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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.02.2021

PRONOUNCED ON : 23.02.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.NO.1389 OF 2011

AND

M.P.NOS.1 OF 2011 & 1 OF 2012

Janakiammal
W/o.Late Sundarraaj

... Appellant

.Vs.

1. Rajalakshmi (deceased)
W/o.Sundarraaj

2. S.Ramanathan
S/o.Sriivasa Padayachi

3. R.Babu
Son of Rajakanacikam
R3 brought on record as LRs of the
deceased R1 vide order of Court
dated 21.01.2015 made in M.P.3/14
in S.A.No.1389/2011

... Respondents

PRAYER:-

Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree of the learned District Judge, Nagapattinam made in A.S.No.9 of 2010 dated 06.04.2011 confirming the judgment and decree of the learned Subordinate Judge, Nagapattinam, made in O.S. No.59 of 2007 dated 12.09.2009.

For Appellant : Mr.P.Dinesh Kumar

For Respondents

For R3 : Mr.A.K.Kumarasamy,
Senior Counsel
For Mr.M.S.Palanisamy



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For R2 : No appearance
Set exparte vide order
dated 11.02.2021.

For R1 : Died.

JUDGMENT

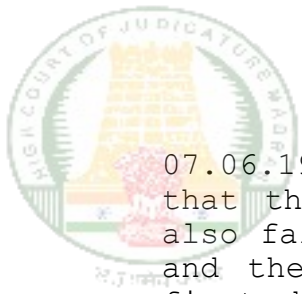
Challenge in this second appeal is made to the judgment and decree dated 06.04.2011 passed in A.S.No.9 of 2010 on the file of District Judge, Nagapattinam, confirming the judgment and decree dated 12.09.2009 passed in O.S. No.59 of 2007 on the file of the Subordinate Court, Nagapattinam.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The first defendant in OS.No.59 of 2007 is the appellant in the Second Appeal.

4. Suit for declaration and permanent injunction.

5. Briefly stated, the case of the plaintiff is that the suit properties were purchased by her husband late Sundarraaj by virtue of the sale deeds dated 06.06.1967, 15.07.1971 and 06.08.1985 and the 11th item in the suit properties devolved upon him in a partition effected with his brothers and the deceased Sundarraaj was enjoying the same by paying the tax and kists and the revenue records also stood in the name of the deceased Sundarraaj. The plaintiff's husband Sundarraaj died on 27.08.2006 leaving her as his sole legal heir and out of the wedlock no children born to them. The first defendant was working as a maiden servant in the house and taking advantage of the abovesaid position, the first defendant, by giving false assurances, insisted Sundarraaj to purchase the properties in her name and Sundarraaj had also purchased about three veli of lands in her name. However, the above properties were under the cultivation of the deceased Sundarraaj. The first defendant never married Sundarraaj at any point of time and therefore, after the demise of Sundarraaj, it is only the plaintiff who is entitled to succeed to all his properties. At the instigation of the second defendant, who is the brother-in-law of the plaintiff, the defendants attempted to trespass into the suit properties. After the demise of Sundarraaj, it is only the plaintiff who had been enjoying the suit properties. The plaintiff issued the legal notice on 10.02.2007 to the defendants. The defendants sent the reply on 24.02.2007 containing false allegations and that the allegation that the first plaintiff married Sundarraaj on



07.06.1997 at Swamimalai Temple is false and that the allegation that they lived as husband and wife for more than 30 years is also false. Even otherwise, when the marriage between Sundarraaj and the plaintiff was subsisting, the alleged marriage of the first defendant with Sundarraaj is invalid. The first defendant is not entitled to claim any right over the suit properties and the allegation that the plaintiff's whereabouts were not known for more than 10 years is also false. Hence, according to the plaintiff, she has been necessitated to lay the suit against the defendants for appropriate reliefs.

