

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT NO.1829 OF 1999

JUDGMENT:

The defendants 1 and 3 in O.S. No.16 of 1992 on the file of Senior Civil Judge, Medak, (hereinafter referred as "trial Court") filed this appeal against the judgment and decree, dated 22.12.1998, whereunder, the suit filed for recovery of possession of Ac.1.07 gts in S.No.246/2 situated at Medak Town, was decreed in favour of respondents/ plaintiffs.

2) The appellants were the defendants 1 and 3 and the respondents were the plaintiffs before the trial Court. For the sake of convenience, the parties herein after will be referred to as arrayed before the trial Court.

3) The plaintiffs filed suit for recovery of possession of an extent of Ac.1.07 gts in S.No.246/2, Medak Town and District, (rough sketch is annexed to the plaint) alleging that the plaintiffs 1 and 2 are the brothers and sons of plaintiff No.3 and plaintiff No.4 is sister of plaintiff Nos.1 and 2 and daughter of plaintiff No.3; they are absolute owners of agricultural land in S.No.246/2 (dry land), situated at Medak Town, Medak District.

4) Originally the said land admeasuring Ac.3.00 gts belongs to them; out of the said land, the plaintiffs are in possession of Ac.1.33 gts and defendant No.1 being Principal of A.P. Residential School for girls, occupied an extent of Ac.1.07 gts out of Ac.3.00 gts, constructed school building and hostel without any manner of right. As the third party contractor made an attempt to encroach into the land to construct in the above said land, the plaintiffs filed the suit for injunction simplicitor, on the file

of District Munsiff Court, Medak, restraining the third party from interfering with the peaceful possession and enjoyment of the plaintiffs over the land, to an extent of Ac.1.07 gts and the suit was decreed in favour of the plaintiffs. Without considering the decree and judgment, the revenue department handed over possession of Ac.1.07 gts to the defendants. Though the injunction granted by the Court against the third party, constructed A.P. Residential Girls School Building and Hostel without any manner of right, title, interest and without proper identification of the land on ground, in the year 1984. Thus, the Principal of A.P Residential Girls School is in wrongful possession to an extent of Ac.1.07 gts.

5) The plaintiffs submitted an application to Assistant Director of Land Survey and Settlement, to demarcate their land in S.No.246/2 and fix its boundaries. The Assistant Director of land, Survey and settlement directed the Inspector to survey and demarcated the land. The Inspector of Survey conducted survey on 23.07.1988 in the presence of three panchas (mediators) vide file No.C2/904/84 fixing boundary stones to the property, according to the report of Inspector of Survey, the school is in occupation of Ac.1.07 gts in S.No.246/2. Since the plaintiffs are absolute owners of property and the possession of defendants is illegal, the plaintiffs are entitled to recover possession of the property and prayed to pass a decree against defendants 1 to 3 to deliver vacant possession of land in S.No.246/2 to an extent of Ac.1.07 gts out of Ac.3.00 gts within the boundaries mentioned in the schedule.

6) The 3rd defendant alone filed written statement denying material allegations made in the plaint including the relationship and ownership of the plaintiffs, *inter alia*, contending

that MRO, Medak vide letter R.C. No.B/4770/85, dated 12.10.1985, handed over Ac.30.00 gts of land to defendant No.3 on 03.12.1983 for construction of school building and staff quarters in S.No.248/1 to an extent of Ac.15.00 gts, S.No.246/2 to an extent of Ac.1.22 gts, S.No.248/3/2 to an extent of Ac.1.37 gts, S.No.248/4/2 to an extent of Ac.3.11 gts, Sy.No.248/1 to an extent of Ac.8.10 gts, totally Ac.30.00 gts.

7) The plaintiffs filed suit for permanent injunction (simplicitor) against the contractor without impleading the defendants herein but the 3rd defendant does not know anything about title of the plaintiffs' property.

8) The defendants specifically contended that in pursuance of allotment of Ac.30.00 gts of land in different survey numbers referred above, the defendants alone are in possession and enjoyment of the suit land which is part of Ac.1.22 gts in S.No.246/2, constructed school building for A.P. Residential school for girls at Medak and other buildings for staff quarters and thereby, their possession cannot be termed as illegal or unlawful. It is specifically contended that there is no cause of action for the suit and that the plaintiffs have not chosen to implead proper parties to the suit and the suit is not maintainable for non-joinder of necessary parties. Consequently, the plaintiffs are not entitled to claim any relief in the suit and prayed for dismissal of the suit. The other defendants filed memo adopting the written statement filed by 3rd defendant.

