

EXECUTIVE OFFICER, ARULMIGU  
CHOKKANATHA SWAMY KOIL TRUST VIRUDHUNAGAR

v.

CHANDRAN & ORS.  
(Civil Appeal No. 2342 of 2017)

FEBRUARY 10, 2017

[**RANJAN GOGOI AND ASHOK BHUSHAN, JJ.**]

*Code of Civil Procedure, 1908:*

*s.100 – Suit for declaration of title and mandatory injunction – Stating that he had purchased an area of 2 acres and 73 cents (suit property) which was part of Survey No.188 (measuring 7 acres 84 cents) recorded in the name of defendant No.1 – Also sought correction in revenue records by entering his name therein – Plea of defendant No.1 that plaintiff or his predecessors were never the owner of the suit property; that there was no survey number as 188 and the available survey numbers were 188/1, 188/2 and 188/3; that survey Nos.188/1 and 188/3 (measuring 5 acres 10 cents) were in the name of defendant No.1 and Survey No.188/2 was in the name of a third party (not impleaded in the suit) – Complaint was amended mentioning the suit property as Survey No.188/3 – Trial court dismissed the suit holding that description of suit property was not correct; that Survey No.188 was never in the name of predecessors in interest of the plaintiff; and that the suit was hit by non-joinder of necessary party – Appellate court affirmed the order of trial court – In second appeal, High Court reversed the orders of courts below directing to include name of the plaintiff in revenue records after excluding extent of property which stood in the name of first defendant – On appeal, held: Plaintiff failed to correctly describe the suit property – He failed to prove his title – High Court having held the defendant No.1 was entitled to Survey Nos. 188/1 and 188/3 has virtually decreed the suit for survey No. 188/2 which is admittedly recorded in the name of third party – High Court in exercise of jurisdiction u/s. 100 could not have reversed the order of courts below without holding that reasoning given by courts below was legally unsustainable.*

A        **Allowing the appeal, the Court**

**HELD: 1.1** The plaintiff came with the case in the suit that 'P' was the owner of the property, who transferred it in favour of 'S', on whose General Power of Attorney 'B' has transferred the property to the plaintiff by Sale Deed dated 04.11.2007. Trial Court has categorically recorded a finding that 'P' was never a recorded owner of the property and no patta was issued in his favour. [Para 20] [481-C]

1.2 The plaintiff initially in the plaint has prayed for decree for an area of 2.73 acres, as part of Survey No. 188. Sale Deed dated 04.11.2007 also mentions the suit property as part of Survey No. 188. Plaintiff himself has examined PW-4, Surveyor at Collectorate Office, who has stated that he has brought the village revenue records for the year 1983 with regard to Survey No. 188/1, 188/2 & 188/3. Sub Divisions 188/1, 188/2 & 188/3 were in existence at least since before 1983. The deeds on which the reliance has been placed by the plaintiff i.e. Sale Deed dated 28.08.1992, by which 'P' is said to have transferred the property in favour of 'S' as well as General Power of Attorney dated 31.10.2007 and Sale Deed dated 04.11.2007 in the name of plaintiff, the suit property is not described by sub division, rather it is mentioned as part of Plot No. 188. Although, plaintiff got his plaint amended by amending part of Plot No. 188 as Survey No. 188/3 but Sale Deed being not for Survey No. 188/3, both the trial court and the appellate Court have rightly come to the conclusion that the plaintiff failed to correctly describe the suit property and it cannot be accepted that deeds claimed by him referred to the suit property. [Paras 21, 22] [481-D-E, F-H; 482-A]

1.3 The Deed dated 29.7.1974 executed in favour of 'P' has been relied on by the plaintiff to prove the title of 'P' over 2.79 acres of Survey No.188. The said deed has been filed by the plaintiff-respondent as Exhibit A-14. The trial court has in its judgment noticed that plaintiff came with the case in the plaint that suit property was inherited by 'P', however, he relied on Exhibits A-12 to A-14 with regard to which there was no pleading in the plaint. In his deposition, PW.1 admitted that without disclosing this deed in the plaint, he filed Exhibits A-12 to A-

