

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL No.990 of 2011

JUDGMENT:

The defendants in O.S.No.68 of 2001 on the file of the Junior Civil Judge, Kalyandurg, and the respondents in A.S.No.1 of 2008 on the file of the Judge, Family Court – cum – Additional District Judge, Anantapur, preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) challenging the decree and judgment of the first appellate Court in A.S.No.1 of 2008, whereby, the first appellate Court granted a decree restraining the appellants herein/defendants and their men from interfering with the respondent herein/plaintiff's peaceful possession and enjoyment over the plaint schedule property.

2. For convenience of reference, the parties to this appeal will be hereinafter referred to as plaintiff and defendants.

3. The sole plaintiff – K. Hanumakka filed the suit for injunction simplicitor restraining the defendants from interfering with the peaceful possession and enjoyment of site in Survey No.98 (V.S.P.) of Kariganipalli Grampanchayat, more fully described in the schedule annexed to the plaint, alleging that the land in question was originally a patta land vested on the Government and it is in her possession and enjoyment for the last more than 25 years and she raised a tiled roof house and tethering cattle in front yard in the land; the Gram Panchayat assigned door number to the hut; While she is continuing in possession and enjoyment of the property, the Gram Panchayat authorities, in recognition of her possession, issued an "Annexure Certificate" in R.C.No.169/98 dated 08.09.1998; Thus, she is in lawful possession and enjoyment of the property; While so, the defendants threatened to interfere with the peaceful possession and enjoyment of the schedule property by the plaintiff, but she could resist their high-

handed attempts; Hence, she filed the suit for injunction simplicitor.

4. The defendants contested the suit raising several contentions and one among them is that they are in possession and enjoyment of the property by virtue of Ex.B.1 – Possession Certificate issued by the MRO, while denying the possession of the plaintiff and the alleged threat to interfere with her possession and enjoyment.

5. Based on the pleadings, the trial Court framed two issues. On behalf of the plaintiff, the sole plaintiff was examined as P.W.1 and P.Ws.2 and 3 were examined and Exs.A.1 to A.3 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Ex.B.1 was marked.

6. Upon hearing argument of both the learned counsel, the trial Court disbelieved the case of the plaintiff, declined to grant permanent injunction. Aggrieved by the decree and judgment of the trial Court dismissing the suit, the unsuccessful plaintiff in O.S.No.68 of 2001 preferred the appeal before the Judge, Family Court – cum – Additional District Judge, Anantapur, in A.S.No.1 of 2008, upon hearing the argument of both the learned counsel, the Additional District Judge, Anantapur, by decree and judgment dated 12.11.2010, allowed the appeal with costs, granting decree of permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment over the schedule property.

7. Aggrieved by the said decree and judgment in A.S.No.1 of 2008 passed by the first appellate Court, the defendants preferred this Second Appeal, under Section 100 of the Code, raising several substantial questions of law and one such question is that the decree and judgment of the first appellate Court is without consideration of evidence and thereby, it is perverse.

8. Notice before admission was ordered to the plaintiff and the

same is duly served on her and the defendants filed proof of service vide USR No.702 of 2016, but none put up appearance on her behalf.

9. Heard the arguments of the learned counsel for the appellants/defendants at the stage of admission.

10. The trial Court dismissed the suit, declined to grant permanent injunction, disbelieving the possession of the plaintiff on the basis of evidence of D.W.3 – M.R.O., Kundurpi, coupled with Ex.B.1. The first appellate Court, in para No.12 of the judgment, discussed the evidentiary value of P.W.2 regarding possession, but however, disbelieved the evidence of P.W.2 regarding possession of the defendants and came to the conclusion that the plaintiff is in possession. The first appellate Court did not consider the evidence of D.W.3 coupled with Ex.B.1 and did not assign any reasons for believing Ex.A.1 – Annexure Certificate, but concluded that the plaintiff is in possession of the schedule property.

11. In a suit for injunction simplicitor, the prime consideration is lawful possession as on the date of filing of the suit and threat to interfere with the possession and enjoyment of the plaintiff by the defendants without any manner of right. Here, the trial Court disbelieved the entire case of the plaintiff, but the first appellate Court reversed the finding and concluded that the plaintiff proved her possession, but failed to record that her possession is lawful. The first appellate Court also did not record any finding that the defendants made any attempt to interfere with the peaceful possession and enjoyment or infringed or invaded the legal right of the plaintiff, as required under Section 38 of the Specific Relief Act, 1963. In the absence of proof of threat to interfere or attempt to infringe or invade the legal right of the plaintiff, as required under Section 38 of the Specific Relief Act, 1963, a suit for permanent injunction cannot be decreed basing on the possession, much less lawful possession. The

alleged threat to interfere or infringe or invade the legal right of the plaintiff would give rise to a cause of action to file a suit for permanent injunction and in the absence of recording such a finding, the decree passed by the lower appellate Court is perverse, unsustainable and the same is liable to be set aside. However, it is necessary to record a finding regarding establishment of the requirements under Section 38 of the Specific Relief Act, 1963, by the first appellate Court. Hence, by exercising power under Order XLI Rule 23-A of the Code, I am of the considered view that it is a fit case to remand the matter to the first appellate Court directing the first appellate Court to record a specific finding as to the requirements under Section 38 of the Specific Relief Act, 1963, i.e., a finding on the attempt to infringe or invade the legal right of the plaintiff by the defendants without any manner of right.

12. In the result, the appeal is allowed at the stage of admission by setting aside the decree and judgment dated 12.11.2010 passed in A.S.No.1 of 2008 by the first appellate Court. The matter is remanded to the first appellate Court with a direction to record a specific finding with regard to the infringement or invasion of the legal right of the plaintiff by the defendants without any manner of right, and dispose of the appeal within a period of three (03) months from the date of receipt of a copy of this order. Both the parties are directed to appear before the first appellate Court on 16.08.2016 and it is made clear that no further notice need be given by the first appellate Court for appearance of the parties.

There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal, shall stand dismissed.

M. SATYANARAYANA MURTHY, J

27th July, 2016.
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