

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.No. 455 OF 1997

JUDGMENT:

The unsuccessful plaintiff in O.S.No. 110 of 1996 on the file of the Court of I Additional District Judge, Visakhapatnam (for short, 'the trial Court'), preferred this appeal challenging the decree and judgment dated 10-04-1997, whereby the suit filed by the plaintiff for declaration of his title to schedule property, for recovery of possession of part of schedule property and for consequential permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of schedule property was dismissed.

2. The appellant was the plaintiff and the respondents were the defendants before the trial Court. For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this judgment.

3. The plaintiff filed the suit for the aforesaid reliefs contending that the plaintiff occupied schedule property in the year 1975 and constructed a house in the year 1982. Schedule property was assigned to the plaintiff as per Andhra Pradesh Revenue Board Standing Orders (for short, 'B.S.O.') and granted D-Form patta for schedule property in his favour on 10-03-1982. As such, the plaintiff became the absolute owner of ABCD schedule property and he was in exclusive physical possession and enjoyment of schedule property. While the matter stood thus, on 16-03-1990, when the plaintiff was away to schedule property working as lecturer at Bobbili and his wife was at Vijayanagaram in connection with her employment, the defendants forcibly entered into schedule property, occupied MNCO portion of schedule property without any manner of right or title. As such, their occupation of MNCO portion of schedule property is illegal without any lawful entitlement. Therefore, the plaintiff, being the absolute owner of schedule property, is entitled to recover possession of MNCO portion of ABCD schedule property. While continuing in part of schedule property, the defendants openly threatened that they would occupy the other portion of schedule property. It is impossible for the plaintiff to resist the highhanded act of the defendants. Hence, the plaintiff claimed consequential permanent injunction restraining the defendants from interfering with peaceful possession and enjoyment of schedule property after delivery of MNCO portion of

ABCD schedule property.

4. The 9th defendant, mother of the plaintiff, filed written statement which was adopted by defendant Nos. 1 to 8 by filing memo.

The defendants denied the allegations made in the plaint and resisted the claim of the plaintiff on the following grounds:

- (a) The 9th defendant denied classification of schedule property as Poramboke, occupation of open land by the plaintiff in 1975 and construction of house on obtaining D-Form patta on 10-03-1982 so also exclusive possession and enjoyment of schedule property till alleged occupation on 16-03-1990;
- (b) The plaintiff is the only son, the 2nd defendant is the eldest daughter and the 3rd defendant is the 2nd daughter of the 9th defendant. The 1st defendant is husband of the 2nd defendant and defendant Nos. 4 to 8 are children of defendant Nos. 1 and 2. Thus, the defendants did not dispute the relationship between them and the plaintiff but, suppressing the relationship, the plaintiff obtained *interim* injunction against defendant Nos. 1 to 8 without impleading the 9th defendant though she is the absolute owner of schedule property. Thus, the plaintiff approached the Court suppressing the true facts;
- (c) The 9th defendant and her husband Moses worked as teachers from 1934 to 1970 and 1935 to 1972 respectively. They purchased a thatched house along with vacant site with their earnings for Rs.300/- from one Sukhasi Suryanarayana and others under registered sale deed dated 29-07-1950 and obtained delivery of possession of the property on the same day. The total extent is Ac. 5.00 cents. Subsequently, in the year 1961, both the 9th defendant and her husband Moses laid foundation for construction of a terraced house. While so, in the year 1961, the thatched house was gutted in a fire accident. Subsequently, the 9th defendant and her husband constructed two rooms in the ground floor and two rooms in the first floor with two store rooms, two kitchen rooms and latrine with their own earnings and that the plaintiff did not

contribute any pie for construction of the house. As such, the 9th defendant and her husband Moses and, after the death of Moses, the defendants became absolute owners of the property;

(d) The plaintiff was born on 29-03-1937 and he was brought up by the 9th defendant and her husband Moses with love and affection as he is the only son, got him educated and performed marriage with a girl by name Jangam Joiyicee Victoria @ Joy of Visakhapatnam. After few months of the marriage, the plaintiff deserted her, the plaintiff was dragged to Court in connection with the litigation and the plaintiff spent all his little earnings in the litigation for more than 8 years. Later, the plaintiff developed intimacy with the present woman with whom he is living who is native of Orissa and blessed with a son by name Vinay Kumar. Thus, the plaintiff has no source of income to construct house in MNCO portion;