15. When there was no pleading in the plaint regarding title of 'P' by any other earlier deed except the claim of inheritance, the trial court rightly discarded the Deed dated 29.7.1974. The evidence, with regard to which there is no pleading, has rightly been discarded by the trial court. Unless there is a pleading especially with regard to the source of title, the defendant of a suit has no opportunity to rebut such pleading thus an evidence with regard to which there is no pleading can not be relied by the plaintiff for setting up his title in a suit. Moreover, the deed dated 29.7.1974 referred to part of Survey No.188, whereas the suit was filed in 2007 by the plaintiff by which date the Survey No.188 was sub-divided as 188/1, 188/2, 188/3. The deeds through which plaintiff claims title i.e. 28.8.1982, General Power of Attorney dated 31.10.2007 and sale deed dated 05.11.2007 do not refer to any sub-division. The plaintiff although amended the schedule property from part of Plot No. 188 as Survey No.188/3 but he failed to prove his title over Plot No.188/3. The trial court after considering the document dated 29.7.1974 held that plaintiff failed to prove his title. [Para 23] [482-A-G]

2.1 The High court has also affirmed the findings of the courts below that defendant-Temple is entitled for Survey No. 188/1 and 188/3 i.e. 5 acres and 10 cents land. In spite of the aforesaid findings, the High Court proceeded to decree the suit. The High Court proceeded on the premise that no document has been filed for the purpose of establishing that Survey No. 188/2 stands in the name of 'J' and further, the High Court proceeded that first defendant being not absolute owner of the old Survey No. 188 except 5 acres and 10 cents, the plaintiff is the owner of the rest of the property. Thus virtually, the suit has been decreed by the High Court for Survey No. 188/2, whereas, Survey No. 188/2 was admittedly recorded in the name of 'J', [Paras 26, 27 and 28] [483-E-F; 484-A-B]

2.2 The High Court neither adverted to the finding of the trial court nor has set aside the reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding

- A that the reasoning given by the courts below was legally unsustainable. Thus, the High Court committed error in decreeing the suit. [Para 36] [486-F-G]

- 2.3 The decree of the High Court is also contradictory. The High Court has affirmed the findings that Defendant No. 1 is the owner of the Survey No. 188/1 and 188/3, whereas, by decreeing the suit for declaration and mandatory injunction the name of Defendant No. 1 is to be removed and replaced by plaintiff which is clearly erroneous and unsustainable. [Para 37] [486-H; 487-A]

- C *Ram Saran and Anr. v. Smt. Ganga Devi* AIR 1972 SC 2685 – referred to.

Case Law Reference

AIR 1972 SC 2685                      referred to                      Para 35

- D CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2342 of 2017.

From the Judgment and Order dated 22.01.2013 of the High Court of Madurai Bench of Madras in S. A. (MD) No. 800 of 2012.

- E A. T. M. Sampath, V. Balaji, Asai Thambi, Rakesh K. Sharma, Advs. for the Appellant.

M. Yogesh Kanna, Ms. Nithya, T. Harish Kumar, C. Nagamani, P. Balaji, Advs. for the Respondents.

The Judgment of the Court was delivered by

- F **ASHOK BHUSHAN, J.** 1. Leave granted

2. The defendant has filed this appeal against judgment of the Madurai Bench of Madras High Court dated 22.01.2013, by which judgment the High Court while reversing the judgment of trial court and First Appellate Court, has decreed the suit of the plaintiff.