6. The defendants filed the written statement by denying all the averments contained in the plaint and put forth the case that the marriage between the plaintiff and the deceased Sundarraaj has not been established and the plaintiff and Sundarraaj had not lived husband and wife as claimed by the plaintiff. Therefore, the plaintiff is not the first wife of the deceased Sundarraaj. If really the plaintiff is the first wife of the deceased Sundarraaj, she would have produced all the original title deeds as well as the parent title deeds pertaining to the suit properties. Without establishing the marriage with Sundarraaj, the plaintiff is not entitled to seek the relief of declaration as prayed for. The photographs projected by the plaintiff, by themselves, would not lend support to the case of the plaintiff that she is the first wife of the deceased Sundarraaj and according to the defendants, the marriage between the first defendant and the deceased Sundarraaj was solemnized on 06.06.1997 in the presence of the relatives at Kumbakonam Swaminatha Swami temple and since then they had been living together as husband wife for more than 30 years. The first defendant was not informed about the first marriage of the deceased Sundarraaj with the plaintiff either by Sundarraaj or his relatives and it was informed to the first defendant that 10 years before the marriage of the first defendant with Sundarraaj the plaintiff's whereabouts are not known for several years and in the abovesaid situation, the first defendant married Sundarraaj. Even in the voters list, ration card and other documents, it is only the first defendant, who has been shown as the wife of the deceased Sundarraaj and after the demise of Sundarraaj, it is only the first defendant who has been in the enjoyment of the suit properties as his wife. The plaintiff is not entitled to maintain the suit without seeking declaration that she is the legally wedded wife of the deceased Sundarraaj and also for the recovery of possession of the suit properties. All the properties of Sundarraaj had not been disclosed. The court fees paid is incorrect. Therefore, prayed for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case P.Ws. 1 to 7 were examined and Exs.A1 to A20 were marked. On the side of the



defendants D.Ws.1 to 3 were examined and Exs. B1 to B24 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to grant the relief of declaration to the plaintiff as prayed for and negatived the claim of the relief of permanent injunction sought for by her. Aggrieved over the judgment and decree of the trial court granting the relief of declaration in favour of the plaintiff, the first appeal had been preferred by the first defendant and the plaintiff has preferred the cross appeal aggrieved over the judgment and decree of the trial court in declining the relief of permanent injunction. The first appellate court, on an appreciation of the materials available on record and the submissions put forth by the respective parties, was pleased to dismiss the appeal preferred by the first defendant as well as the cross appeal preferred by the plaintiff. Impugning the judgment and decree of the first appellate court, the second appeal has been preferred by the first defendant.

9. At the time of admission, the following substantial questions of law were formulated in the second appeal for consideration.

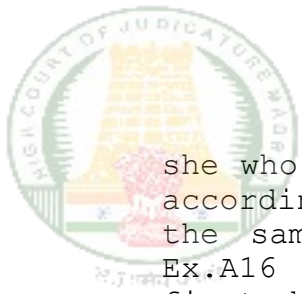
- 1) Having regard to the scope and ambit of Section 34 of the Specific Relief Act, when the defendant disputing the marriage of the plaintiff with the Sundarraaj and her legal status, in the absence of a prayer that the plaintiff is a legally wedded wife of Sundarraaj, whether the suit as framed is maintainable in law?
- 2) Whether in law the adverse findings of the courts below based on the evidence of P.W.1 to P.W.6 are sustainable when those witnesses are partisan and untrustworthy of acceptance and more over there are material contradiction in their own evidence with regard to alleged factum of marriage?
- 3) Whether the courts below having found that the 1st respondent/plaintiff is out of possession of the suit properties are right in granting a declaration in the absence of prayer of appropriate further relief of possession?

10. The suit has been laid by the plaintiff claiming the relief of declaration and permanent injunction. It is found that the parties are not at issue that the suit properties belonged to the deceased Sundarraaj and that he had been in the



possession and enjoyment of the suit properties till his demise. Now according to the plaintiff, she is the first wife of the deceased Sundarraaj and therefore, on that premise, put forth the case that after the demise of Sundarraaj, it is she who is entitled to the suit properties belonging to the deceased Sundarraaj and claiming that the suit properties are in her possession and enjoyment, accordingly, the suit has come to be laid by the plaintiff seeking for a declaration that she is the absolute owner of the suit properties and also sought for the relief of permanent injunction restraining the defendants from interfering with her possession and enjoyment of the suit properties.