(e) The husband of the 9th defendant alone paid property tax to the authorities concerned and he died on 19-02-1975 due to prolonged illness for a period of one year. During the said period, the plaintiff obtained signatures of his father and fabricated a will with *ante* date and later obtained signatures of the 9th defendant on a blank whitepaper on the pretext that those papers were required in connection with the dispute between one Shaik Ismail and the defendants and the plaintiff which was pending on the file of the Court of District Munsif, Bheemunipatnam. Taking advantage of those papers, the plaintiff created another will. Thereby, the plaintiff did not approach the Court with clean hands. Therefore, the plaintiff is disentitled to claim equitable and discretionary relief of declaration;

(f) Schedule property originally belongs to Marana Bangarayya, S/o Butchanna of Tagarapuvalasa and he sold the same to Sukhasi Suryanarayana, S/o Appalaswamy, under registered sale deed dated 28-01-1937. From Sukhasi Suryanarayana, the 9th defendant and her husband purchased the same under registered sale deed dated 29-07-1950 and raised construction. Thereby, schedule property is never classified as Poramboke land and it is the land belonging to private

individual. Therefore, question of granting patta to the plaintiff, who is an employee working as lecturer, does not arise since house site patta will only be granted to landless poor. Hence, the patta allegedly granted in favour of the plaintiff by revenue department is not valid and, on the strength of the same, the plaintiff is not entitled to claim declaratory relief and other consequential reliefs of recovery of possession and permanent injunction;

(g) The plaintiff got issued legal notice prior to filing the suit which was suitably replied by the 9th defendant denying title of the plaintiff setting up title on herself but, total contrary to the earliest version, the plaintiff invented theory of grant of patta in his favour which disentitles him to claim any relief and prayed for dismissal of the suit.

5. On the strength of the above pleadings, the trial Court framed the following issues (extracted):

Issues:

- 1) Whether the plaintiff is entitled for declaration asked for?*
- 2) Whether the plaintiff is entitled for recovery of possession of 'MNCO' marked property?*
- 3) Whether the plaintiff is entitled for permanent injunction with regard to 'ABCD' marked property from interfering with the plaintiff's possession?*
- 4) To what relief?*

6. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 to A106. On behalf of the defendants, D.Ws.1 to 3 were examined and got marked Exs.B1 to B18.

7. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court, disbelieving the case of the plaintiff, declined to grant any of the reliefs claimed by the plaintiff and dismissed the suit.

8. Aggrieved by the decree and judgment, the plaintiff preferred the present appeal raising the following contentions:

- (a) Exs.B1 and B2 sale deeds cannot convey any right or title over schedule property since the vendors under Exs.B1 and B2 had no title to the

property as it is poramboke vested on Government and classified as Hill Poramboke but the trial Court did not consider the same in proper perspective and upheld the contentions of the defendants without any legal basis;

- (b) The trial Court did not consider the patta dated 10-03-1982 under which the land was assigned to the plaintiff and its legal consequences;
- (c) The trial Court did not consider the illegal occupation of MNCO portion of ABCD schedule property by the defendants though there is clinching evidence on record to establish that the defendants are in unlawful and illegal possession of the same but the trial Court, ignoring the settled principles under the Indian Evidence Act, 1872 (for short, 'the Act of 1872'), disbelieved the evidence on record and committed an error;
- (d) The trial Court further pointed out certain inconsistencies both in pleadings and evidence but the plaintiff is entitled to raise inconsistent pleas without prejudice and let in evidence to substantiate those contentions. Thereby, inconsistency in the pleas alone is not a ground to discredit the testimony of P.W.1 but the trial Court, on erroneous appreciation of evidence and without any legal basis, dismissed the suit without advertng to the principles of evidence;
- (e) The trial Court ignored payment of property tax to Government under Exs.A9 to A105 without assigning any reason. Thereby, the decree and judgment of the trial Court are erroneous; therefore, liable to be set aside after reappraising entire evidence available on record with reference to principles of evidence and prayed to pass a decree in favour of the plaintiff for the aforesaid reliefs.

