

PATNA HIGH COURT

Dukhan Ram

Vs

Ram Nanda Singh

A.F.O.D. No. 541 of 1958

(Raj Kishore Prasad, J.)

30.03.1961

JUDGMENT

Raj Kishore Prasad, J.

1. This appeal, by the plaintiffs, arises out of a suit for a mere declaration of title to the lands in suit, which has been dismissed by the court below, on the merits, as also on the ground that the suit was not maintainable in view of the Proviso to Section 42 of the Specific Relief Act, hereinafter referred to as "the Act".

2. The two preliminary questions, which fall to be considered are :

- (1) Whether the suit, for a mere declaration of title, was barred on the facts, here, under the Proviso to Section 42 of the Act ?, and,
- (2) In case the above question is answered in the affirmative, then, if the plaintiffs should be permitted to amend their plaint by seeking such consequential relief as may be open to them?

3. The first point, therefore, raises a question under Section 42 of the Act, and, in particular, the Proviso, which precludes the granting of a declaration "where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so".

4. In order to answer this question, it is necessary to know the material facts of the case bearing on this question.

5. Briefly stated, the relevant facts are these. In 1954, on a police report, reporting apprehension of breach of the peace, submitted on 23-11-1954, a proceeding under Section 145 of the Criminal Procedure Code, (for brevity it will be referred in the judgment as 'the Code'), in respect of the lands in suit, was instituted between the parties. In the said proceeding, it is admitted by the learned counsel for both the parties that the lands were attached under the Second Proviso to Sub-Section (4) of Section 145 of the Code. Ultimately, the said proceeding on 6-8-1956 resulted

in an order under Section 146 of the Code as th.3 Magistrate was unable to satisfy himself as to which of them was then in such possession of the lands in dispute, and, therefore, he attached the lands in suit under Section 146(1) of the Code until a competent Court determined the rights of the patties thereto, or the person entitled to possession thereof. Against the said order passed under Section 148 of the Code, both the parties to the present action went up in revision to the Sessions judge, who, however, on 08-11-1956 rejected both the revisional applications and upheld the order under Section 146 of the Code. Against the aforesaid order of the Sessions Judge, only the present defendants moved the High Court in revision. During the pendency of the said revisional application in this Court, the present action was instituted by the plaintiffs on 21-2-1957, originally both for declaration of title and also for recovery of possession. During the pendency of the suit, however, this Court on 24-07-1957 set aside the order under Section 146 of the Code and remanded the proceeding under Section 145 of the Code to be reheard and decided afresh.

6. None of the parties produced the relevant orders of the proceedings under Section 145 or Section 146 of the Code, either of the Magistrate's court or of the superior Courts. It was, however, conceded by the learned counsel for both the parties, that the result of the order of this Court remanding the proceeding under Section 145 of the Code to the Magistrate to be reheard and disposed of afresh was, that the original attachment under the Second Proviso to Section 145(4) of the Code was revived, and, it remained effective during the pendency of the suit, and, further, that the said proceeding under Section 145 of the Code, after remand' by the High Court, was pending during the pendency of the1 suit in the court below and had not been disposed of till the decision of the suit by the trial Judge.

7. In April, 1958, the Magistrate, in seisin of the case under Section 145, after its remand, by public auction, settled the lands in suit with one Kirti Sao for the year ending 31st March, 1959, as admitted by the plaintiffs in their application for amendment of their plaint made to the court below on 07-08-1958.

8. The plaintiffs, after the proceeding under Section 145 of the Code had been remanded to the Magistrate by this Court on 24-7-1957 for a rehearing, filed a petition for amendment of the plaint on 02-07-1958 for deleting relief No. (b), in para 18 of their plaint, asking far recovery of possession. This application of the plaintiffs was allowed and the amendment sought was directed to be made on payment of costs by the plaintiffs.

9. Meanwhile, on an application of the defendants, the court below on 05-08-1958 accepted their contention that, in view of the remand order by the High Court, the question, whether the suit was barred under Section 42 of the Act, would be considered "during the course of the judgment". On 06-08-1958, the plaintiffs filed a petition for permission to adduce evidence on the question of possession, and their prayer was allowed, ay it was not objected by the defendants. On 07-08-1959, the plaintiffs filed another application for amendment of the plaint for adding a fresh cause of action in or about April, 1958, in view of the settlement, referred to above, made by the Magistrate in course of the proceeding under Section 145, after remand with Kirti Sao till March, 1959. This amendment was allowed on the same date, that is, 7-8-1958, and, on that very day the plaintiffs recalled P.Ws. 2 and 3 and gave evidence en the question of possession. On 08-08-1958 the plaintiffs also recalled P.Ws. 4 and 7 and they also gave evidence on the question of possession but the other P.Ws. were not recalled by them. On the same date,

that is, 08-08-1958 the cost, on payment of which relief No. (b) of para 18 of the plaint was to be deleted, as ordered by the court below on 02-07-1958, was paid and on payment of the said cost relief No. (b) in para 18 of the plaint asking for delivery of possession was deleted. The result of this amendment was that the suit, which was in the beginning a suit for declaration of title and also for recovery of possession, was converted into a suit for a mere declaration of title simpliciter.

10. In view of the relief for recovery of possession, originally claimed by the plaintiffs, having been deleted, as just mentioned, an objection was raised by the defendants on the question of maintainability of the suit in view of the Proviso to Section 42 of the Act. The trial Judge held that, on the facts here, the suit for a mere declaration of title without any consequential relief, did not lie as it was barred by the Proviso to Section 42 of the Act, because a decree, even if granted to the plaintiffs, would be in fructuous in the absence of consequential relief for recovery of possession.

11. The plaintiffs however in spite of the objection of the defendants, (and also the order dated 05-08-1958 of the court below), that the plaintiffs suit for a mere declaration was barred under the Proviso to Section 42 of the Act, did not amend their plaint in the court below. The action of the plaintiffs was dismissed and they were non-suited on the above ground as also on the merits of the case. It was, however, conceded by the learned counsel for both the parties, that if the suit be held to be barred under the Proviso to Section 42 of the Act, as held by the court below also, and the plaintiffs be not permitted to restore their relief for recovery of possession, then it would not be necessary to go into the merits of the case. For this reason, I have treated these points as preliminary points in the appeal.

