

24. *The entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in *Dalip Singh v. State of U.P. and others* (2010) 2 SCC 114 : (AIR 2010 SC (Supp) 116 : 2010 AIR SCW 50) observed that*

truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system."

The learned counsel for the appellant also relied upon the judgment of Hon'ble Apex Court in ***Padmawati -vs- Harijan Sewak Sangh and others***, reported in ***[(2012) 6 SCC 460]***, and referred to Paragraph-10 of the said judgment, wherein the Hon'ble Apex Court was pleased to observe as below :

" The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving a no-risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where the court finds that using the courts as a tool, a litigant has perpetuated illegalities or has perpetuated

an illegal possession, the court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the courts. One of the aims of every judicial system has to be to discourage unjust enrichment using the courts as a tool. The costs imposed by the courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

With the above reference to various judgments, learned counsel for the appellant submitted that, in the instant case, the plaintiff has suppressed the truth and has instituted a frivolous litigation against the defendant. As such, the suit of the plaintiff deserves to be dismissed.

18. The above principles enunciated by the Hon'ble Apex Court, which are settled principles of law, would

also be borne in mind while appreciating the evidence in the case on hand.

19. The plaintiff in order to show that the suit schedule property was allotted to him, has produced a certified copy of the Official Memorandum dated 18.10.1978, issued by the office of the B.D.O., Bengaluru North, Yelahanka. The very same document was also confronted to PW-1 in his cross-examination from the defendant's side through Ex.D-3. The said document which was admitted by PW-1 is actually an Official Memorandum dated 18.10.1978, issued by the office of the B.D.O., Bengaluru North, Yelahanka, which after referring to a direction said to have been issued by the Deputy Commissioner, Bengaluru District, for the allotment of one site in Ashok Nagar to the plaintiff – R.Dhanpal under its direction dated 25.7.1977, is shown to have identified a vacant piece of land in Survey

No.129 in Ashok Nagar village, in which, two sites could have been easily formed. The B.D.O. with the said observation has ordered to grant one site with the dimension of 45' East to West and 30' North to South in Survey No.129 of Ashok Nagar, Bengaluru North Taluk, to the plaintiff - R.Dhanpal, at an upset price at ₹750/-. In the same Official Memorandum, it is also mentioned that the Possession Certificate shall be issued to him as soon he remits the price in the office of the Taluk Development Board, Bengaluru North.

20. PW-1 has produced a certified copy of the Possession Certificate at Ex.P-13. The said document which is dated 19.10.1978 issued by the B.D.O., Bengaluru North Block, Yelahanka, would go to show that a site formed in Survey No.129 of Ashok Nagar (Kadugondanahalli), measuring 45' x 30' with the boundary East by Ramaswamy's house, West by

Scheduled Caste Colony Road, North by Yellappa's house and South by vacant site, was given to the possession of the plaintiff. Admittedly, neither the Official Memorandum at Ex.P-12 nor the Possession Certificate at Ex.P-13 anywhere mentions the site number in it, much less, site No.63, which is the subject matter of dispute in the suit.

The plaintiff in order to show that he has paid the cost of the vacant site and also has paid the property tax with respect to the site property, has produced three receipts, which are marked at Ex.P-14. Though those three receipts would go to show that the plaintiff has paid the upset price of the site, which is a sum of ₹750/- and thereafter, has also paid property tax for the year 1978-79 and building licence fee in the year 1981-82, but, none of those documents mention the site number in it. The first document produced by the plaintiff in the

suit which mentions about the site number as '63' is the certified copy of the building licence produced by him at Ex.P-15. The said document go to show that plaintiff was permitted to put up a residential building in the site No.63 of Ashok Nagar. The boundary to the said site No.63 is shown in the said building licence which corresponds to the boundaries shown in the schedule to the Possession Certificate at Ex.P-13. Therefore, even though the building licence at Ex.P-15 shows the schedule to the site which tallies with the Possession Certificate at Ex.P-13, but, there are no documents to show as to on what basis the site number is shown in the said building licence as site No.63.

Ex.P-16 is an endorsement issued by the Assistant Revenue Officer, Bengaluru Mahanagara Palike, Bengaluru and dated 30.2.2002, keeping pending the request of the plaintiff to make over katha with respect

to site No.63 in his name citing the pendency of the litigation between the plaintiff and the defendant in the Civil Court, the Corporation has issued the said endorsement to the plaintiff. As such, the said document would throw no more light as to how the site No.63 appeared with respect to the site allotted to the plaintiff.

21. Even though the Allotment Order and Possession Certificate at Ex.P-12 and Ex.P-13, which are the primary documents upon which the plaintiff relies upon to establish his title over the suit schedule property, it does not mention the site number in it as '63', however, the plaintiff simultaneously relies upon the document at Exs.P-1, P-2 and P-3 to show that the site that was allotted to him was site No.63.

Ex.P-1 is the certified copy of the order passed in case No.VPC.31/1979-80, in the Court of the Assistant

Commissioner, Bengaluru Sub-Division, Bengaluru, on 28.4.1980. The said proceeding in VPC.31/1979-80 is shown to be an appeal under Section 200 of the Karnataka Village Panchayaths and Local Boards Act, 1959, against an order No.CDP.VPC.64/1978-79, dated 18.10.1978, of the B.D.O., Bengauru North (Ex.P-12). The appellant in the said case is the present defendant (appellant in this appeal) Smt.Velliamma. She has challenged the allotment of the site in Ex.P-12 by B.D.O. in favour of the plaintiff. She contended before the Assistant Commissioner that site bearing No.63 in Survey No.129 of Kadugondanahalli, measuring 36' x 46' was granted in favour of Chikka Hanumanthaiah by the Chairman, Kadugondanahalli Panchayath, Bengaluru North Taluk and possession thereof was also handed over to the said grantee on 15.2.1961. It is from said Chikka Hanumanthaiah, the appellant – Smt.Velliamma has purchased the said site under registered Sale Deed

dated 28.1.1978. She has specifically contended that the site which has been purchased by her has been allotted by the B.D.O. in favour of the plaintiff-Dhanpal. As such, she has prayed for setting aside the said allotment.