9) Basing on the above pleadings, the trial Court framed the following issues:

- 1) Whether the suit is bad for non-joinder of necessary parties?

2) Whether plaintiffs are entitled for recovery of possession of suit land?

3) To what relief?

10) During the course of trial, on behalf of the plaintiffs, PWs.1 and 2 were examined, Exs.A1 to A21 were marked. On behalf of the defendants, DWs.1 to 2 were examined and Exs.B1 to B2 were marked.

11) Upon hearing argument of both the counsel, considering the oral and documentary evidence, the trial Court decreed the suit directing the defendants to deliver vacant possession of schedule property to the plaintiffs.

12) Aggrieved by the decree and judgment for delivery of vacant possession of the property, passed by the trial Court, the defendants 1 and 3 preferred this appeal on various grounds. The main contentions raised in the grounds of appeal and during the course of argument are that:

The suit for recovery of possession without declaration of title to the suit property is not maintainable but without considering this contention, the trial Court decreed the suit and the trial Court did not consider the commencement of construction and its completion and ignored the same in toto and that the findings of the trial Court that the plaintiffs have got title over the property and that the plaintiffs are the owners and possessors of the property are not based on any material and prayed to allow the appeal, setting aside the decree and judgment of the trial Court.

13) During pendency of the appeal, the 2nd defendant died leaving behind him, his children to succeed his property and they

were impleaded as respondents 6 to 8 vide orders dated 17.02.2010 in C.M.P. No.230 of 2010.

14) The main contention of the appellants is that without seeking relief of declaration in the absence of proof of title by any documentary evidence, the suit for injunction simplicitor for recovery of possession is not maintainable but the trial Court did not consider this contention in proper perspective, committed a serious error. The plaintiffs filed the suit after long lapse of time though the defendants started construction of the building in the year 1985 and completed in the year 1988, having kept quiet for such a long time, the plaintiffs claimed recovery of possession without establishing their right and title, and therefore, the decree and judgment of trial Court are liable to be set aside and prayed to dismiss the suit.

15) Learned counsel for respondents argued totally in support of decree and judgment of trial Court and prayed to dismiss the appeal confirming the judgment and decree of the trial Court.

16) Considering rival contentions, perusing the material available on record including the decree and judgment, oral and documentary evidence, the point that arise for consideration is:

Whether the suit for recovery of possession is maintainable without seeking declaratory relief and whether the decree and judgment of trial Court are based on any evidence regarding identification on ground, if not liable to be set aside?

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Point:

17) The plaintiffs based their claim on pahani patrika and panchanama, patta certificates issued by Tahsildar, to establish

title over the property. In a suit for recovery of possession, it is for the plaintiffs to prove title and if it is based on previous possession, they must prove their possession prior to dispossession.

18) Here, the plaintiffs claiming title over the schedule property and sought decree for recovery of possession based on title. Even in the cause of action para, there was no reference about the patta allegedly granted in their favour by the Tahsildar in the proceedings referred above. In para No.2 of the plaint, a vague allegation is made that the plaintiffs are the absolute owners of the property of an extent of Ac.3.00 gts in S.No.246/2 of Medak Town, Medak Revenue Mandal and Medak District; that the defendants constructed A.P. Residential Girls School and hostel in an extent of Ac.1.07 gts out of Ac.3.00 gts and planted 20 mango trees. Similarly, para No.3 of last three lines show that a patta certificate was issued by the Tahsildar, Medak vide Proc.No.A3/2399/1984 dated 11.07.1984. Thus, the plaintiffs laid foundation to their title in the pleadings itself and based their claim on patta certificate issued by the Tahsildar in their favour vide proceedings No.A3/2388/1984, dated 11.05.1984. The patta certificate, which is allegedly issued in their favour, is marked as Ex.A9 before the trial Court, which is relevant to decide the title of the plaintiffs.