- G 3. The brief facts of the case are:

The Respondent No. 1, who shall be hereinafter referred to as plaintiff, filed Original Suit No. 33 of 2008 for the relief of declaration and mandatory injunction. Plaintiff's case in the plaint was that by Sale Deed dated 04.11.2007, he has purchased an area of 2 acres and 73 cents being part of Survey No. 188. The entire Plot No. 188 (area 7

acres and 84 cents) is recorded in the name of Defendant No. 1. A  
Mandatory injunction was prayed to be issued, directing the Defendant  
Nos. 4 and 5 to correct the revenue records by entering the name of  
plaintiff in the suit property. The plaintiff's case was that the suit property  
belonged to one R. Padmanabhan who vide Sale Deed dated 28th August,  
1992 on his behalf and on behalf of his minor sons transferred 2 acres 72 B  
cents area being part of Survey No. 188 in favour of one Sanjay  
Ramasamy, correspondent of Annai Velankanni Women Teacher Training  
School. Sanjay Ramasamy executed a General Power of Attorney in  
favour of one Bhaskaran on 31.10.2007 and it was Bhaskaran who  
executed the Sale Deed dated 04.11.2007 in favour of the plaintiff.  
Plaintiff, further stated that when he went to Revenue Tehsildar for C  
issuance of patta in his favour, he came to know that it is in the name of  
first Defendant. Consequently, the suit was filed, seeking declaration  
and mandatory injunction.

4. A written statement was filed by the first Defendant,  
controverting the plaint allegation. It was pleaded that plaintiff or his D  
predecessors in interest were never the owner of the suit property. The  
Defendant No. 1, hereinafter referred to as Temple, has been the owner  
in possession of the suit property whose name is also recorded in the  
revenue records. It was pleaded that there is no such Survey No. as 188  
in the whole village. The only available Survey Nos. as per the revenue  
records are 188/1, 188/2 and 188/3. The first Defendant is entitled to the E  
Survey No. 188/1 and 188/3, which are in possession and continuous  
enjoyment of Temple from the time immemorial. The property register  
of the Temple, which is maintained by Special Tehsildar, Hindu Religious  
& Charitable Endowment Department, records the Temple as the owner  
of the property. Survey No. 188/2 is in the possession and enjoyment of F  
one Janaki Ammal, who being not a party, the suit is not maintainable  
and it is bad for mis-joinder and non-joinder of necessary party. The  
defendants numbers 2 to 4 have adopted the written statement of  
defendant No.1.

5. Plaintiff, initially in the plaint, had claimed for the reliefs of G  
declaration and mandatory injunction for an area 2 ares 73 cents as part  
of Survey No. 188. Subsequently, the plaint was got amended by the  
plaintiff, mentioning the suit property as Survey No. 188/3. The Plaintiff  
in support of his case filed documentary as well as oral evidences of  
PW 1 to PW 5. The Defendant in support of his case has also filed H

A documentary as well as oral evidences of DW 1, Senior Accountant in defendant's temple.

6. Trial court framed the following five issues:

*"1. Whether the plaintiff is entitled for the relief of declaration as prayed for?"*

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*2. Whether the plaintiff is entitled for mandatory injunction as prayed for?"*

*3. Whether the suit is bad for non joinder of necessary party?*

*4. To any other relief?*

C

*Additional issue framed on 17.08.2010:*

*1. Whether this suit is maintainable?"*

7. Trial court, while answering the issue No. 1 to 4 and additional issue No. 1 held that Survey No. 188 further has been sub-divided into Survey No. 188/1, 188/2 and 188/3. The trial court further held that there is no explanation submitted by the plaintiff that how he has got amended the Survey No. 188/3 in the original suit. It held that the description of the suit property is not correct. It was also held that name of Padmanabhan was never recorded in the revenue records. Patta was never transferred in the name of Sanjay Ramasamy, who had no right to execute a General Power of Attorney in favour of Bhaskaran. It was held that no document has been produced to prove that Padmanabhan was in possession and enjoyment of the suit property. None of those persons, who claimed to be vendors have been examined. Finding was returned that the Survey No. 188 was never in the name of Padmanabhan.

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8. It was held that suit property belonged to Temple, which is in possession for a long time continuously. The trial court further recorded a finding that plaintiff had failed to prove, that property belonged to the plaintiff and it is in possession hence declaratory reliefs cannot be granted to the plaintiff and thereby suit is not maintainable.