22. The Assistant Commissioner by his order dated 28.4.1980, while reasoning that the alleged allotment of site No.63 in favour of Sri Chikka Hanumanthaiah, the vendor to the defendant, was bad in the eye of law since B.D.O. was not competent to issue any such Possession Certificate and the Chairman of Village Panchayath had no powers to grant any site and issue Possession Certificate and further observing that it was only Tahsildar who was empowered to grant Possession Certificate during the year 1961, observed that the appellant before him (who is the defendant in the suit in question) has not derived any title from the registered

Sale Deed since the allotment of site in favour of her vendor Sri Chikka Hanumanthaiah was without any authority and further holding that the Block Development Officer has correctly come to the conclusion and has passed the impugned order, proceeded to dismiss the appeal. Ex.P-2 is an endorsement issued by the very same Court of the Assistant Commissioner, Bengaluru Sub-Division, Bengaluru, intimating about the dismissal of the appeal in case No.VPC.31/1979-80.

23. Ex.P-3, which is the certified copy of the order dated 4.12.1981, passed by the Court of Divisional Commissioner, Bengaluru Division, in VPC.RP.4/1980-81, go to show that aggrieved by the order of the Assistant Commissioner at Ex.P-2, the appellant preferred a Revision before the Divisional Commissioner, which Revision also by its reasoned order, came to be

dismissed, thus, confirming the order of the Assistant Commissioner under Ex.P-1. According to the parties, the appellant has not challenged the said order passed by the Divisional Commissioner, as such, it has reached its finality.

24. Learned counsel for the respondents in his argument relying upon Exs.P-1, P-2 and P-3, vehemently submitted that the appellant (defendant) herself has admitted that site that was allotted to the plaintiff-Dhanpal under Exs.P-12 and P-13 is in fact the site bearing No.63, as such, she has sought for the cancellation of the allotment of the said site in favour of plaintiff-Dhanpal. Otherwise, she would not have filed an appeal before the Assistant Commissioner and a Revision Petition before the Divisional Commissioner as per Ex.P-1 and Ex.P-3 respectively. Learned counsel further submitted that the appellant (defendant) thus

cannot approbate and reprobate and she is estopped from taking a contention that site No.63 is not the one allotted to the plaintiff. In his support, he relied upon the following judgments in his support.

In ***The Rajasthan State Industrial Development and Investment Corporation and another –vs- Diamond and Gem Development Corporation Ltd., and another,*** reported in ***AIR 2003 SC 1241,*** with respect to Section 115 of Indian Evidence Act, 1872, and Order VI Rule 2 of Code of Civil Procedure, 1908, (hereinafter for brevity referred to as 'CPC'), and on the principles of approbate and reprobate in respect of estoppel by election, the Hon'ble Apex Court was pleased to observe at Para-9 and Para-10 as below :

" 9. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an

order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience.

10. *Thus, it is evident that the doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels *in pais* (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."*

In ***Shri Surendra Nayak -vs- A.M.Mohammed Shafi***,

reported in [2016 (4) KCCR 3606], a Co-ordinate Bench of this Court while discussing on estoppel under Section 115 of Indian Evidence Act, was pleased to observe at Para-11 and Para-12 of its order as below :

" **11.** *Estoppel is a collective name given to a group of legal doctrines whereby a person is prevented from making assertions that are contradictory to their prior position on certain matters before the Court; thereby the person is said to be "estopped". Estoppel may operate by way of preventing someone from asserting a particular fact in Court, or in exercising a right, or in bringing a claim. Black's Law Dictionary defines "estoppel" as "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."* (Ref. to Black's Law Dictionary, Ninth Edition, 2009).

12. *Judicial estoppel is said to be parcel of doctrine of equitable estoppel. Judicial estoppel binds a party to his/her previous judicial declaration, such as allegations contained in a lawsuit, complaint, written statement, or testimony given under oath. The object of judicial estoppel is to preserve the integrity of the Courts, and to uphold the sanctity of the oath. Under judicial estoppel a party to a litigation cannot be permitted to take*

contradictory stand and to change its position from the previous litigation to the subsequent one. For, a litigant cannot be permitted to take a Court out for a ride by his shifting stand.”

Thus, the earliest act of the present appellant in challenging the allotment order of the site in favour of the plaintiff made by the B.D.O. through Ex.P-12 in an appeal before the Assistant Commissioner in VPC.No.31/1979-80, go to show that immediately after the allotment and taking over of the possession of the allotted site by the plaintiff, the defendant (appellant herein) was confirmed and satisfied that the site that was allotted to the plaintiff under Ex.P-1 was site No.63 which she claims as a purchaser from her alleged vendor Sri Chikka Hanumanthaiah, under registered Sale Deed. Though according to the defendant the site purchased by her from said Chikka Hanumanthaiah was said to be measuring 36' x 46', whereas, the site allotted to the

plaintiff by the B.D.O. was measuring 45' x 30', still, the defendant was convinced that the site allotted to the plaintiff was the very same site bearing No.63, though such site number was not specifically mentioned either in the allotment under Ex.P-2 by B.D.O. or in the Possession Certificate at Ex.P-13, issued by the same authority.

25. The defendant (appellant herein) after her futile attempt before the Divisional Commissioner in Revision Petition as per Ex.P-3, approached the Civil Court by filing an Original Suit No.18/1982, in the Court of learned XIII Addl.City Civil & Sessions Judge, Bengaluru, for the relief of declaration to declare that she is the absolute owner and in possession of the suit schedule property and for permanent injunction against the plaintiff. The suit schedule property is admittedly the present suit schedule property. The said suit which

was instituted against the present plaintiff-Dhanpal, B.D.O. and the Village Panchayat, Kadugondanahalli, arraigning them as defendant Nos.1, 2 and 3 respectively, was contested and tried after framing the following issues :

1. *Whether the Village Panchayat, Kadugondanahalli was entrusted with the distribution of sites formed in S.No.129 to the schedule caste persons?*
2. *Whether the suit site was lawfully allotted to Chikkahanumanthaiah by the Chairman of Kadugondanahalli?*
3. *Whether the plaintiff has acquired title to the suit site by the sale deed of Chikkahanumanthaiah?*
4. *Whether the plaintiff is in lawful possession of the suit site?*
5. *Whether the suit site allotted to 1st defendant by 2nd defendant is valid?*

6. *Whether the plaintiff's entitled for declaration of title prayed for?*
7. *Whether the plaintiff is entitled for injunction prayed for?*
8. *For what relief the parties are entitled?*

The trial Court by its judgment and decree dated 17.3.1993, while answering issue Nos.1, 2, 3, 4, 6 and 7 in the negative and issue No.5 in the affirmative, dismissed the suit with cost. The same is evident in the certified copy of the said judgment and decree which are at Ex.P-4 and Ex.P-5 respectively.