9. During the course of argument, learned counsel for the plaintiff vehemently contended that the plaintiff became owner of the property by virtue of Ex.A4 patta granted under B.S.O.No. 21 but not under B.S.O.No. 15. Government also collected Rs.10/- by issuing B-Memo dated 21-02-1982. If really the defendants are continuing in possession and enjoyment of the property by virtue of purchase under Ex.B1, question of issuing B-Memo dated 21-02-1982 collecting Rs.10/- does not arise. It is

further contended that the defendants did not specifically deny issue of patta to the plaintiff in the written statement that itself is suffice to accept the patta granted in favour of the plaintiff marked as Ex.A4 which conferred title on the plaintiff. Apart from that, receipts marked as Exs.A42 to 84 and counterfoils of cheques marked as Exs.A85 to 105 would clinchingly establish that the plaintiff constructed house contributing amount as he possessed sufficient means. Exs.A1 to A3 are house tax receipts evidencing payment of house tax. Exs.A5 to A9 and A11 to A38 are challans and tax receipts. Payment of property tax for the house is another strong piece of evidence to conclude that the plaintiff is the owner of the property. If the plaintiff is not the owner of the property, the authorities concerned would not assess the property to tax in the name of the plaintiff and collect tax from him. Thereby, payment of tax is a positive proof to establish title of the plaintiff over schedule property. The inconsistencies pointed out by the trial Court based on legal notice, which shows the earliest version of the plaintiff, and the inconsistencies between pleadings and evidence are not germane to decide the real controversy for the simple reason that the plaintiff is entitled to take alternative or inconsistent pleas and let in evidence in support of those please but the trial Court did not realize the importance of oral and documentary evidence adduced, committed an error in dismissing the suit by wrong appreciation of facts with reference to law, finally requested to reappraise entire evidence to come to an independent conclusion uninfluenced by the decree and judgment of the trial Court and pass a decree in favour of the plaintiff for the aforesaid reliefs.

10. Whereas, learned counsel for the defendants mainly contended that schedule property is not classified as Poramboke and it belongs to a private individual. Exs.B1 and B2 are sufficient to establish that the land is not classified as Hill Poramboke so as to grant patta in favour of the plaintiff. Mere payment of tax, if any, would not confer any title over schedule property. The earliest version of the plaintiff that his father and the 9th defendant jointly purchased the property and later his father executed a will bequeathing the property in his favour as per Ex.B12 legal notice dated 19-06-1990 and the later version that D-Form patta was granted in his favour are totally inconsistent to one another. Apart from that, the evidentiary admissions support the earliest version mentioned in Ex.B12 and destroy the specific case of the plaintiff set up in the plaint. On this ground alone, the trial Court declined to grant any of the reliefs. However, the relief under Section 34 of the

Specific Relief Act, 1963 (for short, 'the Act of 1963'), is purely equitable and discretionary and, to claim such equitable and discretionary relief, the plaintiff has to approach the Court with clean hands. To do equity, the plaintiff has to prove his positive case by adducing cogent and satisfactory evidence and even not entitled to take advantage of weakness in the defence of the defendants. In view of the inconsistencies from one stage to another, the trial Court rightly concluded that the plaintiff did not approach the Court with clean hands and, therefore, the plaintiff is disentitled to claim any of the reliefs. Even after reappraisal of entire material by this Court, there is no scope to come to an independent conclusion other than the conclusion arrived by the trial Court. Therefore, the plaintiff is not entitled to claim any of the reliefs; the trial Court did commit no error and prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

11. Considering rival contentions, perusing oral and documentary evidence and the decree and judgment under challenge, the points that arise for consideration are thus:

(1) Whether schedule property is classified as Hill Poramboke as contended by the plaintiff and whether the patta granted in favour of the plaintiff confers any title on the property, if so, is the plaintiff entitled to the relief of declaration of title to schedule property?

(2) Whether the plaintiff is entitled to recover possession of MNCO portion shown in the plaint plan ejecting the defendants therefrom?

(3) Whether the plaintiff is entitled to consequential permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of schedule property shown as ABCD?