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9. Answering the issue No. 6, trial court held that PW 1, the plaintiff having deposed in his cross-examination, that survey No. 188/2 is in the name of Janaki Ammal and she had sold the property to some other persons. The Janaki Ammal being necessary party who has not been impleaded in the suit, the suit is hit by non-joinder of a necessary party.

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10. The plaintiff aggrieved by the judgment of the trial court filed an appeal. The Appellate Court vide its judgment dated 31.10.2011 after reappraising the entire evidence on the record affirmed the findings recorded by the trial court that plaintiff is not the owner of the suit property. The Appellate Court further held that on the date when plaintiff purchased the property in 2007, Survey No. 188 was already sub-divided in 188/1, 188/2 and 188/3. The vendors of the plaintiff did not have patta, chitta and adangal of the suit property.

11. The Appellate Court held that Survey No. 188/1 and 188/3 belong to Temple and survey No. 188/2 belongs to Janaki Ammal who having not impleaded, the suit is bad for mis-joinder and non-joinder of necessary party. It was held that plaintiff was not entitled for declaration and mandatory injunction.

12. Aggrieved by the judgment of the Appellate Court, second appeal was filed by the plaintiff in the High Court. The High Court vide its judgment and order dated 22.01.2013, allowed the second appeal by setting aside the decrees of the trial court and Appellate Court respectively. The High Court although, set aside the decree of courts below and decreed the suit but directed the Defendant Nos. 4 and 5 to include the name of the plaintiff after excluding the extent of property which stands in the name of the first Defendant.

13. The High Court in its judgment did not disturb the findings of the courts below that Temple is the owner of 188/1 and 188/3 total area of 5 acres and 10 cents of land. The High Court, however, held that total area of 188 being 7 acres and 84 cents, plaintiff was entitled for the remaining extent of plot No. 188. Aggrieved by the judgment of the High Court, this appeal has been filed by the Defendant No. 1.

14. Learned counsel for the appellant in support of appeal contends that the High Court in exercise of jurisdiction under Section 100 CPC has interfered with the concurrent findings of the facts, recorded by Courts below that the plaintiff has failed to prove his title and possession.

15. It is submitted that plaintiff having himself admitted that Survey No. 188/2 stood in the name of Janaki Ammal and Janaki Ammal without having been impleaded, the suit of plaintiff was correctly dismissed by two courts below on the grounds of mis-joinder and non-joinder of necessary party. Further, the description of the property in the plaint was incorrect and in spite of the amendment of the plaint, no correction

A having been made in the sale deed, plaintiff could not have been given any right on Survey No. 188/3.

16. The plaintiff came with the case that Padmanabhan acquired the property through inheritance, but in his deposition, it is stated that property was purchased by Padmanabhan. The property being never in  
B the name of Padmanabhan in the records, there was no title vested in the plaintiff. Defendant proved that Survey No. 188/1 and 188/3 having been in the name of Temple, no right could have been granted to the plaintiff.

17. Learned counsel for the respondent/plaintiff submitted that  
C High Court has rightly set aside the judgment and decrees of the two courts below. Plaintiff had proved his title to the suit property by virtue of Sale Deed dated 29.07.1974 Annexure R.1, Sale Deed dated 28.08.1992 and Sale Deed dated 04.11.2007. It is contended that title of Padmanabhan was fully proved by Sale Deed dated 29.07.1974, which was executed by one Rajakambalam Sundara Rajan with regard to part  
D of Survey No. 188 area 2.79 acres.

18. We have considered the submission of the learned counsel for the parties and perused the record. The trial court after considering the both oral and documentary evidence brought on record, dismissed the suit of the plaintiff by recording following findings:  
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(i) Plaintiff has failed to prove by producing any document to show that Padmanabhan had any right and possession over the suit property.

(ii) Survey No. 188/1 and 188/3 are in the name of Defendant  
F No. 1, the Temple.

(iii) The suit property belonged to Defendant No. 1 and it is in possession for a long time continuously.