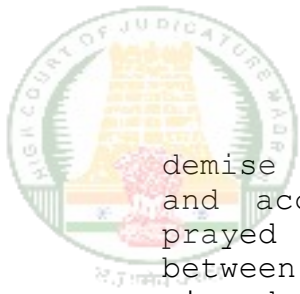
11. According to the first defendant, the deceased Sundarraaj married the first defendant on 06.06.1997 at Kumbakonam Swaminathaswami temple and since then they had been living together as husband and wife for more than 30 years and the first defendant, in paragraph 5 of the written statement, has clearly admitted that the first wife of the deceased Sundarraaj was not heard of for several years and therefore, Sundarraaj married the first defendant for the second time. By way of the abovesaid defence version, it is seen that the first defendant was very well aware that at the time of the alleged marriage between her and the deceased Sundarraaj, Sundarraaj had already contracted a marriage. The defence had been put up by the defendants that the whereabouts of the deceased Sundarraaj's wife had not been heard of for several years. However, as rightly held by the courts below, pointing to the abovesaid defence version, there is no acceptable and reliable material projected on the part of the defendants. Considering the evidence of the plaintiff examined as P.W.1 and the evidence of P.Ws.2 to 7 cumulatively, it is seen that it is only the plaintiff who had been married to the deceased Sundarraaj about 50 years back and thereafter, they had been living together as husband and wife, however, on account of certain misunderstanding between the plaintiff and the deceased Sundarraaj, they were living separately. Therefore, when the plaintiff's witnesses, including the plaintiff, had clearly spoken about the marriage between the plaintiff and the deceased Sundarraaj about 50 years back and when their evidence are found to be inspiring and trustworthy and considering the documents projected by the plaintiff, namely, the voters list marked as Ex.A13 pertaining to the years 1978, 1994 and 1995 and 2001, wherein the plaintiff has been described as the wife of Sundarraaj and also the mortgage deed marked as Ex.16, when the said deed had been executed not only by Sundarraaj but also by his wife Rajalakshmi, namely the plaintiff, in favour of Cooperative Land Development Bank, Keevalur and when the abovesaid execution of the mortgage deed Ex.A16 has not been controverted, it is seen that the abovesaid documents fortify the case of the plaintiff that it is



she who is the legally wedded wife of the deceased Sundarraaj and accordingly the plaintiff's witnesses have also spoken to about the same in a clear and acceptable manner. Therefore, when Ex.A16 is found to have been executed during 1976 and when the first defendant claims to have married the deceased Sundarraaj on 06.06.1977, the defence version projected by the first defendant that prior to the marriage with the deceased Sundarraaj, the first wife of Sundarraaj's whereabouts were not known for several years, i.e, for more that 10 years, as such, cannot be accepted in any manner. As rightly concluded by the courts below, the second defendant being the party to Ex.A16 had also not challenged the same. Therefore, the courts below had accordingly placing reliance upon the evidence of P.Ws.1 to 7 as well as the abovesaid documents in toto, held that the plaintiff is the first wife of the deceased Sundarraaj and therefore the defence version that the plaintiff was not heard of for more than 10 years prior to the alleged marriage between the first defendant and the deceased Sundarraaj is a false version and consequently held that it is only the plaintiff who is the legally wedded wife of the deceased Sundarraaj.

12. When the plaintiff has been rightly declared to be the legally wedded wife of the deceased Sundarraaj and when the marriage between the plaintiff and the deceased Sundarraaj had not been annulled in the manner known to law till the demise of Sundarraaj, accordingly it is seen that it is only the plaintiff who would be the sole legal heir of the deceased Sundarraaj as it is not in dispute that out of wedlock between the plaintiff and the deceased Sundarraaj, no children were born to them. As above pointed out, due to certain misunderstanding, it is seen that Sundarraaj was not living with the plaintiff and living with the first defendant. In view of the abovesaid position, the plaintiff being the legally wedded wife of the deceased Sundarraaj, even assuming for the sake of arguments that the first defendant contracted the marriage with the deceased Sundarraaj during the subsistence of the plaintiff's marriage with the deceased Sundarraaj, the alleged marriage between the first defendant and the deceased Sundarraaj cannot be held to be a valid marriage. Therefore, the claim of the first defendant that she is the legally wedded wife of the deceased Sundarraaj falls to the ground legally and furthermore, the first defendant has also not established that a valid marriage had been celebrated between her and the deceased Sundarraaj on 06.06.1977 as claimed by her. In such view of the matter, following the demise of Sundarraaj, the first defendant cannot claim to be his legal heir and the abovesaid facts have been properly analysed, discussed and determined by the courts below.