12. In Re. Point No. 1:

The basis for claim of the plaintiff is that schedule property is originally classified as Hill Poramboke; the same is assigned to him as per B.S.O.No. 21; and, thereby, he became the owner of schedule property whereas the defendants contended that it was purchased by the 9th defendant and her husband Moses, parents of the plaintiff, under registered sale deed along with a thatched house; later, constructed a terraced building consisting of two rooms in each floor and continuing

in possession and enjoyment of the property in their own right during the lifetime of Moses and thereafter the 9th defendant in exclusive possession and enjoyment of the property. In view of the specific contention of the plaintiff, it is appropriate to advert to the earliest version of the plaintiff in the registered notice before going to decide the specific pleas raised in the plaint. Ex.B12 is legal notice with which the plaintiff started the litigation disclosing his earlier version to claim right in schedule property. Ex.B12 is legal notice dated 19-06-1990 got issued by the plaintiff through his counsel to the defendants calling upon them to vacate the premises and deliver vacant possession of the room in the occupation of the defendants within three days from the date of receipt of the notice by setting up title over schedule property. Para Nos. 2 to 4 are relevant for deciding the real controversy and they are extracted hereunder for better appreciation:

- "2. That P.Moses purchased a thatched house in Tagarapavalasa which was burnt in the village fire. After the accident our client constructed two rooms on the ground floor and two rooms on the first floor with his own money on the site.*
- 3. That our client also obtained a patta in his own name for the said land and he is in possession of the house in his own right paying the municipal taxes on the land.*
- 4. That Sri P.Moses to clear any doubts regarding the title of property executed a will dated 16-07-1974, which was attested by No. 1 among you, in a sound disposing state of mind and out of his free will. P.Moses died on 19-07-1975."*

From the relevant paras extracted above from Ex.B12, the plaintiff admitted that the property was purchased by husband of the 9th defendant *i.e.* P.Moses along with a thatched house and the same was gutted in a fire accident without disclosing the date of fire accident. In para No. 3, P.W.1 contended that he obtained patta without disclosing the date of obtaining patta and other details like extent *etc.*, and further contended that he is in possession and enjoyment of the same constructing two rooms by him after the fire accident with his own money. The strange aspect in para No. 3 of Ex.B12 notice is that his father Moses executed a will bequeathing schedule property to the plaintiff on 16-07-1974 and, thereby, he became the absolute owner of schedule property continuing in possession and enjoyment of the same in his own right. Purchase of the property by Moses and the 9th defendant is admitted by the defendants in their written statement and, in support of purchase of the property, the defendants produced Ex.B1 registration extract of sale deed executed by Suryanarayana and others in favour of father of P.W.1. Ex.B2 is link

document *i.e.* original registered sale deed executed by Bujjanna and his father Bangarayya in favour of Appala Swamy. Both these two documents established the contention of the plaintiff in para No. 2 of Ex.B12 and, however, this fact is not in dispute. The only dispute is that vacating the premises after the fire accident by Moses and the 9th defendant. This fact is not substantiated by any independent evidence by the plaintiff when the defendants asserting that Moses and the 9th defendant constructed house in schedule property after the fire accident and continuing in possession and enjoyment of the same. Therefore, the contention of the plaintiff that the 9th defendant and her husband Moses vacated the premises after the fire accident remained unsubstantiated.

13. When the plaintiff is aware that the property was purchased by his father and mother under the original of Ex.B1 as admitted in para No. 2 of Ex.B12, question of applying for issue of patta for house site under B.S.O.No. 21 creates any amount of suspicion and that too in the absence of any details of patta in para No. 3 of Ex.B12. B.S.O.No. 21 deals with the procedure for assignment of houses sites in villages and towns. Section I of B.S.O.No. 21 deals with assignment of house sites in villages and Section II deals with towns. Since the property is situated in Tagarapuvalasa Village of Bheemunipatnam, Section I is relevant. According to Section I (1) of B.S.O.No. 21, portions of gramnattam or village-site at the disposal of Government, not being land required for the common use of the villagers, may be granted for building purposes to bona fide applicants and the minimum extent to be assigned to any applicant for building houses should ordinarily be 10 cents. Section I (2) deals with the procedure for applying for assignment of house sites in villages. According to it, applications for house-site should be made in writing and should clearly specify the land required, the purpose for which it is wanted, *i.e.*, whether, for constructing a thatched, or a tiled or terraced building, or for erecting a cow-shed and so on. The application may be presented either to the village officer in the first instance, or to the Tahsildar directly. Village Officers shall register applications in the order of date in a bound book, the pages of which should be consecutively numbered. The fact that an application has been made for a particular site shall be published in the village by beat of tom-tom and a notice in the form given in Appendix XV pasted up in the village choultry and on the site applied for a period of 15 days. A copy of the notice shall also be sent to the panchayat board if there is one for the village. At the end of the period, a report in duplicate should be prepared