26. It is an undisputed fact that aggrieved by the judgment and decree passed in O.S.No.18/1982, the present appellant (defendant) preferred an appeal before this Court in RFA.No.485/1997, which appeal came to be dismissed only on the ground of limitation, by holding that the appeal is barred by time. The same is evident from the certified copy of the order dated

14.7.1997, passed by this Court in RFA.No.485/1997, which is at Ex.P-6.

27. The evidence of the parties further make it clear that in spite of dismissal of RFA.No.485/1997, the present appellant once again filed a suit in O.S.No.2410/1997, in the Court of learned XXVII Addl.City Civil Judge, Bengaluru, against the present plaintiff, B.D.O., Yelahanka, Village Panchayat, Kadugondanahalli and the State, with respect to the suit schedule property for the relief of perpetual injunction restraining the defendants from interfering with her alleged peaceful possession and enjoyment over the suit schedule property and also for a declaration to declare that the Possession Certificate issued by the B.D.O. is *non est* and nullity in the eye of law. The present respondent/deceased plaintiff who was defendant No.4 in the said suit, has filed an application (IA.7), seeking

rejection of the plaint on the ground that the dispute had already been decided in O.S.No.18/1982, filed under Section 11 of CPC. The trial Court decided issue No.5 framed in the suit, which read as "*Whether the suit is hit by principles of res judicata in view of the findings in O.S.No.18/1982 and RFA No.54/1995 filed by the plaintiff herein?*" and IA.7 together, and by its order dated 6.12.2003, answered the said issue No.5 in the affirmative and dismissed the suit of the plaintiff therein as could be seen in the certified copy of the said order which is at Ex.P-7 and decree at Ex.P-8 respectively.

Against the said judgment and decree, RFA.No.69/2004 was filed before this Court, which confirmed the declaration decree passed in O.S.No.18/1982 and remanded the matter for trial to decide regarding possession.

Thus, the third attempt made by the present appellant challenging the allotment of the site to the plaintiff in an appeal also came to be dismissed.

28. In the light of the above, it was further the argument of learned counsel for the respondents that in view of the fact that since the title of the plaintiff over the suit schedule property has been decided by the competent Court of law and has reached its finality, raking up the same issue again by the appellant herein is hit by principles of *res judicata*. In that regard, learned counsel relied upon the following judgments.

In ***Forward Construction Co. and others -vs- Prabhat Mandal (Regd.) Andheri and others and connected matters***, reported in ***AIR 1986 SC 391***, the Hon'ble Apex Court at Para-20 of its judgment, on the principle of *res judicata*, was pleased to observe as below:

" 20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to S. 11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has

been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

In ***Dr.Subramanian Swamy -vs- State of Tamil Nadu and others and connected matters***, reported in ***AIR 2015 SC 460***, the Hon'ble Apex Court was pleased to explain the scope of application of doctrine of *res judicata*, in Paragraphs-23, 24 and 26 of its judgment on the following lines :

"23. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments". "Res judiciata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata",

which means that res judicata is accepted for truth.

24. *The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence. "interest republicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari pro uno et eadem causa" (no man should be vexed twice over for the same cause.)*

Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata (Vide: Shah Shivraj Gopalji v. ED-, Appakadh Ayiassa Bi and Ors., AIR 1949 PC 302; and Mohanlal Goenka v. Benoy Kishna Mukherjee and Ors., AIR 1953 SC 65).

26. *This Court in Satyadhyayan Ghosal and Ors. V. Smt. Deorajin Debi and Anr., AIR*

1960 SC 941 explained the scope of principle of res judicata observing as under :

" 7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

For coming to a finding as to who has a better title with respect to the suit schedule property and the contention of the plaintiff that the question regarding the title has already been decided between the parties, as such, the attempt of raking up the same issue by the

defendant (appellant herein) is hit by principles of *res judicata*, it is required to assess the evidence placed by the defendant also in the suit.

29. The pleading, as well the oral evidence of the defendant is that the sites in Survey No.129 were formed by the then Government of Mysore and among those sites, site No.63 was allotted in favour of Chikka Hanumanthaiah in the year 1955 and an adjoining site bearing site No.40 was allotted to the husband of the defendant by name Sri Y.Yellappa. A copy of the Mysore Gazette dated 24.3.1955 produced and marked at Ex.D-8 by the defendant would go to show that a Gazette Notification with respect to the acquisition of the land in Survey No.129 of Kadugondanahalli was published by the then Government of Mysore under Mysore Land Acquisition Act, 1894. This would only go to show that certain lands in Survey No.129 was

acquired by the then Mysore Government. However, the said Notification does not show anywhere as to the formation of a Layout or the total number of sites intended to be formed in the acquired land.

30. The pleadings, as well the evidence of defendant as DW-1 further is that the suit schedule property was originally allotted to one Sri Chikka Hanumanthaiah in the year 1955 by the then Government of Mysore and the Possession Certificate has been issued in favour of Sri Chikka Hanumanthaiah by the Kadugondanahalli Village Panchayath. Though such a contention was taken up by the defendant regarding allotment of site originally in favour of Sri Chikka Hanumanthaiah, the vendor of the defendant, but, admittedly the defendant has not produced the document of allotment of said site to Sri Chikka Hanumanthaiah by the then Government of Mysore. As

such, primarily the contention of the defendant that the suit schedule property was originally allotted to Chikka Hanumanthaiah is confined only to the statement of the defendant in the form of oral evidence of DW-1. However, the defendant has produced a document shown to be a Possession Certificate and dated 15.2.1961 and marked it at Ex.D-10 to show that said Chikka Hanumanthaiah, the vendor of the defendant, was put in possession of site No.63 in Survey No.129, which is the suit schedule property. A perusal of the said Possession Certificate would lead to following doubts :

(i) Its recital in the first para shows that the site was handed over to Sri Chikka Hanumanthaiah on 4.2.1955, which means, he had taken possession of the site on 4.2.1955, however, at the bottom of the very same document, it is shown to have been written as "*Taken possession of above site No.63 in A.K.Colony*

*measuring 36 (36') x 46' this 15th day of February 1961,
Sd/- Chikka Hanumanthaiah",* which leads to an inference that Chikka Hanumanthaiah has acknowledged the receipt of possession of the site six years after the above date i.e., 4.2.1955. Thus, a site cannot be handed over twice to a person under the same document showing two different dates with a gap of not less than six years.