13. As above pointed out, the plaintiff's claim of remaining in the possession and enjoyment of the suit properties after the



demise of Sundarraaj has not been accepted by the courts below and accordingly declined the relief of permanent injunction prayed for by her. On account of the strained relationship between the plaintiff and the deceased Sundarraaj due to some misunderstanding, from the materials available on record, it is seen that Sundarraaj had been living with the first defendant and the same has also been admitted by the plaintiff during the course of cross examination. From the materials available on record, as rightly held by the courts below, when there is no acceptable and reliable material on the part of the plaintiff evidencing her claim of possession and enjoyment of the suit properties and on the other hand, the possession and enjoyment of the suit properties are found to be only with the first defendant accordingly, the courts below are found to be justified in negating the relief of permanent injunction prayed for by the plaintiff.

14. The first defendant has not raised the plea of adverse possession in the written statement contending that on account of her long enjoyment, she has prescribed title to the suit properties. Even otherwise, as the plaintiff had failed to establish her claim of possession and enjoyment of the suit properties following the demise of Sundarraaj, the courts below had proceeded to negative the relief of permanent injunction sought for by the plaintiff. Accordingly, the trial court is found to be justified in granting the relief of declaration only as prayed for by the plaintiff. The first appellate court also concurred with the trial court and upheld the relief of declaration granted to the plaintiff by the trial court as well as upheld the determination of the trial court in negating the relief of permanent injunction prayed for by the plaintiff. The first appellate court should have disposed of the appeal accordingly. On the other hand, it is found that the first appellate court, while concluding the judgment, has noted that the plaintiff is at liberty to recover the suit properties by filing a separate suit for possession. The abovesaid observation or direction given by the first appellate court, in my consider opinion, is not acceptable in the eyes of law. The judgment of the courts below should not be taken as a cause of action for enabling the parties to levy a fresh suit unless the parties are able to justify the granting of such direction. From the inception, the first defendant has been resisting the case or claim of the plaintiff that she is in the possession and enjoyment of the suit properties after the demise of the deceased Sundarraaj and on the other hand, vehemently contended that it is only she who in the possession and enjoyment of the suit properties and as above pointed out, the plaintiff has miserably failed to establish her claim of possession and enjoyment of the suit properties by placing the acceptable and reliable materials. Though the plaintiff has been declared to



be the absolute owner of the suit properties, on that score alone, the plaintiff cannot be held to be entitled to seek the relief of permanent injunction. Admittedly, the suit properties are only found to be in the possession and enjoyment of the first defendant. The position being above, as rightly contended by the first defendant's counsel, when the first defendant is all along contending by way of the written statement that it is only she who has been in the possession and enjoyment of the suit properties and the plaintiff having no material to sustain her claim of possession and enjoyment of the suit properties on the date of filing of the suit or prior to the filing of the suit, according to him, the plaintiff should have also sought the relief of recovery of possession of the suit properties from the defendants as per law. In addition to that, according to him, despite the judgment and decree of the trial court dated 12.09.2009 declining the relief of permanent injunction prayed for by the plaintiff, even thereafter, the plaintiff has not endeavoured to amend the plaint as per law for including the relief of recovery of possession of the suit properties from the defendants. On the other hand, as above pointed out, the plaintiff has only preferred the cross appeal in the appeal preferred by the first defendant against the declining of the relief of permanent injunction sought for by her. As further noted, the cross appeal preferred by the plaintiff had been dismissed by the first appellate court along with the appeal preferred by the first defendant. Against the dismissal of the cross appeal, the plaintiff has not preferred any appeal independently or preferred any cross appeal in the present second appeal preferred by the first defendant. The position being above, the direction of the first appellate court granting the liberty to the plaintiff to seek the recovery of the possession of the suit properties by filing a separate suit for possession, cannot be sustained and hence the abovesaid direction is set aside.

15. During the course of arguments, the first defendant's counsel contended that the very suit laid by the plaintiff is not legally sustainable as according to him, as per the proviso to Section 34 of the Specific Relief Act 1963, 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 and relying upon the abovesaid proviso according to him, when the plaintiff has failed to seek the relief of recovery of possession for the suit properties on the footing that she is the lawful owner of the suit properties and her claim to be in the possession and enjoyment of the suit properties having been disbelieved by the courts below and thereby the courts below had declined the relief of permanent injunction prayed for by her and even thereafter the plaintiff having not endeavoured to seek for the amendment of the plaint by including the recovery of the



possession of the suit properties as per law, according to him, in the light of the various decisions of the Apex court and our High Court, the plaintiff's suit is liable to be dismissed.