19) As seen from Ex.A9, it is only pattadar certificate dated 11.05.1984 certifying that Syed Azizullah Hussaini, Syed Fazlullah Hussaini, Dastagir Begum and Kumari Shahanaz Sulthana are the pattadars of the land of Ac.3.00 gts in S.No.246/2 of Medak District. The certificate was issued on the strength of the certification made by the record keeper. The plaintiffs also

produced mutation entries in revenue record, mutating the name of the plaintiffs in the register as pattadars of the property of an extent of Ac.3.00 gts in S.No.246/2 and other extents. As per the entries in Ex.A10, the mutation took place on 30.05.1973. The total extent in S.No.246/2 is Ac.4.55 gts, out of it, the plaintiffs are owners of Ac.3.00 gts. Thus, from 1973 onwards the plaintiffs were shown as pattadars in the revenue records and paid land revenue as per Exs.A11, 12 and 13 for different Faslis i.e., for the years 1988-89, 1987-88, 1989-90 respectively. Ex.A14 is Kammi eksala paisal patti, where the plaintiffs were shown as pattadars. Similarly in the other documents i.e., sethwar, pahani patrika also discloses that Ac.3.00 gts of land in S.No.246/2 is in possession of the plaintiffs and the plaintiffs are the owners of the said land for the year 1982-83. However, since the plaintiffs asserted their title to the property based on the certificate issued by MRO marked as Ex.A9, it is for them to prove the same and to substantiate their contention. The 2nd plaintiff was examined as PW.1 before the trial Court to testify about the title to the property. While admitting that his father purchased the suit land in S.No.246/2 which consists of Ac.9.16 gts out of it, Ac.6.16 gts was acquired by Government for house-sites for weaker sections on payment of compensation to the petitioner. At the time of acquisition, the S.No.246 was divided into two numbers i.e., S.No.246/1 consists of Ac.6.15 gts and S.No.246/2 consists of Ac.3.00 gts, which is schedule property.

20) In the cross examination of PW.1, a suggestion was put to him that his father did not purchase the property and that PW.1 did not succeed the suit schedule property and got denial. It is further elicited that the plaintiffs filed O.S. No.43 of 1984

against one Satyavardhana Rao restraining him from interfering with the peaceful possession of the property of the plaintiffs, Ex.A5 is the certified copy of the decree. It is followed by a suggestion that the plaintiffs in the suit did not impleaded the Government and suppressing the real fact obtained permanent injunction and that the certificate marked as Ex.A9 dated 11.07.1984 is not a patta.

21) He also suggested that the defendants did not encroach the plaintiffs' land and PW.1 denied the same. In the entire cross examination nothing has been elicited to disprove the title of the plaintiffs, which is based on a patta certificate marked as Ex.A9.

22) PW.2 is Inspector of Survey, who allegedly conducted survey on the application made by the plaintiffs and his evidence is not consistent. In his cross examination, he admitted that he has not conducted any survey in S.No.246/2 and Vikaruddin, who demarcated the land is in service. He does not know anything about the suit land. He admitted that the record does not disclose that any notices were issued to the adjacent land owners and Government at the time of survey and demarcation and Ex.A16-- panchanama does not contain any signature of Principal of A.P.Residential School for Girls, Medak. He further admitted that the notice is required to be issued before demarcating the land to the neighbouring owners and no notice was given to the Principal, A.P. Residential School for Girls, Medak before demarcating the suit land.

23) Ex.A16 does not disclose anything about the details of survey number of the land. Based on the evidence of PW.2, it is

contended that the survey would have been conducted by demarcating the land in S.No.246/2 so as to identify the land of Ac.1.07 gts in S.No.246/2 and that the procedure has not been followed and therefore no evidentiary value can be attached to the report marked as Ex.A16. The general procedure to be followed for conducting survey, is; initially a notice is required to be issued to the boundary/ adjacent owners at the time of survey but no such procedure has been followed as per Ex.A16 and no notice was issued to the 1st defendant—the Principal, A.P. Residential School for Girls, Medak before demarcating the land in S.No.246/2 and that apart PW.2 is not a person who demarcated the land in S.No.246/2 of Medak. Therefore, the testimony of PW.2 regarding conducting survey demarcating land on ground and issuing Ex.A16 is of no use and on the strength of such evidence, it is difficult to accept the identification of the property with reference to revenue records.