12. In this Court, the argument put forward by Mr. A.N. Chatterji, on behalf of the appellants, was that since admittedly the lands in suit were under attachment under the Second Proviso to Sub-Section (4) of Section 145 of the Code, and, admittedly also, neither the plaintiffs nor the defendants were in possession of the lands in suit, the plaintiffs could not ask for delivery of possession against the defendants, because they not being in possession, would not be in a position to deliver possession, to the plaintiffs, and, as such, it was argued that, in such a situation, the lands were in possession of the Court, that is, of the Magistrate, who has seisin of the case under Section 145 of the Code, and consequently, the lands in suit being in custodia legis it was not at all necessary for the plaintiffs to ask for any consequential relief in the shape of recovery of possession, or the like. He further urged that in principle there is no difference whatsoever between an attachment under Section 146(1) of the Code and an attachment under Section 145(4) of the Code, and, therefore, when, admittedly, in a suit, arising out of an order passed under Section 146 of the Code, no relief for recovery of possession, or the like, has to be asked for, and, the suit which is to be brought against such an order, is only for a mere declaration of title, there is no reason why in the case of an attachment under the Second Proviso to Section 145(4) different considerations should arise, and, as such, it was argued that, here also, the suit was not at all hit by the Proviso to Section 42 of the Act.

13. In support of this argument, Mr. Chatterji relied on a decision of a Letters Patent Appeal Bench of the Madras High Court, presided over by Leach, C.J. and Patanjali Sastri, J., in *Sundaresa Iyer v. Sarvajana Sowkiabi Viridhi Nidhi Ltd¹*, on a decision of the Privy Council in *Sunder Singh. Mallah Singh Sanatan Dharam High School Trust, Indaura v. Managing Committee, Sunder Singh Mallah Singh, Rajput High School, Indaura²*. and, two Bench

decisions of the Calcutta High Court in *Abinash Chandra v. Tarini Charan*³, and in *Surendra Narayan v. Bhairabendra Narayan*⁴, and, also on a Bench decision of this Court *IM Pratap Narain Das v. Sri Krishna Chandra*⁵,

14. In reply, Mr. Shree Nath Singh, appearing for the respondents, combated the above contentions, by countering that the purposes and the objects of the two attachments, one under Section 145(4), and, the other, under Section 146(1) of the Code, were entirely different and, therefore, although in a case of an attachment under Section 146 of the Code, a suit, brought against such an order, for a mere declaration of title is enough, but, in a case of an attachment under the Second Proviso to Sub-Section (4) of Section 145 of the Code, unless the aggrieved plaintiffs seek, besides a declaration of their title, also for recovery of possession, they cannot get possession at all, if the decision of the criminal court in the proceeding under Section 143 is against them, which conclusion the Magistrate could come to on the question of possession, in spite of a decree declaring the title of such plaintiffs in the suit, during the pendency of the proceeding under Section 145 of the Code. In support of his argument, Mr. Singh relied on a Bench decision of the Calcutta High Court in AIR 1926 Calcutta 782, referred to before, which was also relied upon on behalf of the appellants.

15. On the arguments presented by the learned counsel for the parties, the first question, therefore, which emerges for determination, and, which, in my opinion, is the crux of the whole matter, is, what is the scope of an attachment under the Second Proviso to Sub-Section (4) of Section 145, and, one under Section 146(1) of the Code, as they stood before they were amended in 1955 by the Code of Criminal Procedure (Amendment) Act, 1955 (Act 26 of 1955).

16. There can be no dispute, and, in fact, there is none, that, here the unamended Sections 145 and 146 of the Code will apply. This position is also clear from Section 116 of this 1955 Criminal Procedure (Amendment) Act, which specifically deals with "Savings". Section 116(a), (so far as material) provides :

"(a) Section 145 or Section 146 of the principal Act as amended by this Act shall not apply to, or affect, any trial or other proceedings which, on the date of such commencement, is pending before any Magistrate, and every such trial or other proceeding shall be continued and disposed of as if this Act had not been passed.

17. In view of this 'Savings' clause, provided in Section 116(a) of the 1955 Amendment Act, it is plain that, here, also, the proceeding under Section 145 of the Code, stinted on 23-11-1954, before the Amendment Act, would be governed by, and wilt have to be disposed of under the unamended Section 145 of the Code, as it was in force then.

18. Before considering the merits of the controversy, however it is desirable to clear the ground by determining the effect of the order of attachment made, in the instant case, under the Second Proviso to Sub-Section (4) of Section 145 and also of an attachment made under Sub-Section (1) of Section 146 of the Code.

19. In order to ascertain the effect of an attachment under the Second Proviso to Section 145(4) and, under Section 146(1) of the Code, it is necessary to read first the material portions of the

unamended Sections 145 and 146 of the Code.

20. It may be noted, at the outset, that, here,, we are not concerned with any 'dispossession' within the meaning of the First Proviso to Sub-Section (4) of Section 145, and, as such, the question of 'dispossession' contemplated either by the First Proviso to Sub-Section (4) of Section 145 or by Section 146(1) of the Code, will not be dealt with in the discussions which are to follow hereinafter.

21. Section 145(4), (so far as material), with its Second Proviso, provides :

"The Magistrate shall then,, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the subject".

** ** * ** **

Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending its decision under this section."

** ** * ** **

Section 146(1), which alone is material here, is in these terms :

"If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent court has determined the rights of the parties thereto, or the person entitled to possession thereof."

** ** * ** **

22. From the foregoing provisions of Section 145(4) and Section 146(1) of the Code, therefore, the legal position thereunder is thus : The first step to be taken under Section 145, is to draw up a proceeding in terms of Sub-Section (1) thereof. The object of this preliminary and formal order made in writing under Sub-Section (1) of Section 145 is to give notice to the parties to put their claim to enable the Magistrate to decide as to who was in possession at the date of the commencement of the proceeding, that is, at the date of the preliminary order made in writing under Sub-Section (1) of Section 145. It is only after that has been done that the Magistrate acquires jurisdiction to make an order of attachment under the Second, which is the last proviso to the unamended Sub-Section (4) of Section 145. Under the Second Proviso to Sub-Section (4) of Section 145 it is within the jurisdiction of the Magistrate, if he considers the case to be one of emergency, to attach the subject of dispute pending his decision under Sub-Section (4) of Section 145. Once an attachment is made, under the second proviso to Sub-Section (4) of Section 145, the property attached passes into and is in custodia legis. It may be that an attachment under Section 145(4) may terminate on the proceedings being dropped, but otherwise, it subsists pending the decision of the Magistrate under Section 145(4). Once the Magistrate has found possession in favour of a party to the proceeding, the order of attachment then ceases. The custody of the court, during attachment, under Section 145 (4) therefore, enures for the benefit of the party who should ultimately, as required by Sub-Section (4) of Section 145, be found by the

Magistrate to be in possession, at the date of the preliminary order made in writing earlier in terms of Sub-Section (1) of Section 145.