16. With reference to the abovesaid contentions, the first defendant's counsel placed reliance upon the decision of the Apex Court reported in (2014) 14 Supreme Court Cases 502 (Venkataraja and others v. Vidyane Doureradjaperumal (dead) through legal representatives and others) wherein it has been held that where a suit had been laid for declaration of title over suit land without claiming consequential relief of possession, such suit is not maintainable and further held that the plaintiff could later file a suit for possession is not a ground to hold that the suit laid by the plaintiff as maintainable and further held that the plaintiff having failed to amend the plaint despite the objection put forth by the defendant in the written statement that the plaintiff is not in the possession and enjoyment of the suit property and that it is only the defendant who is in the possession and enjoyment of the suit property, according to the Apex court, permitting the appellant to maintain the suit would also defeat Order 2 Rule 2 CPC and accordingly held that the plaintiff should include the whole of the claim he is entitled to seek for and the relief omitted/relinquished by the plaintiff on the same cause of action cannot be sued for/claimed afterwards and held that the defendant having taken the plea in the written statement that it is only the defendant who has been in the possession and enjoyment of the suit properties and even thereafter the plaintiff not making any attempt to amend the plaint immediately or even at a later stage, the declaration sought for by the plaintiff was not in the nature of a relief as such. Declarative relief does not attain finality and the position of law has been outlined by the Apex Court in the abovesaid decision as follows:

Specific Relief Act, 1963 - Ss. 34 proviso and S.5
- Declaratory suit without consequential relief -
Maintainability of - Suit for declaration of title
over suit land filed but without claiming
consequential relief of possession by eviction of
tenants in possession of suit land which was
possible - Held, not maintainable - That plaintiff
could later file a suit for eviction of the tenants
is no ground to hold the suit as maintainable -
Appellant plaintiff even failed to amend the plaint
despite objection by defendants in their written
statement - Permitting the appellant to maintain
the suit would also defeat Or.2 R.2 CPC.

- Civil Procedure Code, 1908 - Or.2 R.2 -
Principle under that suit to include whole claim



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(and relief omitted/relinquished by plaintiff for same cause of action cannot be sued for/claimed afterwards) - Application - Property Law - Transfer of Property Act, 1882, S. 108(q)

...

19.3 Thus, the only relevant issue on which the judgment hinges upon is, whether the suit was maintainable without seeking any consequential relief.

20. In *Deo Kuer v. Sheo Prasad Singh*, this Court dealt with a similar issue, and considered the provisions of Section 42 of the Specific Relief Act, 1877 (analogous to Section 34 of the 1963 Act), and held, that where the defendant was not in physical possession, and not in a position to deliver possession to the plaintiff, it was not necessary for the plaintiff in a suit for declaration of title to property, to claim the possession. While laying down such a proposition, this Court placed reliance upon the judgments of the Privy Council in *Sunder Singh Mallah Singh Sanatan Dharma High School Trust v. Sunder Singh Mullah Singh Rajput High School and Humayun Begum v. Shah Mohammad Khan*.

21. In *Vinay Krishna v. Keshav Chandra*, this Court while dealing with a similar issue held: (SCC p. 132, para 14)

" ... It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration."

22. The facts in *Deo Kuer* are quite distinguishable from the facts of this case, as in that case the tenants were not before the Court as parties. In the instant case the respondents 3 to 10 are tenants, residing in the suit property. The said respondents were definitely in the position to deliver the possession. Therefore, to say that the appellants would be entitled to file an independent proceedings for this eviction under different



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statute, would amount to defeating the provisions of Or.2 Rule 2 CPC as well as the proviso to Section 34 of 1963 Act. Thus, the first appellate court, as well as the High Court failed to consider this question of paramount importance.

23. The very purpose of the proviso to Section 34 of the 1963 Act, is to avoid the multiplicity of the proceedings, and also the loss of revenue of courts fees. When the Specific Relief Act, 1877 was in force, the 9th report of the law commission of India, 1958, had suggested certain amendments in the proviso, according to which the plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/proceedings. However such an amendment was not accepted. There is not provision analogous to such suggestion in the 1963 Act.