(ii) The Possession Certificate is shown to have been issued by the Chairman of Kadugondahanalli Group Panchayath, Bengaluru North Taluk and when the site is shown to have been formed by the State Government, then how come a Chairman of a Panchayath can issue Possession Certificate after six years of the alleged allotment of a site is not at all shown either in the said document or in the pleading and evidence of the defendant.

Added to the above, finding of the Assistant Commissioner and the Divisional Commissioner under Ex.P-1 and Ex.P-3 respectively that Village Panchayath had no power and authority either to allot the said site or to issue Possession Certificate, has reached its finality. Thus, the very Possession Certificate at Ex.D-10, which is the only and primary document produced and relied upon by the defendant as an allotment of the suit site to Sri Chikka Hanumanthaiah creates a serious doubt in it and proves to be not safe to believe.

31. When the very Possession Certificate in the name of Sri Chikka Hanumanthaiah itself proves to be not safe to believe, then, the building licence shown to have been issued in favour of Sri Chikka Hanumanthaiah in the year 1975 as per Ex.D-11 also loses its reliability. Ex.D-12, a Ledger Extract showing the entry

of name of Chikka Hanumanthaiah with respect to property bearing No.817, would in no way improve the case of the defendant since it is neither a Katha Certificate nor shows the suit schedule property number in it. Further the said document also proceeds on the basis of Possession Certificate at Ex.D-10, which Certificate itself was found to be not safe to believe and acted upon.

32. Learned counsel for the appellant in his argument heavily relying upon a document at Ex.D-9, which is shown to be a Layout plan in Survey No.129 of Kadugondanahalli Village, vehemently submitted that name of Sri Chikka Hanumanthaiah is shown as against site No.63 in the said plan, which shows that the said site was allotted to Sri Chikka Hanumanthaiah, the vendor to the defendant. The respondents herein have seriously disputed the said plan.

The said argument of the learned counsel for the appellant is not acceptable for the reason that Ex.D-9 was not accepted by the plaintiffs in the trial Court as an authenticated document to show the alleged ownership of the persons against the site numbers alleged to have been shown in the said plan. When the alleged plan is perused, it can be seen that the said plan is shown to have been approved once again by Kadugondanahalli Group Panchayath, Bengaluru North Taluk, on 3.11.1974. Had really the sites to the allottees were made in the year 1955 by the then Mysore Government, the question of Kadugondanahalli Group Panchayath approving the layout plan nineteen years thereafter under Ex.D-9 is highly impossible and that by itself shows that Ex.D-9 is not a trustworthy and reliable document.

Secondly, generally when a layout plan is approved, the names of the allottees would not be mentioned there since there will be no allottees before formation and approval of layout plan. As such also, in the absence of any details as to on what basis the said layout plan shows the names of the alleged allottees in it also creates a doubt in the very genuinity and authenticity of the document at Ex.D-9.

33. According to the plaintiffs, in the land at Survey No.129 of Kadugondanahalli Village, originally only 62 sites were formed, later on, in the vacant space available, two more sites were formed, out of which, site No.63 was allotted to the deceased plaintiff vide Exs.P-12 and P-13. In that regard, learned counsel for the respondents herein while drawing the attention of the Court to layout plan at Ex.D-9 submitted that, looking at the alleged plan, the same would go to show

that Sl.Nos.1 to 62 as the site numbers run in continuity, whereas, showing of site No.63 and site No.64, adjacent to site No.40, go to show that those two sites were subsequently formed in the vacant space available in the layout. Though the said argument logically appears to be carrying some force in it, but, in the absence of any pleading or evidence in that regard, the same cannot be accepted.

34. The contention of the plaintiffs that originally in the land at Survey No.129, only 62 sites were formed and subsequently, two more sites with the Nos.63 and 64, were formed, gathers further support from the very pleading of the present defendant as a plaintiff in O.S.No.2410/1997, which she had instituted against the B.D.O., Village Panchayath, Kadugondanahalli, the present plaintiff and the State, for the relief of declaration and permanent injunction. As could be seen

in Ex.P-7, it appears that, she has stated in her plaint that as many as 64 sites were formed out of the said extent of land in Survey No.129 and 62 sites were allotted to various persons in the year 1956, which means, even according to her, the total number of sites that were allotted as in the year 1956 were only 62 in number. According to her own pleading in the form of written statement in the present case, site No.63 was allotted to her vendor Sri Chikka Hanumanthaiah, in the year 1955. The same is the evidence of DW-1 also. Had there been the allotment of only 62 sites as on 1956, the question of allotting 63rd site one year prior to 1956 i.e., in the year 1955, in favour of Chikka Hanumanthaiah does not arise. Thus, from the very pleading and evidence led by the defendant herself, it falsifies that one Sri Chikka Hanumanthaiah was allotted any site in Survey No.129, much less, site No.63 in the year 1955.

35. Learned counsel for the appellant, for this discrepancy in the form of difference with respect to two sites, submitted in his argument that, as could be seen in Ex.D-9 – the Layout plan, site No.39 and site No.45 are shown as the sites allotted to the Society and a Well respectively, the number of allottees would reduce to 62 only. As such, the pleading in O.S.No.2410/1997 that there were the allotment of 62 sites stands established.