and sent to the Tahsildar without delay in the form prescribed in Appendix XVI, together with the notice which should be signed by the monigar and the karanam. Village Officers have no authority to grant house-site. At the same time, it is the duty of the village officers to afford every assistance to a person requiring a house-site, not only in the selection of the site, but also in acquainting him the manner in which formal application is to be made, and when an available site has been selected, the karanam will be held responsible for procuring without delay the necessary formal application. If the applicant is poor or illiterate and his application is made orally to the village officers, it will at once be reduced to writing by the karanam, who will take the necessary action thereon. Plotted sketches of the sites to be granted should invariably prepared. Also measurements should be taken connecting the sites with any permanent or semi-permanent marks in the neighbourhood or union survey stones where they exist with a view to the sites located in the event of disputes. All these measurements should be entered in the plotted sketches which should form part of the assignment records. Then only, a patta allotting house site can be granted. In the present case, the procedure followed by Tahsildar was not placed before the trial Court and no measurements were contained in Ex.A4 patta but mentioned the extent as Ac. 0.03 cents in S.No. 26, plot No. 17, within the following boundaries:

North : Road

East : House of B.Narasa Reddy

South : Rasta

West : House of Ameerunnissa Begum

Thus, no rough sketch was annexed to the patta and no measurements were given. However, in normal course of events, when there is a dispute with regard to extent or survey number, boundaries will prevail. Schedule property is an extent of Ac. 0.04 ½ cents. Initially, the plaintiff claimed Ac. 0.03 cents only but later amended the extent and valuation. Even assuming for a moment that assignment was granted for Ac. 0.03 cents under Ex.A4, he is disentitled to claim Ac. 0.04 ½ cents. That apart, as per rough sketch annexed to the plaint, house is in southeast corner which is described as MNCO but measurements of MNCO portion were not mentioned

either in plan or in schedule. If measurements of MNCO portion are given, there is a possibility to find out whether or not the land shown as ABNMOD is equivalent to Ac. 0.03 cents. Therefore, in the absence of any details including measurements, it is difficult for the Court to accept that schedule property alone was assigned to the plaintiff.

14. One of the contentions of learned counsel for the plaintiff is that initially, B-Memos under Land Encroachment Act were issued and later, Tahsildar issued Ex.A4 patta since the encroachment is not objectionable. In fact, before granting patta, necessary enquiry as required under B.S.O.No. 21 has to be undertaken to find out whether or not it is poramboke or village-site. No such application was submitted by the plaintiff to the authorities concerned. Report from village officer or Tahsildar, layout pertaining to schedule property dividing the vast extent into plots, registers maintained in Appendix XVI and register of assignments which is permanent in the office were not produced before the trial Court. In the absence of such evidence and basing on a bald allegation in para No. 3 of Ex.B12, source of title claimed by the plaintiff cannot be accepted, more particularly when the plaintiff is aware about purchase of the property by the vendor of Moses in 1937 under Ex.B2, from him by Moses and the 9th defendant and continuing in possession and enjoyment in their own right. When the plaintiff is contending that schedule property is Hill Poramboke, he would have produced at least relevant registers maintained in the office of Tahsildar classifying schedule property as Hill Poramboke but no steps were taken to accept the classification of schedule property. The plaintiff also failed to examine village officer or any revenue official to prove classification of schedule property as Hill Poramboke. Therefore, it is difficult to accept that schedule property is Hill Poramboke and assigned to the plaintiff under Ex.A4 as per B.S.O.No. 21.