24. A mere declaratory decree remains non executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (vide Prakash Chand Kurana v. Harnam Singh and State of M.P. v. Mangilal |Sharma.)

25. In Munilal v. Oriental Fire and General Insurance Co. Ltd., this Court dealt with declaratory decree, and observe that : (SCC o. 93 para 4)

"4. ... mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief".

26. In Sakuntha Devi v. Kamala this court while dealing with the issued held: (SCC p.399, para 21).

"21.... a declaratory decree simplicitor does attain finality if it has to be used for obtaining any future decree like possession. In such cases if suit for possession based on an earlier declaratory



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decree is filed, it is open to the defendants to establish that the declaratory decree on which the suit is based is not a lawful decree".

27. In view of the above, it is evident that the suit filed by the appellant -plaintiffs was not maintainable, as they did not claim consequential relief. Respondents 3 and 10 being admittedly in possession of the suit property, the appellant-plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondent-defendants while filing the written statement. The appellant-plaintiffs did not make any attempt to amend the plaint at this stage or even at a later stage. The declaration sought by the appellant-plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein was for the benefit for the appellant-plaintiffs themselves.

28. As a consequence, the appeals lack merit and, are accordingly, dismissed. There is no order as to costs.

Similarly in the decision of the Apex Court reported in (2017) 3 Supreme Court Cases 702 (Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandran and others), the abovesaid position of law has been outlined as follows:

A. Civil Procedure Code 1908 - Ss. 33, 2(2), 100, Or.7 Rr 1(g), 7, 1(e) & 3, Or.6 R.1 & 2, Or.14 Rr.2 &3, Or. 20 Rr.5,6, & 9 and Or. 1 Rr.3, 10(2) & 9 - Judgment and decree granting relief with respect to property other than that described in plaint - unsustainability of such judgement and decree - moreso when that property admittedly stood in the name of another person who was not party to suit nor was any relief claimed against him.

- Plaintiff filing suit for declaration and mandatory injunction with respect to certain land (admeasuring 2 acres 73 cents) described in plaint as part of Survey No.188, which was subsequently amended to survey No.188/3 - As per defendants, (i) there was no survey number 188 in village concerned and the only available survey numbers as per



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revenue records were 188/1, 188/2 188/3 and (ii) the recorded owner in possession of Survey Nos.1881/1 and 188/3 was defendant I and Survey No.188/2 stood in the name of one J, who was not party to suit - on these facts considering that plaintiff failed to produce any document establishing his right and possession over suit property, trial court dismissing suit - said decision stood affirmed in first appeal - but, in second appeal, though High Court affirming the finding of courts below that defendant I was owner of Survey Nos. 188/1 and 188/3, it proceeding on basis that total extent of Survey Nos. 188/1 and 188/3 was only 5 acres and 10 cents whereas total area of Survey No. 188 was 7 acres and 84 cents, and in this way, it holding the plaintiff entitled to remaining part of Survey No.188 - Resultantly, High Court virtually decreeing the suit in favour of plaintiff with respect to property bearing Survey No.188/2, despite said property admittedly being recorded in the name of J who was not party to suit, and no relieve having been for Survey No.188/2 or against J.

- Held, such judgment and decree passed by High Court not sustainable in law - moreso when it containing contradictory directions to the effect that on one hand in it holding defendant I to be owner of Survey Nos. 188/1 and 188/3 and on the other hand, it directing the name of defendant I to be removed and replaced by the plaintiff.

...

D. Contract and Specific Relief - Specific Relief Act, 1963 - S. 34 proviso - Declaratory suit - Maintainability - Suit filed by plaintiff, not in possession of property - Seeking relief of mere declaration without further relief of possession - Held, was not maintainable - Hence, rightly dismissed by trial court - Civil Procedure Code, 1908, Or.7 Rr.7 and 8.

...

33. Section 34 of the Specific Relief Act, 1963 provides as follows:

" 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



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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:

Provided that no court shall make any such declaration of title, omits to do so."