The said contention of the learned counsel for the appellant is also not acceptable for the reason that in the very same Layout plan, apart from site No.39 and site No.45, bearing no name of any specific allottee, one more site bearing No.28 is also shown as a 'Community Hall'. Then, if three three sites are excluded, the total site numbers would reduce to 61, but, not to 62. Thus, it further goes to show that Ex.D-9 is not a reliable

document and is a document to serve the purpose of the defendant in the suit. Furthermore, when the plaintiff has seriously disputed the said document at Ex.D-9, the defendant was expected to subject the Author of the said document or an official from the Village Panchayath, Kadugondanahalli, for his evidence and cross-examination to ascertain the genuinity and authenticity of the said document. The same has not been done.

36. Thus, all the above analysis of the pleading and evidence led by the defendant in the matter would go to show that the defendant has utterly failed to show any piece of evidence to the effect that site No.63, which is the suit schedule property, was originally allotted to Sri Chikka Hanumanthaiah. The defendant has even failed to show that when the Layout was formed in Survey No.129, originally there were not just

62 sites, but, there were 64 sites in total. Even the Possession Certificate at Ex.D-10 also failed to inspire any confidence to believe in it. On the other hand, the finding of the Assistant Commissioner and Divisional Commissioner that there was no allotment of site in favour of Sri Chikka Hanumanthaiah and that the Possession Certificate shown to have been issued to him by Village Panchayath is not valid in the eye of law, since has reached its finality, it would go to show that the alleged vendor Chikka Hanumanthaiah had no marketable title in the suit property. That being the case, even if it is accepted that the present defendant had purchased the suit schedule property from said Sri Chikka Hanumanthaiah under registered Sale Deed, which is at Ex.D-13, on 28.1.1978, the same would give her no better title than what her vendor had. Since the vendor's title itself is not a better title, he has not passed any better title to the purchaser i.e., the

defendant herein. Since the said aspect was also in dispute and decided by various competent Courts in O.S.No.18/1982 and O.S.No.2410/1997, as observed above, the question of the title with respect to suit property between the present plaintiff and the present defendant had already been heard and decided in favour of the present plaintiff, as such, is barred by *res judicata* also.

37. When the defendant herein has no better title compared to the plaintiff with respect to the suit schedule property, her further documents produced in the suit under Exs.D-15 to D-46 would only go to show that she has been in possession of the property, but, the same would not confer any title upon her with respect to the suit property.

38. Learned counsel for the appellant in his argument relied upon a judgment of Hon'ble Apex Court

in ***Vimal Chand Ghevarchand Jain and others -vs- Ramakant Eknath Jadoo, reported in [(2009) 5 SCC 713]***, and submitted that title is passed on the registration of the Sale Deed. In Para-34 of the said judgment, the Hon'ble Apex Court was pleased to observe that, right of possession over a property is a facet of title. As soon as a Deed of Sale is registered, the title passes to the vendee. Relying upon the said observation, learned counsel for the appellant submitted that in view of the Sale Deed with respect to suit property at Ex.D-13 standing in the name of the defendant/appellant, the title has passed in her favour. The said argument of the learned counsel is also not acceptable in view of the analysis made above, more particularly, when it is established that vendor to the present defendant when himself had no title, he cannot pass any better title to the vendee, who is the present defendant. As such, merely because a registered Sale

Deed is shown to have been standing in her name, by that itself, it cannot be held that she has an absolute title and a better title with respect to the suit property which her vendor himself did not have.

39. Learned counsel for the appellant/defendant in his argument also submitted that the plaintiff has not approached the Court with clean hands and has suppressed the material facts, more particularly, the fact that the suit schedule property with site No.63 had already been allotted to one Sri.Chikka Hanumanthaiah, as such, for suppression of facts and playing fraud on the Court, the suit deserves to be dismissed.

40. In support of his argument, learned counsel for the appellant relied upon the following judgments of the Hon'ble Apex Court:-

[1] In the case of *S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs. and*

others reported in **(1994) 1 Supreme Court Cases 1**, the Hon'ble Apex Court was pleased to observe at paragraph 5 of its judgment that, one who comes to the Court must come with clean hands.

In paragraph 6 of the same judgment, the Hon'ble Court was further pleased to observe that, a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the Court is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side, then, he would be guilty of playing fraud on the Court as well as on the opposite party.

[2] In the case of *Ramjas Foundation and another Vs. Union of India and others* reported in (2010) 14 Supreme Court Cases 38, at paragraph 21 of its judgment, the Hon'ble Apex Court was pleased to observe that, 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 other 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 the facts which have a bearing on the adjudication of the issue(s) arising in the case.

[3] In the case of ***Bhauraao Dagdu Paralkar Vs. State of Maharashtra and others*** reported in **(2005) 7 Supreme Court Cases 605**, the Hon'ble Apex Court was pleased to observe at paragraphs 9 to 11 as below:-

"9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

10. *A "Fraud" is an act of deliberate deception with the design of securing something*

by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.

11. *"Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letters. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and*

deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

[4] In the case of ***Kishore Samrite Vs. State of Uttar Pradesh and others*** reported in ***(2013) 2 Supreme Court Cases 398***, at paragraph 38, the Hon'ble Apex Court was pleased to observe as below:-

"38. No litigant can play "hide and seek" with the Courts or adopt "pick and choose". True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty-bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of Court."

The above judgments reiterate the settled principle of law that, a person approaching Court should approach with clean hands and should not suppress any material facts which are relevant and necessary for adjudication of the matter pending before the Court. It is also settled principle that the person seeking equity must do equity.

41. In the instant case, the contention of the defendant/appellant is that, the plaintiff/respondent has not approached the Court with clean hands since in his plaint, he did not disclose that site No.63 which is the suit schedule property was originally allotted to the vendor to the defendant by name Sri.Chikka Hanumanthaiah in the year 1955.

42. The plaintiff in his plaint has stated that the suit schedule property was allotted to him under the order of the Block Development Officer dated

18-10-1978. No doubt, he has not stated anything about the alleged earlier allotment of the very same site in favour of one Sri.Chikka Hanumanthaiah who is said to be the vendor of the same property in favour of the defendant herein, but, the point that is required to be considered here is, assuming for a moment that, the defendant was contending that, she was the purchaser of the suit schedule property from the said Sri.Chikka Hanumanthaiah, since prior to the plaintiff filing this suit and the same was to the knowledge of the plaintiff, still, undisputedly, the plaintiff has not admitted the alleged fact from the beginning since the inception of O.S.No.18/1982 against him by the present defendant.