15. Coming to evidence of P.W.1, P.W.1 in his examination in chief admitted that in 1950, his father purchased land with a thatched house but it was burnt in 1967 and thereafter he constructed a terraced house consisting of two floors. The construction was started in 1967 and completed in 1974. At the same time, the plaint averments disclosed that schedule property was occupied by him in or about 1975 and constructed a house. The examination in chief of P.W.1 is totally inconsistent with the specific plea about his occupation in 1975. If really the plea raised in the plaint that he occupied the property in 1975 is accepted, his construction of house during the period from 1967 to 1974 is a bare lie. If the evidence is accepted, his

occupation in 1975 is false on the face of record. At the same time, according to the plaintiff's evidence, the thatched house was gutted in fire in 1967 and constructed a house during 1967 to 1974 but the plaintiff occupied the property in 1975. All these inconsistencies go to the root of the case which falsify the contention of the plaintiff that he constructed the house occupying the property in 1975. Therefore, in view of the inconsistencies between Ex.B12 and the specific pleas raised in the plaint and evidence adduced in support of it, it is difficult to accept any of the pleas of the plaintiff.

16. One of the strange contentions in Ex.B12 notice is that his father bequeathed the property to him executing will dated 16-07-1974. If Moses, father of the plaintiff, is not the owner of schedule property, question of bequeathing the same in favour of the plaintiff does not arise in normal course of events. Execution of will, as contended in para No. 4 of Ex.B12, totally destroyed the plea of the plaintiff that he constructed a house and obtained assignment from Government under Ex.A4. The said will was not brought on record to claim right in the property as a legatee under the will and, in fact, that was not the plea before the trial Court.

17. The 9th defendant was examined as D.W.1. D.W.1 testified totally in support of her contention, more particularly about purchase of the property, raising construction *etc.*, and her continuation in possession along with her children. As purchase of the property is not disputed, this Court need not go into the legality and validity of Ex.B1. In case Moses and his family members are continuing in possession and enjoyment of the property even if schedule property is Hill Poramboke, the authorities concerned would have booked B-Memos levying penalty for their unauthorized occupation of Government land and, if the encroachment is not objectionable, patta would have been granted in their favour only. Instead of adopting such procedure, revenue authorities resorted to issue patta in favour of the plaintiff finding that the encroachment is not objectionable and it appears that it is only a stage management of the plaintiff in obtaining Ex.A4 so as to throw out the defendants from schedule property who are no other than his mother and sisters.

18. Another strange circumstance to point out the conduct of the plaintiff is that he got issued Ex.B12 legal notice to defendant Nos. 2 and 9; when the 9th defendant filed a caveat petition, the plaintiff filed the suit without arraying the 9th defendant as a party to the suit and obtained *interim* order against the remaining defendants but

the 9th defendant came on record on her own accord and filed written statement. When the plaintiff demanded the 9th defendant to vacate the premises within 3 days from the date of receipt of Ex.B12 notice, he would have arrayed the 9th defendant as a party claiming relief of eviction but he did not array the 9th defendant as a party. This itself shows that the plaintiff did not approach the Court with clean hands.

19. The trial Court disbelieved the claim of the plaintiff in view of the inconsistencies in the evidence. One of the contentions raised before this Court is that the plaintiff is at liberty to raise inconsistent pleas in alternative. No doubt the plaintiff is entitled to raise inconsistent pleas in alternative but, in fact, in the present case, the trial Court pointed out the inconsistencies in various contentions raised in the documents, including Ex.B12, which disclosed the earliest version of the plaintiff and subsequent change in the case of the plaintiff in the plaint. The contention raised in Ex.B12 is not a plea since pleading is confined to plaint and written statement under Order VI Rule 1 of the Code of Civil Procedure (for short, 'C.P.C.'). Therefore, Ex.B12 cannot be termed as a pleading and it is a document which directly throws light on the title set up by the plaintiff over schedule property to disbelieve the changing contentions from time to time subject to convenience. Hence, the contention of the plaintiff that he is entitled to take pleas in alternative can be accepted but the contention in Ex.B12 is not a plea within the meaning of pleading under Order VI Rule I of C.P.C. The trial Court disbelieved the case of the plaintiff on the sole ground that the plaintiff raised inconsistent pleas but that is not a ground to decline any of the reliefs claimed by the plaintiff in view of my earlier discussion.