34. 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. In this context the reference is made to the judgment of this Court in Ram Saran v. Ganga Devi, wherein in paras 1 and 4 following was stated: (SCC pp.60-61)

"1. This is a plaintiff's appeal by special leave. Ram Saran and Raghubir Saran, the plaintiff's are brothers. They jointly owned suit property with Chhabili Kuer, widow of Lalita Prasad. After the death of Chhabili Kuer on 8-2-1971, 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 plaintiff's brought this suit for a declaration that they are the sole owners of the suit properties. They did not claim possession of either the entire or even any portion of the suit properties.

...

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 plaintiff's 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."

35. The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. The plaintiff being out



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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 CPC 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.

36. The decree of the High Court is also contradictory. The High Court has affirmed the findings that defendant 1 is the owner of Survey Nos.188/1 and 188/3, whereas, by decreeing the suit for declaration and mandatory injunction the name of Defendant 1 is to be removed and replaced by the plaintiff which is clearly erroneous and unsustainable.

Our High Court in the decision reported in 1982 2 MLJ 348 (Cheventhupaul Nadar v. Srinivasa Nadar and others) also held that when in a suit laid by the plaintiff for declaration of title and injunction and the plaintiff has been held to be out of possession of the suit properties and the plaintiff not seeking the recovery of possession, held that the suit laid by the plaintiff is not maintainable and the position of law has been outlined in the abovesaid decision as follows:

Specific Relief Act (XLVII of 1963), Section 42 -
Suit for declaration of title and injunction -
Plaintiff out of possession of the disputed items
of suit properties - Plaintiff not seeking
recovery of possession - Suit cannot be
maintained.

Though the plaintiff had proceeded on the basis that he was in possession of the suit properties and claimed the relief of injunction the evidence had disproved his possession. Since the plaintiff who was found to be out of possession of the disputed items of the suit properties had not sought for recovery of possession as a consequential relief for the main relief of



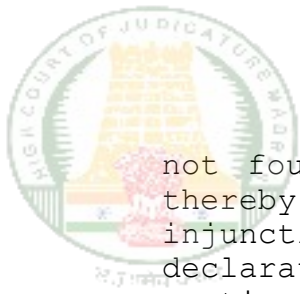
declaration of title, the suit could not be maintained.

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8. Though the findings rendered above with reference to the evidence on record on the question of title put forward by the plaintiff to the items 5 to 9 are sufficient to dispose of the appeal on merits, since the counsel for the respondents raised a legal objection to the maintainability of the suit, that question also has to be considered. The 6th defendant raised a plea in the written statement that a person like the plaintiff who is admittedly out of possession cannot seek a declaration of title and the suit for mere declaration when the plaintiff is not in possession of the property has to be dismissed as not maintainable. This objection was reiterated before me by the learned counsel appearing for the 6th defendant. The learned counsel has placed reliance in support of this contention on the decision in Ram Sarma v. Ganga Devi. In that case, the Supreme Court has specifically held that where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of these properties but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable since such a suit is hit by Section 42 of the Specific Relief Act. In this case, the plaintiff is not in possession of the suit property. Though the plaintiff has proceeded on the basis that he is in possession of the suit properties and claimed the relief of injunction, the evidence in the case completely establishes that the disputed items of the suit properties i.e. items 6 to 8 are in the possession of the 6th defendant. Since the plaintiff who is found to be out of possession has not sought for recovery of possession, as a consequential relief for the main relief of declaration of title, the suit cannot be maintained. Having regard to the said decision of the Supreme Court, the suit in this case has to be held not maintainable so far as the disputed items of the properties are concerned which are found to be in the possession of the 6th defendant.

I had an occasion to consider the abovesaid position of law in the decision reported in MANU/TN/4837/2018 (Narayanasamy Gounder vs. Mainavathi and Ors), wherein I held that the plaintiff when



not found to be in the possession of the suit properties and thereby cannot maintain the suit for the relief of permanent injunction as prayed for and resultantly the relief of declaration sought for by the plaintiff cannot be granted particularly when the plaintiff has failed to seek the relief of possession and the position of law has been outlined in the abovesaid decision as follows:

Property - Declaration of title - Appeal filed against dismissal of suit for declaration of title and injunction over suit property - Whether lower Appellate Court committed error in dismissing the suit for declaration of title and injunction over suit property - Held, it was only Respondents who had been granted patta in favour of properties acquired by owner and to evidence possession and enjoyment of same - Lower Appellate Court rightly concluded that it was only Respondent No.1 who was found to have acquired title of suit land from legal heirs of original assignee - Lower Appellate Court has rightly considered materials placed on record, thereby negated claim of title, possessory title sought for by Appellant - Appellant during course of evidence has admitted that it was only Respondents who were in possession and enjoyment of suit property - Appeal dismissed.