23. The "possession" contemplated by Section 145(4) is the actual possession of the subject of dispute. Actual possession means actual physical possession; it means the possession of the person who has his feet on the land, entirely irrespective of whether he has any right or title to possess it. Actual possession is not the same as a right to possession nor does it mean lawful or legal possession. It is clear from Sub-Section (4) of Section 145 that what the Magistrate is concerned with is not the right to possess the subject of dispute, but the actual possession thereof, at the date of the order under Sub-Section (1) of Section 145.

24. Under Section 145, after the passing of the preliminary order, in terms of Sub-Section (1) of Section 145, therefore the only question before the Magistrate is whether the applicant was in possession of property on the date of that order, in other words, the Magistrate is to decide which party was in actual possession on the date of the preliminary order. The Magistrate acting under Section 145, has nothing to do with, the title to the property and is concerned only with maintaining actual possession with a view to prevent breach of the peace.

25. A Magistrate's order under Section 145(4) therefore, is merely a police order made to prevent breaches of the peace. It decided no question of title, and as such, it confers no title. Under Section 145 of the Code relating to disputes, as to immovable property, the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute, and if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain, possession until evicted in due course of law, and forbidding all disturbance of such possession until such eviction. This is the effect of an order under Section 145 of the Code. The effect of such an order is that the fact of possession remains and the persons in possession can only be evicted by a person who can prove a better right to possession himself : *Dinomoni v. Brojo Mohini*⁶, An Order under Section 145(4) is merely declaratory and lasts only until the party in whose favor it is made is evicted in due course of law.

26. An order of attachment under Sub-Section (1) of Section 146, however, is within the jurisdiction of the Magistrate only if neither side has been proved to be in actual possession on the date of the preliminary order made under Sub-Section (1) of Section 145 and neither side had been dispossessed within two months before the order. Section 146 is continuation of Section 145, and, therefore the initiation of proceedings under Section 145 is preliminary to an order under Section 146. All that Section 146(1) requires is that if the Magistrate finds that none of the parties was then in such possession or, is unable to satisfy himself as to which of the parties was in "such possession" that is, actual possession, of the subject of dispute it is open to him then to attach the subject of dispute thereunder otherwise an order of attachment made without one or other of these findings is without jurisdiction. When a Magistrate attaches lands under Sub-Section (1) of Section 146^ the possession of the Magistrate must be taken to be a possession on behalf of such of the rival parties as might establish a right to possession by a civil suit. On such an attachment the property attached passes into legal custody, that is, it is in custodia legis, and, such custody is for the benefit of the rightful owner. To put it in different words such attachment under Section 146(1) operates in law simply as detention of custody of the property by the Magistrate, pending decision by a Civil Court of competent jurisdiction, on behalf of the party entitled and for such purposes the seisin or legal possession is, during the attachment in the true owner, and as such, the attachment does not amount to either dispossession of the owner or

the discontinuance of his possession. The Magistrate's possession is not adverse to the true owner.

27. To quote the words of Lord Morris, from the judgment of the Judicial Committee of the Privy Council, in *Khagendra Narain v. Matangini Debi*⁷, the Magistrate in such a case is "really in the position of stake holder". The attachment is to continue until a competent court has determined the rights of the parties and, therefore, it is the duty of a Magistrate to withdraw the attachment and release the property as soon as it is brought to his notice that: a competent court has determined the rights of the parties or of the person entitled to possession. The Juridical possession, based on attachment under Section 146(1) ends when the order of a competent civil court has been pronounced.

28. It should be borne in mind that proceedings under Section 145 or Section 146, or as a matter of fact the proceedings under Chapter XII of the Criminal Procedure Code are of a quasi civil character and the Magistrate intervenes and attaches the property either under Second Proviso to sub-section (4) of Section 145 or under Sub-Section (1) of Section 146 of the Code, much on the same lines and with a similar purpose as when a Receiver is appointed by the Court in a Civil action in order to prevent a scramble and to preserve the property until the rights of the parties are ascertained. The possession of a Receiver appointed under such circumstances is exclusively the possession of the court, the property being regarded as in the custody of the law in gremio legis for the benefit of whoever may be ultimately determined to be entitled thereto.

29. In view of this legal position, therefore, the possession of Kirit Sah, with whom the lands in suit were settled by the Magistrate by public auction in April, 1958 up to the end of March, 1959, will not change the position in lands as his possession will also be considered to be the possession of the court as long as the attachment subsists.

30. It is manifest, therefore, that the objects of the two attachments, one under the Second Proviso to Section 145(4) and the other under Section 146(1) are entirely different. The object of proceedings under Section 145 being to determine which party was in possession at the date of the proceedings and to declare such party to be entitled to retain possession, the possession of the court during attachment in the course of these, proceedings should enure for the benefit of such party in whose favor such a declaration is made. The object of an attachment under Section 146, however, is to hold the property in anticipation of an action in which the right of title to possession is to be declared by a competent court and the possession, of the court during such attachment should enure for the benefit of the party or person in whose favor a competent court would make such a declaration.

31. The true scope and the true effect of an attachment made under the second proviso to Section 145(4) and under Sub-Section (1) of Section 146 of the Code may, therefore, be summarized thus : The purposes of the two attachments, one under the Second Proviso to Sub-Section (4) of Section 145 and the other under Sub-Section (1) of Section 146 of the Code, are different, and the stakes are not the same. In the case of the former, attachment subsists till the decision under Sub-Section (4) of Section 145, that is to say, till it is decided which party was in possession at the date of the proceedings; in the latter case, it lasts until a competent court has determined the rights of the parties or the person entitled to possession.