(iv) Plaintiff in his suit has prayed for the reliefs of declaration without seeking the relief for the possession hence the suit was  
G not legally maintainable.

(v) Plaintiff cannot be granted the decree of the declaration and mandatory injunction.

(vi) Survey No. 188/2 being in the name of Janaki Ammal, she  
H having not been made party to the suit, suit was hit by the principle



of non joinder of the necessary party.

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19. The Appellate Court, after advertng to documentary and oral evidence has confirmed the above findings. Appellate Court has also rejected the application filed by the plaintiff, for amending the plaint for incorporating new pleadings. Appellate Court held that by amendment, plaintiff intends to fill up the gap and wanted to change the entire nature of the case, which cannot be permitted.

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20. The plaintiff came with the case in the suit that R. Padmanabhan was the owner of the property, who transferred it to in favour of Sanjay Ramasamy on whose General Power of Attorney Bhaskaran has transferred the property to the plaintiff by Sale Deed dated 04.11.2007. Trial Court has categorically recorded a finding that R. Padmanabhan was never a recorded owner of the property and no patta was issued in his favour.

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21. The plaintiff initially in the plaint has prayed for decree for an area of 2.73 acres, as part of Survey No. 188. Sale Deed dated 04.11.2007 also mentions the suit property as part of Survey No. 188. Plaintiff himself has examined PW 4, A. Murugesan, Surveyor at Virudhunagar District, Collectorate Office. PW 4 in the statement has stated that he has brought the village revenue records for the year 1983 with regard to Survey No. 188/1, 188/2 & 188/3. It is useful to extract the statement of PW 4, which was to the following effect:

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*"I received summons from this Hon'ble court to depose witness. I brought Chinnamoopanpatti Village's revenue records for the year 1983 with regard to S. No. 188/1, 188/2 & 188/3. I am producing 1914 settlement."*

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22. From the above, it is clear that Sub Divisions 188/1, 188/2 & 188/3 were in existence at least since before 1983. The deeds on which the reliance has been placed by the plaintiff i.e. Sale Deed dated 28.08.1992, by which Padmanabhan is said to have transferred the property in favour of Sanjay Ramasamy as well as General Power of Attorney dated 31.10.2007 and Sale Deed dated 04.11.2007 in the name of plaintiff, the suit property is not described by sub division rather it is mentioned as part of Plot No. 188. Although, plaintiff got his plaint amended by amending part of Plot No. 188 as Survey No. 188/3 but Sale Deed being not for Survey No. 188/3, both the trial court and the Appellate Court have rightly come to the conclusion that the plaintiff

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- A failed to correctly describe the suit property and it cannot be accepted that deeds claimed by him referred to the suit property.

23. Learned counsel for the respondent has laid much emphasis on the Deed dated 29.7.1974 executed by Sundara Rajan in favour of Padmanabhan which has been brought on the record of paper book at page No.104. Learned counsel submits that said sale deed clearly proves the title of Padmanabhan over 2.79 acres of Survey No.188. The said deed has been filed by the plaintiff-respondent as Exhibit A-14. The Deed dated 29.7.1974 has been specifically considered by the trial court in para 9 of the judgment. The trial court has in its judgment noticed that plaintiff came with the case in the plaint that suit property was inherited by Padmanabhan, however, he relied on Exhibits A-12 to A-14 with regard to which there was no pleading in the plaint. In his deposition, PW.1 admitted that "it is correct to say that without disclosing this deed in the plaint I filed Exhibits A-12 to A-15". When there was no pleading in the plaint regarding title of Padmanabhan by any other earlier deed except the claim of inheritance the trial court rightly discarded the Deed dated 29.7.1974. It is further relevant to note that plaintiff's application made for amendment of the plaint in the Appellate Court was considered and rejected by the Appellate Court. The evidence, with regard of which there is no pleading, has rightly been discarded by the trial court. Unless there is a pleading especially with regard to the source of title, the defendant of a suit has no opportunity to rebut such pleading thus an evidence with regard to which there is no pleading can not be relied by the plaintiff for setting up his title in a suit. Secondly, the deed dated 29.7.1974 referred to part of Survey No.188, whereas the suit was filed in 2007 by the plaintiff by which date the Survey No.188 was sub-divided as 188/1, 188/2, 188/3. The deeds through which plaintiff claims title i.e. 28.8.1982, General Power of Attorney dated 31.10.2007 and sale deed dated 05.11.2007 do not refer to any sub-division. The plaintiff although amended the schedule property from part of Plot No. 188 as Survey No.188/3 but he failed to prove his title over Plot No.188/3. We, thus, do find that the trial court after considering the document dated 29.7.1974 held that plaintiff failed to prove his title.