....

15. Last but not least, the materials placed on record also would go to show that the plaintiff during the course of evidence has admitted that it is only the defendants who are in possession and enjoyment of the suit properties. In such view of the matter, it has not been explained by the plaintiff as to how the suit could be maintained by him on the strength of the claim of possessory title for the relief of permanent injunction as prayed for. It is thus seen that as rightly argued by the defendants' counsel, the plaintiff found to be admittedly not in possession of the suit properties and thereby cannot maintain the suit for the relief of permanent injunction as prayed for and further the relief of declaration also sought for by him cannot be maintained in the eyes of law as above noted and even assuming for the sake of arguments that the abovesaid declaratory relief could be maintained, when the plaintiff has failed to



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seek the relief of possession, on having admitted that the suit properties are in the possession and enjoyment of the defendants, the suit laid by the plaintiff without the said relief is found to be not clearly maintainable in the light of the decisions of the Apex Court reported in MANU/SC/0147/2017:2017(2) CTC 678 (Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and others), MANU/SC/0354/2013: (2014) 14 SCC 502 (Venkataraja and other vs. Vidyane Deoureradjaperumal (dead) through Lrs and others) and in view of the above position also, it is found that the plaintiff's suit has to fail.

17. The learned Senior Counsel appearing for the plaintiff contended that when the plaintiff is found to be the legal owner of the suit properties and the plaintiff also having laid the suit not only for mere declaration but also for the consequential relief of permanent injunction, according to him, the proviso to Section 34 of the Specific Relief Act, 1963, would not apply to the case at hand. However, as held by the Apex Court and our High Court in the various decisions referred to supra, when the defendants have stoutly resisted all along that the plaintiff has never been in the possession and enjoyment of the suit properties and it is only the first defendant who has been in the possession and enjoyment of the suit properties and the plaintiff is also not able to substantiate her possession and enjoyment of the suit properties during the course of trial and moreso, the defendant in para No.6 of written statement clearly pleaded that the plaintiff's suit is legally not sustainable in the absence of relief of recovery of possession as well as the relief of declaration that she is the lawfully wedded wife of the deceased Sundarraaj, accordingly when the plaintiff is put on notice that her suit would be not maintainable for want of seeking the relief of recovery of possession of the suit properties and finally her claim of the relief of permanent injunction having been negatived by the courts below and the plaintiff, despite the abovesaid position, having failed to amend the plaint by including the recovery of possession, in such view of the matter, considering the position of law as outlined in the decisions referred to supra, the proviso to Section 34 of the Specific Relief Act would apply to the case at hand and accordingly I hold that the courts below had erred in granting the relief of declaration of title in favour of the plaintiff in the absence of the prayer of appropriate further relief of possession.



18. In the light of the abovesaid discussions, when the determination of the courts below that it is only the plaintiff who is the legally wedded wife of the deceased Sundarraaj and consequently she is the only legal heir of the deceased Sundarraaj and the abovesaid determination of the courts below being based on the proper appreciation of the materials available on record, both oral and documentary, in such view of the matter, the plaintiff having laid the suit seeking for the declaration that she is lawful owner of the suit properties after the demise of the deceased Sundarraaj, accordingly, for the aforesaid reasons, the substantial questions of law 1 and 2 are answered. However, for the reasons aforesaid, the substantial question of law 3 is answered against the plaintiff and in favour of the first defendant.

19. In conclusion, the judgment and decree dated 06.04.2011 passed in A.S.No.9 of 2010 on the file of District Judge, Nagapattinam, confirming the judgment and decree dated 12.09.2009 passed in O.S.No.59 of 2007 on the file of the Subordinate Court, Nagapattinam, are set aside and consequently, the suit laid by the plaintiff in O.S.No.59 of 2007 is dismissed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. The District Judge,
Nagapattinam.
2. The Subordinate Court,
Nagapattinam.
3. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.M.S.Palanisamy, Advocate, S.R.No.11621

+1cc to Mr.J.Ramakrishnan, Advocate, S.R.No.11330

S.A.NO.1389 OF 2011

RGN(CO)

PBS/22/10/2021