32. The objects of the two attachments are also different. The possession in the case of the former, enures to the benefit of the party who eventually is found to be in possession at the date of the proceedings, and in the case of the latter, to the party or to any person either a party to the proceedings or not, who may be adjudged, on the basis, of his rights, to be entitled to possession.

33. The above view was taken by a Division Bench of the Calcutta High Court in AIR 1926 Calcutta 782, relied upon by both the parties, which was followed subsequently in *Rajjabali Khan v. Faku Bibi*⁸,

34. Having ascertained the scope of the two attachments, one under Section 145(4) and the other under Section 146 (1) of the Code, now the crucial point which emerges from the arguments presented at the Bar, therefore, is, with whom did possession of the suit lands lie during the attachment under Second Proviso to Sub-Section (4) of Section 145 of the Code, that is to say, did possession lie with the rightful owners whoever they were, or with the plaintiffs or the defendants to the suit?

35. The contention of Mr. Chatterjee was that the plaintiffs should be considered to be in possession of the suit lands, because the attached properties were, and still are in possession of the Magistrate, and, as such, in custodia legis.

36. To answer the above question, it is very necessary to ask the question as to what is meant by the term "In custodia legis" which expression was repeatedly used and strongly relied upon by Mr. Chatterji in support of his argument.

37. Literally, this latin term 'in custodia legis' means "in the keeping of the law". It is a terra used "of goods which have been seized under an execution. Goods seized in execution, are deemed to be in custodia legis". This term, however, is very often used when an attachment of the land in suit is made by a Magistrate under Section 146(1) of the Code in order to indicate that the land attached and in possession of the Magistrate is not in possession of any of the parties to the suit, but it is in legal custody of the Magistrate, and, the possession of the Magistrate is in law the possession of the true owner, whoever, may subsequently be found to have title to it, or, to the person entitled to possession thereof by a civil court.

38. When, therefore, the subject of dispute is attached, either under the Second Proviso, to Sub-Section (4) of Section 145 or under sub-section (1) of Section 146 of the Code, in the eyes of law, the attached land is in custodia legis.

39. But, simply because land attached under Section 145(4) is also in custodia legis, like land attached under Section 146 (1) it does not logically follow therefrom that because in a suit arising out of an order of attachment under Section 146(1) no consequential relief, in the shape of recovery of possession or the like, has to be specifically asked for, therefore, also in a suit arising out of an order of attachment made under the Second Proviso to Sub-Section (4) of Section 145, during the pendency of the proceeding under Section 145, and before an order is passed under Section 145(4) declaring one of the parties to the proceeding in possession at the date of the order under Section 145(1) a similar consequential relief need not be asked for.

40. In order to decide the validity of this argument, which at first sight appears very attractive, it is necessary first to know what is meant by 'consequential relief', and what is the scope of the

Proviso to Section 42 of the Act. In order to know what "consequential relief means, Section 42 of the Act, and, Section 7(iv)(c) of the Court-fees Act both have to be read.

41. Section 42, omitting the Explanation which is unnecessary here, of the Act, is to the following effect :

"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 :

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."

42. Sub-clause (c) of clause (iv) of Section 7 of the Court-fees Act, (so far as necessary), is in these terms :

"(iv) in suits -

** ** * ** **

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

** ** * ** **

43. The words used in Section 42 of the Act are "further relief, whereas in Section 7 (iv)(c) of the Court-fees Act the words used are "consequential relief".

44. It is well settled that the "further relief mentioned in the Proviso to Section 42 of the Act, must be "other relief" against the defendant himself against whom the declaration is sought. The words "further relief in Section 42 of the Act, refer to some relief to which the plaintiff will be necessarily entitled to on the basis of the title declared. If the plaintiff will not be so entitled, the relief will nor be "further relief" within the meaning of Section 42 or the Act, and the suit will not then come within the mischief of the proviso to Section 42 of the Act, on the ground of the plaintiff having omitted to ask fur such relief.

45. The word "consequential relief, in sub-clause (c) of clause (iv) of S. 7, Court-fees Act, also may be taken to refer to a relief of the above description. In other words, the relief must be such that it will constitute "further relief" within the meaning of Section 42 of the Act. A "consequential relief", within tile meaning of Section 7 (iv) (c), Court-fees Act, besides being a "further relief" within the meaning of Section 42 of the Act, however, must fulfill another condition. The relief must be asked for as incidental to the declaratory decree. Section 7(iv)(c), Court-fees Act, contemplates a suit in which the declaratory decree is the main, basic relief and the "further relief" is asked for only as incidental to it. The two reliefs must be asked for as one joint and indivisible relief so that if the Court, in the exercise of its discretion, refuses to pass a declaratory decree, the claim for "further relief also will fall with it. It is only in cases in which the "further relief is asked for on this footing that the suit will come under sub-clause (c) of clause (iv) of S. 7, Court-fees Act, and not otherwise.

46. For purposes of Section 42 of the Act, it is not essential that the "further relief" should be

asked for as an incident to the declaratory decree. Even if the "further relief" is asked for as a separate relief, the requirements of the Proviso to Section 42, Specific Relief Act, will be satisfied, and, the suit will not be liable to be dismissed under that Proviso on the ground of its failing to include a prayer for "further relief."

47. Therefore, though "consequential relief", within the meaning of Section 7(iv)(c), Court-fees Act, will be "further relief" for the purposes of Section 42 of the Act also, but, what would be "further relief, within the meaning of Section 42 of the Act, will not necessarily be "consequential relief" within the meaning of Section 7(iv)(c), Court-fees Act, for the simple reason, that in order to come under sub-clause (c) of clause (iv) of S. 7, Court-fees Act, the suit must aim at a single, composite relief, in which the main and basic part will consist of a declaratory decree and the "further relief" will only form an adjunct to it, to be granted or refused along with it, and, not independently of it. Hence, the mere fact that a certain relief flows from the right declared will not ipso facto make it "consequential relief" within the meaning of Section 7(iv)(c), Court-fees Act : see, for instance, *Kalu Ram v. Babu Lal*⁹,

48. In this connection, the observation of Turner, C.J., with whom Muttuswami Iyers, J., agreed, in *Ramanuja v. Devanayaka*¹⁰, is very apposite and may usefully be read here. Turner, C.J. observed :

"Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under Section 42, Specific Relief Act, as to whether the plaintiff is, or is not, able to seek further relief. It may be observed that the term relief presupposes the actual withholding of the fruit of the right of which a declaration is sought, and not its mere denial. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the Court to replace him in possession."