24. As noted above, there was categorical finding by trial court and First Appellate Court that Defendant No. 1 is the owner of Survey No. 188/1 (2 acres and 2 cents) and 188/3(2 acres and 88 cents). In the documentary evidence, filed by the defendant both the aforesaid sub

divisions i.e. Survey No. 188/1 and 188/3 were recorded as the Temple property. In the property records maintained by the Hindu Religious & Charitable Endowment Department also Survey Nos. 188/1 & 188/3 were recorded in the name of Temple. Extract of the property registered was produced before the courts below which was believed. A

25. The High Court, in its judgment has also accepted that the Temple's name is recorded for Survey Nos. 188/1 and 188/3. The High Court, in its judgment had held that total extent of 188/1 and 188/3 is only 5 acres and 10 cents, whereas, plot No. 188 is 7 acres 84 cents, hence, the plaintiff was entitled to the remaining extent. Following observations have been made by the High Court in Para 16: B

*"16. The first defendant has put forth its right, title and interest over the suit property by virtue of Exs. B1 to B3. In Exhibits B1 to B3, it has been clearly stated that Sub Division Nos. 188/1 and 3 are standing in the name of the first defendant and its total extent is 5 acre 10 cents. It has already been pointed out that the total extent of original Survey No. 188 is 7 acre 84 cents. By virtue of Exs. B1 to B3, the first defendant is entitled to get only 5 acre 10 cents and in the remaining extent, the first defendant cannot claim any right, title and interest."* C D

26. Thus, the High court has also affirmed the findings of the courts below that Temple is entitled for Survey No. 188/1 and 188/3 i.e. 5 acres and 10 cents land. In spite of the aforesaid findings, the High Court proceeded to decree the suit on the basis of its reasoning, as given in paragraphs 16 & 18 of the judgment. Para 18 of the judgment of the High Court is as below: E

*"18. Considering the fact that no document has been filed for the purpose of establishing that Survey No. 188/2 stands in the name of Janaki Ammal and also considering that the first defendant is not the absolute owner of the entire extent of old Survey No. 188 except 5 acre 10 cents of land, the Court can very well declare that the plaintiff is the owner of the suit property and since it is seen from Ex. A30 that the entire extent of old Survey number stands in the name of first defendant, the ancillary relief of mandatory injunction can also be granted in favour of the plaintiff."* F G

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A        27. The High Court proceeded on the premise that no document has been filed for purpose of establishing that Survey No. 188/2 stands in the name of Janaki Ammal and further, the High Court proceeded that First Defendant being not absolute owner of the old Survey No. 188 except 5 acres and 10 cents, the plaintiff is the owner of the rest of the property.

B        28. Thus virtually, the suit has been decreed by the High Court for Survey No. 188/2, whereas, Survey No. 188/2 was admittedly recorded in the name of Janaki Ammal, who was not impleaded in the suit nor any relief was claimed against the Janaki Ammal or for Survey No. 188/2. In this context, it is useful to refer to the evidence of Plaintiff himself i.e. C        PW 1. PW 1, in his deposition before the court, has admitted the fact that Survey No. 188/2 is in the name of Janaki Ammal and he has not initiated any action against her nor she was impleaded in the suit. Following statement was made by the PW 1 in his statement:

