

VIRARAGHAVA
 AYYANGAR
 v.
 KANAGAVALLI
 AMMAL.

Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—We doubt whether the failure to state the place where the distrained property is kept can ever be a ground for a suit under section 18 of the Rent Recovery Act to set aside the distraint. The appropriate remedy seems rather to be, under section 17 of the Rent Recovery Act, to apply to the Collector for an order to restore the distrained property to the owner, if such omission was a material irregularity. However that may be, we are satisfied that, in the present case, in which the property distrained consisted of some small jewels, the statement that they were “with the distrainer” was a sufficient statement of the place where they were kept, within the meaning of section 15 of the Act. It is difficult to see what more information the plaintiff could have required for any practical purpose. Moreover, this objection was not taken before the Deputy Collector or even in the grounds of appeal to the District Judge, a fact which shows clearly enough that it was of no real materiality in the eyes even of the plaintiff.

As the District Judge decided the appeal on this preliminary point, we set aside his decree and remand the appeal for disposal according to law. Costs in this Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SURYANARAYANAMURTI AND ANOTHER (DEFENDANTS

Nos. 2 AND 3), APPELLANTS,

v.

TAMMANNA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1),
 RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Suit for declaration of invalidity of will on ground that it bequeathed family property—No claim for partition—Maintainability—Hindu Law—Existence of leases over family property no bar to partition.

Plaintiff sued his brother, his sister and his brother's son, for a declaration of invalidity of a will which purported to have been executed by his late father, by which certain property had been bequeathed to one of the defendants. Plaintiff

* Appeal No. 96 of 1900 against the decree of C. G. Kuppussami Ayyar, Subordinate Judge of Occanada, in Original Suit No. 61 of 1898,

claimed that the property was ancestral; that he was entitled to his share in it by right of survivorship and that the testator had no power to bequeath it. No claim was made in the plaint for partition of the property, which was stated to be in the possession of tenants under leases granted by plaintiff and first defendant:

Held, that the suit was barred by the proviso to section 42 of the Specific Relief Act, inasmuch as plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Even though the land were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a partition of the property among the members of the family.

Suit for a declaration that a will was illegal and invalid. Plaintiff and first defendant were brothers, being sons of one Venkataratnam Garu, deceased; third defendant was their sister; and the second defendant was the son of first defendant. Plaintiff charged defendants with having fabricated a will by which the late Venkataratnam Garu purported to bequeath to second defendant the property which had fallen to Venkataratnam in a division with his brothers in 1895. He claimed that the property was ancestral; that he was entitled to it by right of survivorship and that the testator had no power to bequeath it. Defendants pleaded the genuineness of the will, and claimed that the property bequeathed by it was the self-acquired property of the testator and not ancestral. They also contended that the suit was barred by section 42 of the Specific Relief Act, inasmuch as it was for a declaration without a further claim for possession of the property. The Subordinate Judge held that the suit was maintainable as the property was in the possession of tenants who had executed leases in favour of plaintiff and first defendant. He declared that the will was illegal and invalid.

Defendants Nos. 2 and 3 preferred this appeal.

V. Krishnasami Ayyar and *Nagabluhanam* for appellants.

Sundara Ayyar and *K. Subrahmania Sastri* for respondent No. 1.

Raghava Ayyangar for respondent No. 2.

JUDGMENT.—A preliminary objection is taken that the suit is barred by the proviso to section 42 of the Specific Relief Act, 1877. An issue was raised on this point in the lower Court, but the Subordinate Judge held that the objection was invalid, because the lands in suit were in the possession of tenants under leases granted by plaintiff and first defendant.

We are unable to concur in this view. The leases, we observe, were granted in the life-time of the father of the plaintiff and

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first defendant, and were for a year only and had expired before the suit was filed. But even if the leases were subsisting leases granted after the father's death it would make no difference in the decision of the present question. The proviso to section 42, Specific Relief Act, prohibits the Court from granting a declaration like that asked for in this suit "where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." Here it was open to the plaintiff to have sued for partition of his share in the joint family property, if it was joint family property as alleged by plaintiff. That was a further relief of a very substantial character, and even if the land were in possession of tenants entitled to continue in occupation it would be no bar to a partition of the property among the members of the family, the tenant's right of occupation, if any, not being affected by such partition. We do not think that the suit is one in which we should allow the plaint to be amended at this stage and the suit converted into a partition suit, as the objection was taken from the very beginning and plaintiff notwithstanding persisted in continuing the suit as framed.

On the preliminary ground stated above we must set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit against all the defendants with costs throughout.

No order is required on the memorandum of objection.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
November 26.

KRISHNA AYYAR (PETITIONER—DEFENDANT No. 1), APPELLANT,

v.

MUTHUSAMI AYYAR (COUNTER-PETITIONER—PLAINTIFF),
RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 89—Order absolute for sale—Notice to defendant of application—Practice.

Notice need not be given to a defendant before an order absolute for sale is made under section 89 of the Transfer of Property Act.

* Civil Miscellaneous Second Appeal No. 34 of 1901, against the order of G. F. S. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 675 of 1900 affirming the order of A. Rajagopala Ayyar, District Munsif of Mayavaram, in Miscellaneous Petition No. 785 of 1900 (Original Suit No. 216 of 1899),