49. The above observations were quoted with approval by Leach, C.J., who delivered the joint judgment of the Letters Patent Appeal Bench, on behalf of himself, and Patanjali Sastri, J., in AIR 1939 Madras 853, at p. 854. I express my cordial assent to the same, and, if I may say so with respect, the law regarding the scope of Section 42 of the Act is there correctly stated.

50. Having thus known the true scope and effect of the Proviso to Section 42 of the Act, I shall now proceed to answer the questions, set out before posed by me. But before I do so, I may notice the cases relied upon by Mr. Chatterji, in order to see if they support the contention of the appellants that because, here also, the lands attached under the Second Proviso to Sub-Section (4) of Section 145 of the Code were in custodia legis and the proceedings under Section 145 were sub judice, and pending during the pendency of the suit in the court below, no "further relief", within the meaning of the Proviso to Section 42 of the Act was either available to the appellants or was necessary to be asked for.

51. I shall, therefore, now deal with the authorities, relied upon by Mr. Chatterji in order to see if they furnish a key to the solution of the controversy.
AIR 1938 P.C. 73 :

52. In this Privy Council case, there was, no question of any attachment under the Second Proviso to Sub-Section (4) of Section 145 of the Code, as is the case here.

53. In that case, the plaintiff claimed to be a trustee and administrator of a certain school, which was the subject-matter of the suit, of which neither he nor defendant was in possession or control of its management. The Managing Committee of the School, through two persons, namely, the plaintiff, who was a member of the Committee and the Manager of the School and, another, who was also a member of the trust, filed the suit and impleaded to it also the trustees as defendants.

54. In the plaint, the plaintiffs respondents claimed (a) a declaration and (b) a perpetual injunction against interference by the defendants. In those circumstances, the High Court held, which view was affirmed by the Privy Council on appeal, that the defendants were not in a position to deliver possession of the properties, and, that, therefore, there was no further relief available to the plaintiffs against the defendants.

55. Lord Thankerton, who delivered the opinion of the Board, in the just mentioned Privy Council case, however, observed that :-

",..... it may be added that where it is not open to the plaintiff to pray for Possession also as against the defendant, injunction is further relief within the meaning of the Proviso," (meaning the Proviso to Section 42 of the Act.)

It is, therefore, manifest that as in that suit there was also a prayer for injunction against the defendants, which their Lordships held, to be further relief within the meaning of the Proviso to Section 42 of the Act, the suit was held maintainable and not hit by it.

56. Mr. Chatterjee, relying on this case, very strongly urged, that the true test is whether the defendants were in a position to deliver possession of the properties to the plaintiffs, and if they were not, it would serve no useful Purpose for the plaintiffs to ask for a relief for delivery of possession against the defendant. He, therefore, urged that, here also, if that test is applied, it would be plain that the defendants being admittedly not in possession of the lands in suit, they were not in a Position to deliver possession to the plaintiffs, and, as such, it was not at all necessary for the plaintiffs to ask for recovery of possession against the defendants. This argument cannot be accepted as valid in law. In the Privy Council case, no doubt, there were proceedings under Sections 144 and 145 between the parties, but eventually they agreed to leave the school and its properties in possession of one Mallah. Singh and to seek their remedy in Civil Court. In that case, as mentioned before, there was no attachment, as here, under the Second Proviso to Sub-Section (4) of Section 145 of the Code. This Privy 'Council case, therefore, in my opinion instead of being of any assistance to the plaintiffs, is against them, because in the instant case, the appellants have claimed only a declaration, and they have not asked in the plaint for any injunction, as was done in the Privy Council case. This case rather shows that, on the facts here, the appellants should have prayed for an injunction against the defendants restraining them from proceeding with the Section 145 Criminal Procedure Code proceedings, or, the like. AIR 1939 Madras 853 :

57. The plaintiff-appellant, in that case, filed a suit for a declaration that he was the absolute owner of certain jewels, which were at the time of the suit in possession of the Court of the Sub-

divisional Magistrate and in that suit no consequential relief was asked for, and, therefore, the question arose as to whether the suit was maintainable without a prayer for consequential relief in view of the Proviso to Section 42 of the Act.

58. In that case, at the time the suit was filed the possession of the jewels was neither with the plaintiff appellant nor with the defendant respondent, but were in possession of the Sub-divisional Magistrate in custodia legis and remained in custodia legis, and, therefore, naturally, the Sub-divisional Magistrate was bound to deliver them to the person who proved his title to them, and, as such, in such circumstances, it was not necessary for the plaintiff appellant to ask for any thing more than a mere declaration.

59. Leach, C.J. who delivered the joint judgment of the Court, held that a suit for a mere declaration that the plaintiff is the owner of certain property, without consequential relief for Possession, is maintainable, if at the time of the institution of the suit the property is in possession of the Court pending the decision of the suit and not in the possession of the person against whom the relief is sought. The above mentioned Privy Council case was also relied upon.

60. In the above Madras case, there was no question of any attachment under the second Proviso to Sub-Section (4) of Section 145 of the Code. In my opinion, therefore, the said decision will not apply here. AIR 1930 Calcutta 386 :

61. In this Calcutta case, the suits filed by the petitioners before the High Court, were dismissed on the ground that they were not maintainable, by reason of Section 42 of the Act, and, therefore, they came up in revision before the High Court.

62. In the suit, in the above case, the plaintiffs claimed the Bijni Raj and the two defendants impleaded in each suit were Bhairbendra Narayan Deb, the then holder of the Raj as defendant 1 and the same Bhairbendra represented by the Manager of the Bijni Ram Wards Estate, as defendant 2. Both the suits were purely declaratory suits. During the pendency of the suits, the Court of Wards released the estate in favour of the defendant 1, Raja Bhairabendra Narayan, and, shortly thereafter, he raised a preliminary issue regarding the maintainability of the suits in view of the Proviso to Section 42 of the Act. In that case, an injunction existed restraining the Court of Wards from giving possession to Bhairabendra Defendant 1.

