AYLING AND SPENCER, JJ.

SURYA ROW BAHADUR v. SECRETARY OF STATE FOR INDIA.

the case, *Mr. J. P. Wise* v. *Ameerunnissa Khatoon*(1) has no applicability.

The finding of the District Judge that Block B is not an accretion to appellant's land is correct.

This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. Aug. 15, 16.

MALAIYYA PILLAI (FOURTH DEFENDANT), APPELLANT,

v.

T. PERUMAL PILLAI AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 42—Declaration, when will be given.

In order that a suit can be held not maintainable by reason of the proviso to section 42 of the Specific Relief Act (I of 1877), it must be shown that the defendant was in possession, and that as against him the plaintiff could have obtained an order for delivery of possession.

SECOND APPEAL presented against the decree of K. SRINIVASA ROW, the Subordinate Judge of Tuticorin, in Appeal Suit No. 262 of 1907, presented against the decree of T. MUNRO FRENCH, the Additional District Munsif of Tinnevelly, in Original Suit No. 171 of 1906.

By an agreement (Exhibit A), dated 2nd September 1901, it was arranged that the plaintiff and defendants should manage certain family charities in turn. Dispute having subsequently arisen between the plaintiff and defendants as to the management of charities which culminated in disturbances, proceedings were instituted under sections 145 and 146, Criminal Procedure Code (Act V of 1898), before the District Magistrate, Tuticorin, who ordered the chattram and lands belonging to the charities to be attached on 5th December 1903 (Exhibit B), and appointed the Tahsildar of Srivaikuntam Receiver pending the settlement of the disputes in the civil courts. On 5th February 1906,

(1) (1865) 2 W.R., 34.

* Second Appeal No. 631 of 1909.

this order was reversed by the High Court, which ordered the case to go back to the Head Assistant Magistrate to be dealt with, holding that the attachment was illegal. It appears that at the date when the receiver was appointed, possession of the chattram was with the defendants and the lands with the plaintiff. On 18th February 1906, the authorities, instead of returning the chattram to the defendants and the lands to the plaintiff, gave possession of both to the defendants.

Meanwhile, the present suit was filed by the plaintiff on 1st January 1905 for a declaration of his right to the chattram and the lands and to conduct the charities in accordance with the agreement (Exhibit A). He also asked for an injunction to restrain the defendants from interfering with the charities and for damages.

The District Munsif dismissed the suit holding on a construction of Exhibit A, that the plaintiff had forfeited his rights. This decision was reversed on appeal by the Subordinate Judge who granted the declaration and injunction prayed for. In doing so he held that the defendant's possession of the lands was no possession in law and that they must be construed to be in possession of the plaintiff.

Defendants appealed.

T. Rangachariar for appellant.

V. C. Seshachariar for first respondent.

K. Parthasarathi Aiyangar for second respondent.

JUDGMENT.—The first contention urged before us is that the Magistrate's order under section 146, Criminal Procedure Code, putting the chattram in the possession of the Tahsildar being set aside by the High Court which directed possession to be given to the defendants, the plaintiff's suit could not be maintained for a mere declaration of his right. But we do not think that this contention should prevail. The defendant was not at the date of the suit in possession of the chattram though he was entitled to obtain possession under the order of the High Court. It is true that the possession of the Magistrate would not be deemed to be adverse within the meaning of the Law of Limitation, but in order that a suit can be held to be unmaintainable by the application of section 42 of the Specific Relief Act, it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for

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delivery of possession. It is true that the Magistrate after the order of the High Court was bound to deliver possession to the defendant but he had not yet delivered possession to him when the suit was instituted. Supposing that the plaintiff asked for recovery of possession and obtained a decree before the defendant obtained possession from the Magistrate it is difficult to see how such a decree could be effectively executed against the defendant. There is no authority covering this question, and the cases in *Raj Narain Das* v. *Shama Nando Das Chowdhry*(1) and *Narayanan Chetty* v. *Kannammai Achi*(2) do really throw no light in this connection.

As regards the lands it was found that the plaintiff was in possession of them at the date of the suit and that finding is not open to any legal objection.

The next contention is that because the land revenue was not paid punctually on the due date, the plaintiff forfeited his right to manage the charities, although as a matter of fact no damage was caused thereby to the trust property. We are unable to place such a narrow construction on the agreement (Exhibit A). Besides apart from the agreement of the parties, we have to see whether there is sufficient cause for removing the plaintiff from the trusteeship of the charities and no such case has been made out. In our opinion the plaintiff has not forfeited his right and is entitled to the management of the charities and the properties belonging thereto, according to the terms of Exhibit A. We dismiss this Second Appeal with the costs of the first respondent.

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(1) (1899) I.L.R., 26 Calc., 845. (2) (1905) I.L.R., 28 Mad., 338.