24) The defendants to substantiate their case examined the Principal, A.P.Residential School for Girls, Medak. Based on record DW.1—R.S.Nagalakshmi testified and according to her, the Tahsildar alienated Ac.30.00 gts of land in different survey numbers i.e., S.Nos.248/1, 246/2 and other survey numbers in S.No.246/2 an extent of Ac.1.20 gts was alienated to the 1st defendant for construction of school building and hostel and construction was started in 1985 and completed in the year 1988 and the construction was surrounded by compound wall on Western side and Southern side and on Northern side and Eastern side, fenced with barbed wire. Thus, it is clear that the defendant is claiming title over the land Ac.1.22 gts in S.No.246/2 and it is specific case of the plaintiffs that the S.No.246 an extent of

Ac.9.16 gts in S.No.246 was purchased by his father, out of it, Ac.6.16 gts was acquired long back to provide house sites to weaker sections, paid compensation to his father and it is specific case that S.No.246 was divided into two i.e., S.No.246/1 consists of Ac.6.16 gts whereas 246/2 consists of Ac.3.00 gts. But no such record is produced before the Court to establish the sub-division and extent contained in each part of S.No.246. Therefore, it is difficult to believe that S.No.246 was divided into two, 246/2 consists of Ac.3.00 gts. However, the revenue account i.e., pahani patrikas marked as Exs.A1 to A4 discloses that S.No.246 consists of Ac.4.55 gts out of it Ac.3.00 gts recorded in the name of plaintiffs. Similarly, Exs.A5 and A6 discloses that S.No.246 was sub-divided into two parts i.e., 246/1 and 246/2 and it is part of Field Measurement Book (FMB). Thus, there is sufficient evidence on record to establish that S.No.246, Medak was divided into two parts and it is not known as to the total extent of each survey number. However no suggestion was put to PW.1 denying division of S.No.246 into two i.e., 246/1 and 246/2. Even DW.1 also did not deny the sub-division specifically.

25) DW.2 is MRO, whose evidence is relevant to decide the alienation of land of an extent of Ac.1.22 gts in S.No.246/2 besides the land in other S.Nos. and even according to the case of the defendant an extent of Ac.1.22 gts in S.No.246/2 was alienated in favour of 1st respondent. That itself indicates that S.No.246 was sub-divided into two and no other proof is required to establish the sub-division.

26) According to the evidence of DW.2, he alienated Ac.30.00 gts of land which includes Ac.1.22 gts in S.No.246/2 under Ex.B2, so also delivery of possession of Ac.30.00 gts of

A.P. Residential School and construction of the same. DW.2 in the cross examination admitted that originally S.No.246 consists of Ac.9.36 gts out of it Ac.0.20 gts is Pote kharas and Ac.9.16 gts was acquired by Municipality vide Gazette No.18, dated 27.02.1347 Fasli and it is entered in immovable property register of Municipality Medak and he admitted about the issuance of Ex.A9 by the Tahsildar on confronting it to him. He further asserted that the said land of Ac.1.20 gts in S.No.246/2 was assigned to defendant Nos.1 and 3. Thus, there is clear admission from the evidence of PW.1 that Ex.A9 was issued by the office of Tahsildar, Medak and the other material established that the plaintiffs are the pattadars of the land of an extent of Ac.3.00 gts in S.No.246/2. The undisputed fact is that the defendants 1 and 3 were allotted Ac.30.00 gts which includes Ac.1.22 gts in S.No.246/2 which is allegedly belonging to the plaintiffs. The plaintiffs claimed that they are owners of the property as per the material on record. The plaintiffs are the pattadars of Ac.3.00 gts in S.No.246/2 and even according to Ex.A9 certificate issued by Tahsildar, the plaintiffs are the owners. It is not the case of the defendants that the land in S.No.246/2 is the Government land or the land belonging to municipality but strangely during cross examination of DW.2, he admitted that Ac.9.16 gts was acquired by municipality in 1354 Fasli. But no iota of evidence is produced to substantiate his contention that Ac.9.16 gts was acquired by municipality and it was entered into immovable property register of municipality. In the absence of any proof, it is difficult to accept that the land in S.No.246/2 belongs to either municipality or the Government authorities. On the other hand to substantiate the evidence produced by the Government clinchingly establishes that the plaintiffs are the owners of Ac.3.00 gts.