63. On these facts, it was held by Harries, C.J., with whom Bachawat, J., agreed, that the petitioners before them were in a position to claim further relief through the Court of Wards, and, therefore, they could have claimed possession and that being so, no declaration could be made by reason of Section 42 of the Act, and, consequently, the suits were not maintainable and, further, that the fact that an injunction existed did not make it impossible for the plaintiffs in those suits to claim possession of the property. This case, therefore, does not support the appellants at all, inasmuch as, in clear terms it was held that on the facts there, suits for declaration simpliciter were not maintainable as a court cannot make a mere declaration. AIR 1948 Patna 28 :

64. In this case, it was held, that, where a cloud had been thrown on the title of the plaintiff by the conduct of the defendant, but there was no evidence to show that the plaintiff was ever dispossessed by any act of the defendant, a suit for a mere declaration of title, without any further relief, was maintainable and such a suit was not barred by the fact that the defendant interfered

with the possession of the Plaintiff, as interference with possession is not necessarily dispossession.

65. Mr. Chatterjee strongly relied on the observation of Imam, J., with whom Das, J., agreed that "interference with possession is not necessarily dispossession"; and, therefore, it was argued that, even if it be assumed that on 23-07-1954 Ram Pragas Das, defendant 7, a servant of the Sangath of Mahant Narain. Das, Chela of the deceased Mahant Prem Das, settled the lands in suit with defendants 1 to 6, who are defendants 1st Party, it did not amount to dispossession of the plaintiffs, and, therefore, that settlement did not necessitate the claiming of any further relief in their suit by the plaintiffs and as such their suit for a mere declaration simpliciter of their title was maintainable in law.

66. Here, again, in my opinion, this case has no application to the facts of the. Present case, for the very simple reason that in that case admittedly the plaintiff was in possession at the date of the suit and there was no evidence that he was ever dispossessed by any Act of the defendant. In the instant case, however, the plaintiffs admittedly were not in possession at the date of the suit and are still not in possession.

AIR 1926 Calcutta 782 :

67. I propose now to deal with AIR 1926 Calcutta 782, because both the parties have relied on that decision. In that case, what happened was this : In 1904 a common manager was appointed in respect of the estate which was in dispute in that case. In 1945 proceedings under Section 145 of the Code were started between some of the plaintiffs' predecessors and the common manager of the estate. On 23-09-1915, the subject matter of dispute, in that proceeding, was attached, under the Second Proviso to Clause (4) of Section 145, but this attachment lasted till 21-05-1916, on which date the final order, in that proceeding, and, a declaration, in favor of the common manager, were made. Thereafter, the plaintiffs, of that suit, on the 18th January, 1917, instituted a suit for a declaration of their title and for recovery of possession. The substantial question in controversy before their Lordships was that of limitation. On behalf of the common manager, who was the appellant there, it was contended that the suit was barred because the plaintiffs were not in possession within 12 years of the suit. The plaintiffs' answer to this contention, was that in view of the attachment under Section 145(4) of the Code on 23-09-1915, which lasted till 21-05-1916, on which date the final orders were passed against the plaintiffs, the plaintiffs' predecessors, during this period of attachment, must be deemed to have been in Possession thereof. In those circumstances, the question as to with whom did possession lie during the attachment under the second proviso to clause (4) of Section 145 of the Code arose for decision in that case. On a review of the authorities, it was held by Mukherji, J., with whom Suhrawardy, J., agreed, that the common manager, who was the appellant there, and, not the plaintiffs, obviously because the common manager was eventually found to be in actual possession at the date of the commencement of the proceeding under Section 145 (1) of the Code, must be treated as having been in possession during the attachment under Section 145(4) of the Code, and, consequently, the plaintiffs' suit was barred by limitation. This case, in my opinion, is very helpful, as it lays down the true scope and effect of an attachment under Section 145 (4) of the Code, and, therefore, in my opinion, it furnishes the basic key to the solution of the question under consideration.

68. In the light of the Principles, stated above, the first question, set out earlier, has now to be

answered.

69. The principles, which govern a suit, arising out of an order of attachment made under Sub-Section (1) of Section 146 of the Code, in which also the land attached is in custodia legis, and, not in possession of the plaintiff or the defendant of the suit, and, in which a relief for a mere declaration of title is enough, and, even if recovery of Possession is prayed for, such a relief is redundant and superfluous, and the suit, even with such reliefs, for declaration of title and recovery of possession is to be treated as one for a mere declaration of title, (see, for instance, *Panna Lal Biswas v. Panchu Ruidas*¹¹, will not apply, here, to a suit, arising out of an order of attachment made under the second Proviso to Sub-Section (4) of Section 145 of the Code, and instituted during the pendency of the proceeding under Section 145, which was then pending, and in which a decision under Section 145(4) had not till then been made by the Magistrate, simply because in such a case also, the land attached is in custodia legis and not in possession of the plaintiff or the defendant of the suit. The reason is obvious. The attachment, under the second Proviso to Sub-Section (4) of Sec, 145, subsists till the Magistrate himself decides, as required by Section 145 (4), which party was in possession at the date of the preliminary order made under Section 145(1). The possession of the Magistrate, of the land attached, in such a case, enures to the benefit of the party, who eventually may be found to be in possession by him at the date of the said proceeding under Section 145(1). He has to decide only as to which party to the proceeding before him was in actual possession on the date of the said preliminary order. He is to declare that person in possession who is found by him under Section 145(4) to be in possession at the date of the order under Section 145(1) of the Code. He is not bound to find such possession with the person whose title is declared by the Civil Court, but who does not obtain possession through the Civil Court. The second Proviso to Sub-Section (4) of Section 145 itself expressly provides that, in case of an emergency, the Magistrate may attach the subject of dispute, "pending his decision under this section". The Magistrate, therefore, is to continue in possession of the land attached only until his decision under Section 145 (4) as to which party was in possession at the date of the order under Section 145(1) of the Code.

70. In this view of the effect of an attachment i under the second Proviso to Section 145(4) of the Code, assuming the plaintiffs got a decree from the Civil Court, declaring their title to the land attached under Section 145 (4) the crucial question, which then would arise, is, can they, on the strength of such a mere declaratory decree, also get possession through the Civil Court, or obtain a declaration of their possession by the Criminal Court in the proceeding under Section 145 of the Code ?