43. Thus, from the beginning, the alleged allotment of site No.63 in favour of one Sri.Chikka Hanumanthaiah had never been the case of the present plaintiff, but throughout, it has been the case of the

present defendant. Though the present defendant contends the alleged allotment of site originally in favour of Sri.Chikka Hanumanthaiah as a fact, but the plaintiff throughout has been disputing the same. On the contrary, he is contending that he is the original allottee of site No.63 in Survey No.129 of Kaadugondanahalli Village. That being the case, the plaintiff in his plaint could plead what his case was and other aspects which may be necessary and material for the adjudication of the dispute. In the case on hand, the plaintiff, though has not stated in express terms that, in the previous suit, the defendant contended that the suit property was originally allotted to Sri. Chikka Hanumanthaiah, but has given a detailed account of several litigations said to have been held between him and the defendant including the suits in O.S.No.18/1982, .S.No.2410/1997 and also O.S.No.3122/1999. He has given the details of those suits and also how those suits ended. That being

the case, when the plaintiff apart from putting forth his version of the alleged facts, since has also mentioned about the previous litigations between the same parties, which details of the litigation naturally leads the Court to gather the contentions taken up in those suits by the parties, cannot by itself be taken as suppression of material fact which was required for adjudication of this matter. Moreover, when the plaintiff has put forth his version of the case, in the form of plaint, including giving details of the previous litigations that had taken place between him and the defendant, it was for the defendant to give her version of the case in the form of her pleadings by filing the Written Statement. The defendant has filed her Written Statement putting forth her version of the case which includes the alleged allotment of site No.63 in favour of her vendor Sri. Chikka Hanumanthaiah. Thus, the act of the plaintiff, in no manner, be either considered as suppression of any

material facts or playing fraud on the Court. Therefore, the argument of the learned counsel for the appellant/defendant that the plaintiff has played fraud on the Court, is not acceptable.

44. The plaintiff has sought for the relief of possession of the suit schedule property from the defendant in his favour. The defendant has contended that she has been in continuous lawful possession of the suit schedule property from the date of its purchase by her which was in the year 1978 till date. The plaintiff claims his title upon an allotment of the site made in his favour under Ex.P-12. Whereas, the defendant claims her title under registered Sale Deed dated 28-01-1978 which is at Ex.D-13. The defendant contends that she has been put in possession of the suit schedule property, as such, she has been in its lawful possession from the date of its purchase, i.e.28-01-1978.

45. Learned counsel for the appellant in his argument while stating that since the defendant is in lawful possession of the suit schedule property, having purchased the same under a registered Sale Deed, she cannot be dispossessed and the plaintiff is not entitled for possession of the suit schedule property, relied upon two judgments of the Hon'ble Apex Court. In the first judgment which is in the case of ***Rame Gowda (Dead) by LRs. Vs. M. Varadappa Naidu (Dead) by LRs. and another*** reported in ***(2004) 1 Supreme Court Cases 769***, at paragraph 8, the Hon'ble Apex Court was pleased to observe as below:-

"8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser

is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into

would not be called as one acquiesced to by the true owner."

46. In the second judgment in the case of ***Narain Prasad Aggarwal (Dead) by LRs. Vs. State of Madhya Pradesh*** reported in ***(2007) 11 Supreme Court Cases 736***, at paragraph 20 of its judgment, the Hon'ble Apex Court was pleased to observe as below:-

"20. Although title in respect of an immovable property may have different concepts, it is fundamental that title of the same nature cannot be found to be existing in two different persons where their claims thereover are opposite. It was possible for the court to hold in a situation of this nature that the plaintiffs and Defendant 2 being a permanent lessee under the State were bound to pay rent to the State by way of land revenue or otherwise but the same would not mean that despite the plaintiff being the holder of title, the State had in it a right of reversion or for that matter the character of the land was nazul land. It is, therefore, difficult to

agree with the findings of the learned trial Judge as affirmed by the High Court."

47. In the case on hand, the plaintiff contends that his title and possession over the suit schedule property under an order of allotment was made to him vide Ex.P-12 which is dated 18-10-1978. He claims that he was put in possession of the suit schedule property on the very next day, i.e. on 19-10-1978 under Possession Certificate issued by the allotting Authority as per Ex.P-13. According to him, since the said date of he being put in possession of the suit schedule property at Ex.P-13, he has been in lawful possession of the property. However, the defendant subsequently claiming herself to be the purchaser of the same property from one Sri.Chikka Hanumanthaiah has dispossessed him and took wrongful possession of the property in which she has been in continuous possession and also has put up construction un-authorisedly.

According to learned counsel for the respondent, the said possession of the defendant in the suit schedule property has been through out a litigious possession by virtue of the interim orders passed in several of the litigations that went on between the parties.

48. Per contra, learned counsel for the appellant contends that the plaintiff had never been in possession of the suit schedule property. It is because under O.S.No.18/1982 filed by the present defendant, she had been in possession of the property till the year 1993, under the interim orders of temporary injunction. The present plaintiff has admitted in his evidence as PW-1 in O.S.No.3122/1999 that, because site No.63 was vacant, the defendant was put in possession of the said site by Sri. Chikka Hanumanthaiah. Thus, the present plaintiff has admitted the possession of the suit schedule property with the defendant.

49. Learned counsel also contends that, in the very same evidence as PW-1 in O.S.No.3122/1999, the plaintiff has admitted that, the construction in the suit schedule property was put up in the year 1997 by the defendant, though he says the same was with the help of rowdies. Thus, even from 1997 also, the defendant after putting up construction has continued in possession of the suit schedule property. Therefore, when the defendant has been in lawful possession of the suit schedule property from the date of her purchase of the suit property till today and also has put up construction, she cannot be dispossessed. Further, the suit is also barred by limitation.

50. As already observed in the previous paragraphs, even though the defendant has claimed that she has been the owner in possession of the suit schedule property by virtue of the Sale Deed dated

28-01-1978, but it has been proved, as observed above that, her vendor Sri. Chikka Hanumanthaiah himself had no clear and valid title to sell the suit schedule property to the defendant, as such, she has got no better title than what her vendor had. It is also observed above that, on the other hand, the plaintiff could able to establish that he has been allotted with the very same site under Ex.P-12 and the power of allotting it by the B.D.O. has not been in dispute. As such, after the allotment of the said site to him under EX.P-12 on 18-10-1978 and being put in possession of the property on 19-10-1978, he came to be a title holder with respect to suit schedule property in possession thereof.