20. The major contention of the plaintiff is that house site was allotted by granting assignment whereas the defendants' contention is that they purchased the property under Ex.B1. Purchase of schedule property took place in the year 1937 by the vendor of the 9th defendant and her husband Moses under Ex.B2 and the 9th defendant and her husband Moses purchased the same under Ex.B1. The plaintiff also admitted that the 9th defendant and her husband are in possession and enjoyment till the thatched house was gutted in fire accident while contending that they vacated the same due to sentiment but, in the absence of proof of vacating the land after fire accident, taking possession of the property by the plaintiff raising construction in the site cannot be accepted.

21. In a suit for recovery of possession or suit for declaration of title and recovery of

possession, the initial onus of proof is on the plaintiff to prove his title to the property when the suit claim is under Section 5 of the Act of 1963. When the plaintiff is able to discharge his initial onus of proof, the onus of proof will shift to the defendants to prove their positive case. The trial Court dismissed the suit on the ground that the plaintiff failed to prove his title to the property though the 9th defendant and her husband Moses are having better title than the plaintiff. The trial Court discussed both oral and documentary evidence and adverted to each and every relevant sentence in the depositions of the witnesses examined. Learned counsel for the defendants contended that burden of proof is on the plaintiff in a suit for ejectment. In this regard, it is relevant to advert to ***Union of India (UOI) represented by its Secretary to Central Government, Ministry of Defence and others Vs. Vasavi Cooperative Housing Society Limited and others***, wherein it was observed that

"The plaintiff in an ejectment suit must succeed on the strength of his own title and that could be done by adducing sufficient evidence to discharge the onus which is on him, 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, in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited."

The law laid down in the above decision is not in quarrel. Therefore, the duty is cast upon the plaintiff initially to prove his better title than what the defendants possess.

22. To substantiate his contention, the plaintiff mostly relied on Ex.A4 patta granted in his favour but, as discussed in the earlier paras, Ex.A4 was not granted strictly adhering to B.S.O.No. 21 since the persons in possession were not duly evicted by due process of law if it is objectionable before granting patta in favour of the plaintiff if schedule property is classified as Hill Poramboke. In the present case, the plaintiff did not produce any material to establish that schedule property is classified as Hill Poramboke belonging to Tagarapuvalasa Panchayat to grant patta in his favour so also evidence relating to ejectment of persons in unauthorized occupation of schedule property. Moreover, the 9th defendant and her husband Moses and their predecessors in title are continuing in possession and enjoyment of the property in their own right exclusively claiming title to the property. Therefore, basing on Ex.A4 patta and in view of the inconsistent evidence regarding taking possession and construction of house etc., the case of the plaintiff can not be believed. When relief is

claimed under Section 5 of the Act of 1963, Court can grant such relief subject to proving title when it is based on title. When there is a flaw in title of both plaintiff and defendant, in a suit for possession, the plaintiff has to establish that he has a better title to the property than the defendant, otherwise Court would not grant a decree ousting defendant from possession. In a suit for possession, neither the plaintiff nor the defendant could establish a title in himself. It was in evidence that the plaintiff was in possession for some years before his dispossession which occasioned the institution of the suit. It was held that he was entitled to a decree for restoration of possession. In the present case, the defendants are admittedly in possession of the property and failed to dispossess the plaintiff from schedule property by the defendants on the relevant date mentioned in the plaint. That apart, the defendants are having better title than the plaintiff who is claiming title based on Ex.A4 patta which was not granted in accordance with B.S.O.No. 21. Therefore, I find that the 9th defendant and her husband are having better title than the plaintiff and they are admittedly in possession of the property. Apart from that, the plaintiff also failed to prove his dispossession and did not approach the Court with clean hands. Hence, the plaintiff is not entitled to claim recovery of possession of schedule property based on Ex.A4 patta granted in his favour. Accordingly, I hold that Ex.A4 patta granted under B.S.O.No. 21 is not in accordance with B.S.O.No. 21 and such patta would not confer or create any title in immovable property. The 9th defendant and her husband Moses are the purchasers of schedule property under Ex.B1 from their vendor who purchased the same under Ex.B2 in 1937.