The answer obviously must be an emphatic "No". The Civil Court, on the basis of its decree of a mere declaration of tide, has no power to deliver possession to such a plaintiff-decree-holder, in execution of such a decree. The Civil Court, without a prayer for recovery of possession, has no power, in a suit for a mere declaration of title, to grant the plaintiff also a decree for possession, against his wishes, unless he chooses to amend his plaint and seek a relief for recovery of Possession and pays ad valorem court-fee. Even the Magistrate in a proceeding under Section 145 of the

Code, is not bound to declare possession of the land attached with such a person, on the basis of his decree declaring his title only, The Magistrate has to decide the question of actual possession of the evidence of such possession, adduced by the parties to the proceeding. The Magistrate, is not at all concerned either with the title of the parties or with then right to possess the subject of dispute. Even if a party to the proceeding before him has no title to the land attached, but his

evidence of its actual possession is convincing find beyond dispute, the magistrate is bound to find possession with him, notwithstanding that the decree of the Civil Court declaring title to the land attached is in favour of the other party, who is not in actual Possession.

71. It is well settled that where the Civil Court deals only with the question of title of land and gives a decree to a person declaring his title such a decree of the Civil Court will not debar a Magistrate from deciding the question of possession under Section 145 (4) of the Code, irrespective of such a declaratory decree of the Civil Court. Under Section 145(4) of the Code, the Magistrate has to make an enquiry about possession, which may even be quite contrary to title supported by a decree of the Civil Court. In such a situation, even if the plaintiffs obtain a decree declaring their title only, that will not in any way affect the jurisdiction or decision of the Magistrate, in holding, on the evidence adduced before him, as to which party was in actual possession at the date of the proceeding. It may well be that the Magistrate may decide the question of possession in favor of the party who has been defeated in the Civil Court. Therefore, unless a decree for possession has been obtained by a party and he has also got possession thereunder, through the Civil Court, he cannot get a declaration of possession in his favor, as a matter of right, from the Criminal Court in the proceeding under Section 145 of the Code.

72. The jurisdiction of the Magistrate in a proceeding under Section 145, being confined to cases of possession only, and, it being beyond his province to enquire into and ascertain the title to real estate, it is manifestly clear, therefore, if there is a recent decision of a competent Civil Court by which the question of possession as between the contending parties has been decided or possession was delivered to one of the parties through the Court then the Magistrate ought to respect and should follow any such recent decision of a Civil Court on the question of possession of the disputed property and he cannot sit on judgment over that decision. This view is in accord with the spirit of Sections 145 and 146 of the Code. This, however, is not the same thing as saying that the decision given by the Civil Court deprives the Magistrate of the jurisdiction conferred upon him by Section 145 of the Code. The mere fact that a civil suit in respect of the disputed property is pending is, as such, wholly irrelevant and does not deprive the Magistrate of his jurisdiction under Section 145 of the Code : *Imambu v. Husseni*¹², in which the cases of this Court and of other High Courts are mentioned. Likewise, the mere fact that a decree declaring only the title of one of the parties to the proceeding has been made by the Civil Court does not deprive the Magistrate of his jurisdiction to decide the question of Possession of the parties to the proceeding before him as required by Section 145 (4) of the Code.

73. In these circumstances, it was incumbent on the plaintiffs to ask for further relief, in the shape of recovery of possession, or, in the alternative, for confirmation of possession, because they claimed, although that claim is not maintainable in law or on facts, that they were, in the eyes of law, in constructive possession, through the Magistrate, or, even for an injunction, or, whatever other form of the appropriate consequential relief they thought would be on the facts here (sic).

74. It is well settled that where a plaintiff can gain nothing by a mere declaration of his title, unless he proceeds to take the necessary action for recovery of possession of the land or for any other suitable 'further relief', it would be singularly inappropriate for the Civil Court to accede to a claim for declaratory relief only, and it would not be exercising properly its discretionary power of granting declaratory relief under Section 42 of the Act in favor of such a plaintiff : See, for

instance, *Joseph Klein v. Ellahu (Leo) Heiman*¹³,

75. The position in law of a suit, arising out of an order of attachment under Section 146 (1) of the Code, on which analogy strong reliance was placed by the appellants, is entirely different. An order under Section 146 of the Code is final subject only to any subsequent decision by a court of competent jurisdiction in a regular suit. Section 146(1) of the Code itself makes the position clear. In express terms it provides that the Magistrate, in a proceeding under Section 146 of the Code, has jurisdiction to attach the subject of dispute only if one of the two conditions precedent envisaged by Sub-Section (1) of Section 146 is satisfied, and, that such an attachment lasts

"until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

The attachment under Section 146(1), therefore, lasts until a competent Court has determined the rights of the parties or the person entitled to possession. The possession of the Magistrate, in such a case, enures to the benefit of the party or any person, either a party to the proceeding or not, who may be adjudged, on the basis of his right, to be entitled to possession of the land attached. The Magistrate, in such a case, is really in the position of "stakeholder". He is holding possession of the land attached, only to hand it over to the person who may ultimately be found by the Civil Court to have title to it or to be entitled to possess it.

76. The position, therefore, is that in the case of an attachment under Section 145 (4), it lasts until the decision of the Magistrate thereunder, as to which party was in possession at the date of the preliminary order under Section 145 (1), whereas, in the case of an attachment under Section 146 (1), the attachment lasts until the decision, of the Civil Court. In the former case, the Magistrate retains jurisdiction over the proceeding under Section 145 and he attaches the subject of dispute till his own decision, thereafter, under Section 145 (4), whereas, in the case of an attachment under Section 146 (1), the Magistrate has done his part and his order thereunder is final as far he is concerned and he is simply holding custody of the property attached for the benefit of the rightful owner, whoever may ultimately be found to be, not by him, but by the Civil Court. In my opinion, that is the vital distinction between the two attachments.

77. Therefore, cases, such as, *N. Humayun Begam v. Shah Mohammad Khan*¹⁴, *Jagatjit Singh v. Partab Bahadur Singh*¹⁵, *Administrator-General of Bengal v. Bhagaban Chandra*¹⁶, *Jurawan Singh v. Ram Sarekh Singh*¹⁷, which are either cases arising out of an order of attachment under Section 146 (1) of the Code, or out] of an order under Section 145 of the Code, where no order for possession was made by the Magistrate, and, in which a receiver was appointed under Section 146 or 145 of the Code, are of no assistance in deciding the present suit which arises out of an order of attachment made under the Second Proviso to Section. 145(4) of the Code in a pending proceeding under Section 145 of the Code. Moreover, the principles laid down in the above mentioned cases, have not been disputed, as they could not be, and, as such, they need not be discussed in detail.