51. As already observed in the previous paragraphs, the said aspect of the plaintiff having title over the property as confirmed by the Assistant Commissioner and Divisional Commissioner under

Exs.P-1 and P-3 respectively, has reached finality. Apart from the same, the said aspect of title with respect to the suit property between the parties which was also considered in O.S.No.18/1982 and O.S.No.2410/1997 between the same parties has reached its finality, where this Court in R.F.A.No.69/2004, which had arisen on an order dated 06-12-2003 passed on I.A.No.7 in O.S.No.2410/1997, wherein the plaint of the plaintiff therein (appellant herein) was rejected, has also made an observation that, the plaintiff's claim (defendant in this suit) for title in respect of the suit property may be barred by *res judicata*. However, the matter was remanded only to consider the question of possession of the property. Thus, it has been established that, site No.63 which was allotted to the plaintiff under Ex.P-12, though the site number was not specifically mentioned there and he was put in possession of the said site under Ex.P-13. The said allotment being in a manner

known to law, whereas, the alleged allotment of the very same site in favour of Sri. Chikka Hanumanthaiah being not supported with any documentary proof and any cogent evidence, has repeatedly been disbelieved in various proceedings between the parties including O.S.No.18/1982, O.S.No.2410/1997, .F.A.No.69/2004 and the present suit. Therefore, the plaintiff, having established that he has got a better title over the suit property, is entitled for possession of the same.

52. The defendant though could able to show that she is in possession of the suit property by producing not only the Sale Deed at Ex.D-13, but also various other documents including tax paid receipts, telephone bills, electricity bills and photographs from Exs.D-14 to D-46 but her alleged possession, though was, till now, a litigious possession, but no more could she be entitled

for the possession, since the plaintiff has established his better title over the suit schedule property.

53. The possession of the defendant with respect to the suit schedule property throughout has been under various interim orders passed by various Courts in civil litigations including O.S.No.18/1982, O.S.No. 2410/1997, as such, it has been a litigious possession. In O.S.No.3122/1999 which was a suit filed by the present plaintiff against the present defendant for the relief of permanent injunction, in the Court of the learned XXVII Additional City Civil Judge at Bangalore, the Trial Court at paragraph 28 of its judgment has held that, the possession of the defendant of the suit schedule site is to be termed as 'litigious possession'. Therefore, when her alleged possession is purely a 'litigious possession' under various interim orders passed in various litigations and the plaintiff has

established his better title over the suit schedule property, he is entitled for the suit schedule property after demolition of the un-authorised construction put up by the defendant on the suit schedule site. The said construction put up by the defendant in the suit schedule site is an un-authorised one not only because she has put up such a construction in the property belonging to the plaintiff, but also, admittedly, there is no building licence or approved plan for putting up such a construction.

54. Learned counsel for the appellant/defendant has also taken a contention that the suit itself is not maintainable in view of the fact that the present plaintiff had not sought the relief of possession in his earlier suit, i.e. O.S.No.3122/1999 and also in view of the fact that, he had withdrawn the said suit without reserving his liberty to file a fresh suit for the relief of possession, as

such, the suit is hit by Order II Rule 2 and Order XXIII Rule 1 (4) of CPC.

As required under Order II, Rule 2 of CPC, every suit is required to include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

55. Under Order XXIII, Rule 1 of CPC, at any time, after the institution of a suit, the plaintiff may, as against all or any of the defendants abandon his suit or abandon a part of his claim, however, where the Court is satisfied that, there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to

withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. However, where the plaintiff withdraws from a suit or part of a claim without permission of the Court, as referred to in sub-rule (3) of Order XXIII Rule 1 of CPC, he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

56. Admittedly, the plaintiff had earlier instituted a suit against the present defendant with respect to the very same suit property for the relief of permanent injunction. The certified copy of the said suit can be found at Ex.D-1. The said suit was for the relief of bare injunction against the defendant. On 16-03-2005, the plaintiff by filing a memo, withdrew his suit as not pressed. However, the said suit continued to

adjudicate the counter claim filed by the defendant. Thereafter, it ended in decreeing the counter claim of the defendant vide judgment dated 26-05-2010 as could be seen in Ex.P-17. However, as already observed above, the Trial Court while decreeing the counter claim of the defendant, has observed that the defendant has been in litigious possession of the suit schedule property, still, she was entitled for the relief of injunction, as sought for by her. When the plaintiff withdrew his suit by filing a memo as per Ex.D-2 on 16-03-2005, admittedly, he did not pray the Court for reserving him liberty to file a fresh suit on the same cause of action. The reason why the plaintiff withdrew the said suit has come out in the evidence of PW-1 that, he wanted to amend the plaint by including a prayer for possession of the property, however, since his prayer for amendment was rejected, he withdrew the suit. Still,

the fact remains that he has withdrawn the suit without seeking liberty to file a fresh suit.

57. Learned counsel for the appellant on the said point relied upon a judgment of the Hon'ble Apex Court in the case of ***R. Rathinavel Chettiar and another vs. V. Sivaraman and others*** reported in ***(1999) 4 Supreme Court Cases 89: Docid#IndLawLib/ 288264***, wherein at paragraph 6 of its judgment, the Hon'ble Apex Court was pleased to observe that, Order XXIII Rule 1 of CPC provides that, a plaintiff can withdraw a suit or abandon a part of his claim unconditionally. It creates a right in favour of the plaintiff to withdraw the suit, at any time, after its institution. Once the suit is withdrawn or any part of the suit is abandoned against all or any of the defendants, unconditionally, the plaintiff cannot bring a fresh suit on the same cause of action unless leave of

the Court is obtained as provided under Order XXIII Rule 1 (3)(b) of CPC.