27) The contention urged in the grounds of appeal is that the defendants denied the title of the plaintiffs. The plaintiffs filed the suit claiming relief under Section 5 of Specific Relief Act, without seeking declaration of title, consequently the plaintiffs are not entitled to claim any right over the property. In fact the defendants did not raise such contention in the written statement but for the first time in the grounds of appeal, raised such ground to dismiss the suit, setting aside the decree and judgment of the trial Court. No doubt, the plaintiffs are not claiming title based on long possession. The plaintiffs are claiming title over the property based on the title through their father and the certificate issued by revenue authorities, however denial of title of the plaintiffs is not bonafide because the Tahsildar himself issued Ex.A9 and the revenue authorities issued Exs.A1 to A.4 pahani patrika, paisal pati etc. If really the plaintiffs are not the owners of the property the question of mutation of their name in Ex.A10 does not arise. The documents produced, does establish title of the plaintiff to the schedule property in S.No.246/2. When the plaintiffs established their title to the property, the denial of the title to property of the plaintiffs by the defendants cannot be said to be bonafide and alienation of Ac.1.22 gts in S.No.246/2 vide proceedings No.Ex.B.1 is without any title to the Government. The Tahsildar is not competent to alienate the land belonging to the plaintiffs. Therefore such alienation of Ac.1.22 gts in S.No.246/2 allegedly by Tahsildar vide Ex.B1 is without any right or title of the property, such alienation would not confer any title to the property in favour of defendants 1 and 3, since, Government has no title over the property. Therefore, the said alienation of Ac.1.22 gts in S.No.246/2 is invalid since the plaintiffs are the owners as per the

certificate marked as Ex.A9 issued by Tahsildar, who alienated the land to the defendants 1 and 3. When such alienation is invalid, the person who is in possession will not get any title and their possession can be described as unlawful, illegal or without any title to the property, thereby, liable to vacate and deliver vacant possession of the property to the lawful owners i.e., plaintiffs.

28) The dispute is with regard to identity of the property on ground. To establish the same, the plaintiff got examined as P.W.2, who allegedly conducted survey of the land after following necessary procedure under Survey and Boundaries Act. But, his evidence is totally silent with regard to survey by himself and on the other hand, he admitted that the survey was conducted by some other person by name Vikaruddin, who is in service and he further admitted that no notices were issued before conducting survey. The record admits that no procedure has been followed to conduct survey of the land to identify on ground. Therefore, no evidentiary value can be attached to the testimony of P.W.2 and Ex.A-16, the survey report. Thus, the plaintiffs did not adduce any evidence to identify the scheduled property on ground and to establish that the defendants encroached into the land belonging to the plaintiffs in Survey No.246/2 of Medchal City. Since the relief of recovery of possession after removal of constructions of 20 years old is a harshest remedy, the Court has to insist identity of the property on ground. Otherwise, such harshest remedy cannot be granted. Though, the plaintiffs were able to establish their title to the property, no sufficient evidence is available on record to identify the land on ground, so as to direct the respondents to remove the constructions thereon.

29) Though the defendant was examined, his evidence

was not sufficient to disbelieve the title of the plaintiffs, except to the extent of alienation of the property by the Tahsildar in favour of the defendants for construction of Residential Girls High School and Hostel. When the plaintiffs are able to establish their title to the property, the defendants have to deliver vacant possession of the property to the plaintiffs under Section 5 of the Specific Relief Act on identification of property on ground.

30) In the present case, the plaintiffs filed suit O.S.No.43 of 1984 against Satyavardhana Rao, Contractor of the building and obtained a permanent injunction against the defendant therein i.e. contractor, but the respondents were not impleaded in the earlier suit and allowed to raise construction by the Government and having kept quiet for such a long time, allowing the defendants to complete the entire constructions, filed the present suit for recovery of possession of suit schedule property.

31) On a perusal of entire material available on record, it is evident that the Trial Court failed to record the finding that the land in possession and enjoyment of the defendants is the land belonging to the plaintiffs/respondents on ground. Therefore, I find that it is a fit case to remand the matter to the Trial Court exercising power under Order XLI Rule 23-A of C.P.C with a direction to appoint an Advocate Commissioner to localise the schedule property on ground, with reference to the revenue records, including FMB and demarcate the same on ground, fix boundaries with the assistance of Inspector of Survey and Land Records, Medak District permitting the plaintiffs or defendants to examine the Advocate Commissioner, if they desire to examine and decide the suit afresh.

32) In the result, the appeal is allowed, setting aside the decree and judgment of the Trial Court while remanding the matter to the Trial Court with a direction to appoint Advocate Commissioner to localise the suit schedule property with reference to the revenue records including FMB and demarcate the same on ground fix boundaries with the assistance of Inspector of Survey and Land Records, Medak District, while permitting the plaintiffs and defendants to examine the Advocate Commissioner, if they desire to examine and decide the matter within six months from the date of receipt of this order.

33) Both the parties are directed to appear before the Trial Court on 12.08.2016 and no further notice to the parties need be given by the Trial Court before proceeding further.

34) Pending miscellaneous petitions in this writ petition, if any, shall stand closed. No order as to costs.

M.SATYANARAYANA MURTHY, J

Date:15.07.2016

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THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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