D        *"It is correct to say that S.No. 188/2 stands in the name of Janaki Ammal. Now the said Janaki Ammal sold that property to third person. I have not initiated any action to include Janaki Ammal as a party to this suit."*

E        29. In view of the statement of the plaintiff himself that Survey No. 188/2 is in the name of Janaki Ammal, the observations of the High Court that no documentary evidence was filed for the purpose of establishing that Survey No. 188/2 stands in the name of Janaki Ammal are erroneous and mis-placed. When Plaintiff himself admitted that Survey No. 188/2 is recorded in the name of Janaki Ammal, there was no basis for the High Court to come to conclusion that plaintiff is entitled F        for the area apart from 5 acres and 10 cents, which belonged to the Temple.

G        30. As noted above, one of the issues framed, as to whether the suit is bad for non-joinder of necessary party. The said issue was answered against the plaintiff and it was held that suit is bad for non-joinder of Janaki Ammal a necessary party, whose name was recorded against Survey No. 188/2. Without advertng to the said findings of the trial court and the Appellate Court, the High Court has erroneously decreed the suit of the plaintiff.

H        31. There is one more reason due to which the judgment and the decree of the High Court cannot be sustained. The trial court in its

judgment has categorically recorded findings that the Defendant No. 1 is in possession of the suit property. In para 10 following findings have been recorded by the trial court: A

*"From the oral depositions and exhibits produced on behalf of defendant 1, it is clearly found that the suit property belonged to defendant 1 Arulmigu Chokkanatha Swamy Temple and it is in its possession for a long time continuously."* B

32. One of the submissions made before the courts below, on behalf of the defendant, was that the suit for mere declaration when the plaintiff was not in possession of the property, was not maintainable and hit by Section 34 of The Specific Reliefs Act, 1963, the plaintiff having not sought for recovery of possession. C

33. Trial court, after considering the aforesaid submissions, recorded its conclusions in para 14 which is to the following effect:

*"From the facts of above cited suit, plaintiff in this suit has prayed for the relief of declaration without seeking the relief of recovery of possession and under these circumstances, it is clearly seen that the plaintiff is not entitled to get such relief. Therefore, it is held that the suit is not maintainable legally."* D

34. Section 34 of the Specific Reliefs Act, 1963 provides as follows: E

*"Section 34. Discretion of court as to declaration of status or right.-Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:* F

*Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.* G

..... " .

35. In the present case, the plaintiff having been found not to be in possession and having only sought for declaratory reliefs, the suit was clearly not maintainable and has rightly been dismissed by the trial court. H

- A In this context the reference is made to the judgment of this Court reported in *Ram Saran and Anr. versus Smt. Ganga Devi*, AIR 1972 SC 2685, wherein para 1 & 4 following was stated:

B “1. This is a plaintiffs’ appeal by special leave. Ram Saran and Raghubir Saran, the plaintiffs are brothers. They jointly owned suit property with Chhabili Kuer widow of Lalita Prasad. After the death of Chhabili Kuer on February 8, 1971, Ganga Devi the defendant in the suit came forward as the legal representative of Chhabili Kuer and got the mutation effected in her name in the place of the deceased Chhabili Kuer. In 1958, the plaintiffs brought this suit for a declaration that they are the sole owners of the suit properties. They did not claim possession either of the entire or even any portion of the suit properties.

C  
D 4. We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding Courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable.”

E 36. The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit.

G 37. The decree of the High Court is also contradictory. The High Court has affirmed the findings that Defendant No. 1 is the owner of the Survey No. 188/1 and 188/3, whereas, by decreeing the suit for declaration

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and mandatory injunction the name of Defendant No. 1 is to be removed A  
and replaced by plaintiff which is clearly erroneous and unsustainable.

38. In view of the above, judgment of the High Court cannot be  
sustained. The High Court committed an error in reversing the judgments  
of the trial court and the First Appellate Court. In result, the appeal is B  
allowed and the judgment of the High Court is set aside and those of trial  
court and the First Appellate Court are restored.

Kalpana K. Tripathy

Appeal allowed.