58. In the instant case, the withdrawal of the suit in O.S.No.3122/1999 by the plaintiff (who is also the plaintiff in the present suit), as per Ex.D-2 was an unconditional withdrawal, without getting the liberty reserved to file a fresh suit. The said suit was admittedly for the limited relief of permanent injunction against the defendant therein. The cause of action shown in the said suit are the different dates when the defendant was said to have interfered in the alleged possession of the plaintiff's suit schedule property. No doubt, the said suit was filed in the year 1999, and that as could be seen in Ex.D-6, which is a certified copy of the deposition of the plaintiff as PW-1 in the very same O.S.No.3122/1999, the plaintiff has admitted a suggestion that the photograph of a building shown to

him was constructed on site No.63 and it was constructed in the year 1997, but he has stated that the said construction was got done by the defendant with the help of rowdies. He has also stated that the said construction was put up after his building was demolished. By stating so, the witness has made it clear that, the alleged possession and construction of the suit property by the defendant was not only an unlawful act but it was also a criminal act.

59. Learned counsel for the respondents/plaintiffs in his argument submitted that, Ex.D-6, though is a certified copy of the deposition of the plaintiff as PW-1 in O.S.NO.3122/1999, but the relevant portion of the alleged statement of PW-1 said to have been made therein that, it was to his knowledge that construction in the suit schedule property had taken place in the year 1997, was not confronted to PW-1 in the instant case.

As such, mere marking of the said deposition at Ex.D-6 would not enure to the benefit of the defendant.

Learned counsel further submitted that a mere stray statement of a witness in his deposition, though treated as an admission, still, the parties would have an opportunity to give an explanation since the evidentiary admissions which are receivable at the trial are by themselves not conclusive.

60. In his support, he relied upon a judgment of the Hon'ble Apex Court in the case of ***Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram and others,*** reported in ***AIR 1974 Supreme Court 471***, wherein, at paragraph 26 of the judgment, the Hon'ble Apex Court has observed as below:-

"Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of

the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

61. In the case on hand, as already observed above, PW-1 has given an explanation as to how the alleged construction had taken place and also has stated that, the said alleged possession and construction of the suit property by the defendant was not only an unlawful act, but also a criminal act. Thus, he has shown that the evidentiary admission said to have been made by his father as PW-1 in O.S.No.3122/1999 is not conclusive.

62. Even though the Trial Court in O.S.No.3122/1999 has decreed the counter claim granting the relief of permanent injunction in favour of

the defendant therein, however, as observed above, it has categorically observed that the possession of the defendant in the suit property therein was a 'litigious possession'. Thus, when the possession of the present defendant of the suit property at a particular point of time was a 'litigious possession', and the said suit i.e.O.S.No.3122/1999 was filed on a cause of action of alleged interference by the defendant with respect to the suit property, it makes it clear that the cause of action upon which O.S.No.3122/1999 was instituted and the cause of action upon which the present suit is instituted are two different causes of action. Reserving the liberty to file a fresh suit under Order XXIII Rule 1 (3) of CPC is required, when the plaintiff intends to file a fresh suit on the very same cause of action. Since in the case on hand, the plaintiff's institution of the present suit is on a different cause of action, the present suit cannot be

considered as hit either by Order II Rule 2 of CPC or Order XXIII Rule 1 (4) of CPC.

63. The appellant has taken one more contention that the suit is barred by time, as such, the suit was not maintainable.

Learned counsel for the appellant/defendant reiterating the said contention of the defendant in his argument also submitted that if the plaintiff's contention is that, the suit schedule site was allotted to him in 1978, he did not institute the suit for possession within twelve years of his alleged allotment. All the way, he kept quiet and has instituted the present suit only in the year 2005, as such, the suit is hopelessly barred by time.

64. Learned counsel for the respondents/plaintiffs in his argument submitted that the alleged possession of the defendant of the suit schedule property was

throughout a 'litigious possession'. In R.F.A.No.69/2004, the matter was remanded to decide on possession, therefore, no cause of action had arisen to the plaintiff to institute the suit for possession earlier and it was only after his title over the suit property was confirmed, he got the cause of action to institute the suit for recovery of possession.

65. The Trial Court framed a specific issue to decide whether the suit was barred by limitation. It answered the said issue in the negative holding that the suit was not barred by limitation. It has observed that it is only after this Court held in M.F.A..No.3129/2001 while passing an order on I.A.No.3/2001 dated 12-12-2003 that the defendant was not in lawful possession of the suit schedule property, the point of limitation has commenced from the year 2001 and the plaintiff has filed the suit from the date of his knowledge about the

possession of the suit schedule property as per the finding of the judgment in M.F.A. by this Court.

66. In the instant case, even though the defendant claims to be in possession of the suit schedule property from the date of her alleged purchase of property from Sri.Chikka Hanumanthaiah, but her possession of the property is evidenced only after she instituted the suit in O.S.No.18/1982 and obtained an interim order of temporary injunction. The telephone bills produced by her in Ex.D-18 to Ex.D-28 and the electricity bills and receipts produced by her from Ex.D-29 to Ex.D-45 are all of the year 2001 and onwards. Further, as already observed above, her possession was throughout a 'litigious possession' under various interim orders in her favour under different litigations including O.S.No.18/1982, O.S.No.2410/1997 etc. That being the case, the limitation to file the present suit

cannot be said to have accrued to the plaintiff in the year 1978, rather, it has accrued to him on and after the year 2004 and thereafter within the limitation period, he has instituted the present suit. As such, the contention of the learned counsel for the appellant that, the suit is barred by limitation, cannot be accepted.

67. Barring the above, the appellant has not raised any other ground or contentions which are worth to be considered in this appeal.

68. The discussion made above clearly goes to show that the plaintiff is the holder of better title with respect to the suit schedule property and is entitled for possession of the suit schedule property after demolition of the unauthorised construction put up by the defendant in the suit schedule property.

69. The Trial Court after appreciating the materials placed before it in its proper perspective, has

arrived at a right finding, in which, I do not find any reason to interfere.

Accordingly, I proceed to pass the following:-

O R D E R

[i] The appeal is dismissed;

[ii] The judgment and decree dated 10-06-2016 passed by the learned IV Additional City Civil and Sessions Judge, Mayo Hall Unit, Bengaluru (CCH-21), in O.S.No.16762/2005 is hereby confirmed;

Registry to transmit a copy of this judgment along with the Lower Court records to the concerned Trial Court immediately.

**Sd/-
JUDGE**

Bk/BMV*