23. Learned counsel for the plaintiff placed reliance on several documents regarding sending amount to the 9th defendant and payment of house tax *etc.*, but those documents evidencing sending amount would not come to the assistance of the plaintiff to prove construction of house. If really the plaintiff himself got constructed the house, question of sending amount to the 9th defendant in normal course of events does not arise. When it is not case of the plaintiff that he got it constructed through the 9th defendant, those documents are useless to prove the construction of terraced building in schedule property. The other documents are only tax receipts and mere payment of tax is not sufficient to confer any title on immovable property since collection of tax is only for fiscal purpose. On the other hand, the defendants produced voluminous evidence to prove their possession and enjoyment of the property including payment of property tax for schedule building. Hence, the plaintiff,

who is not having better title than the 9th defendant, is not entitled to claim any of the reliefs. When I adverted to the evidence on record, P.W.1 changed his version from time to time while admitting purchase of the property in the year 1950 by his father and fire accident that took place in 1967 and further admitted that his father advised him to leave the land and then he shifted to a rented house belonging to a teacher of the same village. This admission is another strong circumstance to disbelieve his continuation in possession and enjoyment of the property and to establish purchase of the property by Moses, father of the plaintiff. D.Ws.1 and 2 in clear terms testified in support of their contentions, more particularly purchase of the property, their continuation in possession, raising construction and payment of tax *etc.,*.

24. The relief of declaration is purely discretionary under Section 34 of the Act of 1963. Unless the plaintiff established his title by cogent and satisfactory evidence approaching Court with clean hands, the Court cannot exercise such discretion in favour of the plaintiff to grant such relief of declaration of title. Here, the plaintiff's contention initially was based on a will allegedly executed by Moses, father of the plaintiff, but later the plaintiff changed his version contending that he was granted Ex.A4 patta and claiming title over the property. Therefore, the plaintiff both in evidence and pleadings and registered correspondence between the parties admitted about title of his father directly but now set up a different claim that the property was classified as Hill Poramboke and the property was assigned to him under Ex.A4. Thus, the plaintiff did not approach the Court with clean hands and suppressed several facts obviously for different reasons known to him. In such case, the plaintiff is disentitled to claim equitable and discretionary relief under Section 34 of the Act of 1963 as he did not approach the Court with clean hands. Hence, I find no illegality or irregularity warranting interference of this Court with the decree and judgment of the trial Court. Consequently, the finding of the trial Court is hereby confirmed holding this point in favour of the defendants and against the plaintiff.

25. In Re. Point No. 2:

The plaintiff claimed recovery of possession of MNCO portion after ejecting the defendants therefrom. As per my finding on point No. 1, the plaintiff failed to establish his better title to the property than the title of the defendants in view of clear admission in Ex.B12 and in the examination in chief of P.W.1 himself. Therefore, the plaintiff is disentitled to claim recovery of possession of MNCO portion shown in the plaint plan after ejecting the defendants therefrom as they are having better title than

the plaintiff. Accordingly, the point is answered in favour of the defendants and against the plaintiff.

26. In Re. Point No. 3:

Since the finding of the trial Court on the main relief of declaration of title is confirmed by this Court while answering issue No. 1, question of granting consequential permanent injunction in favour of the plaintiff does not arise as the plaintiff is not in lawful possession of the property. Even otherwise, the plaintiff, being a co-owner along with the children of the 9th defendant and Moses, is entitled to enjoy each and every piece of land and not entitled to claim any permanent injunction against other co-owners. Therefore, I am not inclined to grant permanent injunction by exercising power under Section 38 of the Act of 1963. Accordingly, the point is held in favour of the defendants and against the plaintiff.

27. In view of my finding on point Nos. 1 to 3, I find no merits in the appeal and, therefore, it deserves to be dismissed.

28. In the result, the appeal is dismissed confirming the decree and judgment dated 10-04-1997 passed in O.S.No. 110 of 1996 on the file of the Court of I Additional District Judge, Visakhapatnam. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 29-10-2015.

JSK