78. The principles, which can be extracted from the above authorities and the ratio of the said decisions, may be summed up thus : Where an attachment is made under Section 146 of the Code it is for the purpose of preventing a breach of the peace, and, it is to last only till, a

competent Court has determined the rights of the parties to the lands in dispute or the person entitled to possession, and, that the possession, of the Magistrate, or, of the receiver under Section 146 of the Code, or, of a person taking settlement of lands attached under Section 146 of the Code from such a receiver appointed under that Section, cannot be such as to affect the rights of the person whose title may be declared by the Civil Court. Such a possession is merely that of a licensee or a farmer; and the status of such a settlement-holder can be maintained only as against the receiver and not against the rightful owner. In such a case, therefore, the mere declaration of title in favour of a plaintiff is sufficient to entitle him to ask the Magistrate, or, the receiver appointed under Section 148 of the Code, to make over the possession of the land attached to him.

79. The fundamental distinction, therefore, between the two attachments, one under Section 145 (4) and the other under Section 146, is that, in the case of the former, the possession of the Magistrate continues till his own decision under Section 145 (4) as to which party before him is in possession of the subject of dispute, whereas, in the case of the latter, the possession of the Magistrate continues till the decision of the title of the person entitled to the possession of the attached land and as to who its rightful owner is by the Civil Court.

80. The possession of the Magistrate under Section 146 being on behalf of and in the rightful owner, only the question of title has to be decided by the Civil Court, and, therefore, a mere declaration of title is enough, and, as such, there is no necessity of a prayer for recovery of possession in the suit arising out of such an attachment. But in the suit arising out of an attachment under Section 145 (4), in a proceeding under Section 145, which is still pending, unless there is a decision on the question of possession of the parties to the proceeding, of the disputed property, a mere declaratory decree declaring the title of one of the parties is not enough, and, merely on its basis the Magistrate cannot find possession with him.

81. In view of this effect of an attachment under Section 145 (4) of the Code, therefore, when the Civil Court finds that its declaratory decree will be of no effect in giving effective relief to the plaintiff before him in the suit brought against an attachment under Section 145 (4), in a proceeding under Section 145, which is pending, because on its basis the Magistrate is not bound to find actual possession with him, and, the grant of a declaration being a discretionary relief, the Civil Court will refuse to grant it because it is well settled that where the Court cannot pass any effective decree the discretion vested in it should not be exercised.

82. Mr. Chatterjee, however, repeatedly, over and over again, laid over-emphasis on the fact that, as in a suit against an attachment under Section 146 (1) of the Code no relief for recovery of possession has to be claimed by a plaintiff because the defendant not being in possession is not in a position to deliver possession to him, likewise, in a suit against an attachment under Sec. 145(4) also, as the defendant is not in Possession, he is not in a position to deliver possession to the plaintiff, and, as such, it was urged, there was no distinction between the two suits, and, accordingly it was vehemently urged that in the Present suit also, the defendants being admittedly not in 'possession, they would not be in a position to deliver Possession to the plaintiffs, and, as such, no useful purpose will be served by their asking for recovery of possession.

83. This argument based on analogy is not sound and valid. As already mentioned above, in the case of a suit, arising out of an attachment under Section 146(1), the possession of the Magistrate

is subject to the decision of the Civil Court in which even a person not a Party to the proceeding under Section 146 may be found to be the rightful owner, whereas, in a suit, arising out of an attachment under Section 145 (4), the possession of the Magistrate is subject to his own decision, in the same proceeding, under Section 145 (4), and, therefore, unless the plaintiff, in the latter case, seeks recovery of possession in his suit, he cannot be granted any decree for Possession and he cannot therefore get possession, and, as long as he does not get possession through the Civil Court, his decree declaring merely his title will not as of right entitle him to get a declaration of his possession by the Magistrate under Section 145 (4). The declaratory decree will be a mere paper decree, and infructuous as it will not bind the Magistrate on the question of actual Possession.

84. In the suit against an attachment under Section 146 (1) the Civil Court has to decide question of title of the party before it and to find out who the rightful owner of the land attached is, whereas, in the suit against an order or attachment under Section 145 (4), where there is no prayer for recovery of possession, the Civil Court has to decide only the question of title, but the question of actual possession has to be decided by the Magistrate under Section 145 (4), and, the said declaratory decree will not be binding on him on the question of possession. In this view, it is mandatory for the plaintiff to seek recovery of possession and if he does not do so, the Civil Court may refuse to grant him a mere declaratory decree which would be ineffective to enable the plaintiff to get a declaration of possession from the Magistrate under Section 145(4). This is the vital distinction, but the argument of Mr. Chatterji ignores this basic fact.

85. For these reasons, ex necessitate, the plaintiffs, in the instant case, were bound to seek "further relief, and, they not having done so, their suit, ex facie, was not maintainable.

86. As a result of these considerations, therefore, I would answer the subsidiary question, posed by me, as to with whom did possession lie during the attachment under Section 145 (4) of the Code, in this way ; During the attachment under the second Proviso to Sub-Section (4) of Section 145, the possession of the Magistrate enured to the benefit of the party to the proceeding before him, whoever he may be, whether plaintiffs or defendants, who may ultimately be found, by the Magistrate himself, under Section 145 (4), to be in actual possession of the land attached on the date of the commencement of the Proceeding under Section 145 (1) of the Code, and, therefore, such possession of the Magistrate did not necessarily lie with the plaintiffs, as contended, as long as they were not actually found to be in possession by the Magistrate under Section 145 (4), and, as such, the plaintiffs cannot, by any stretch of imagination, be considered to be in possession of the land in suit through the Magistrate during the attachment. Unless the Magistrate gives his decision under Section 145 (4), and, as long as he does not find which party, that is, whether plaintiffs or defendants, who were the only parties before him, was in actual possession at the date of the proceeding, it cannot be said, and, it is naturally difficult to predicate at this stage, who eventually will be found to be in actual possession by the Magistrate under Section 145 (4) of the Code. On the evidence of actual possession adduced by the parties before the Magistrate it may be that he may find the plaintiffs to be in actual possession. It may also be that he may find the defendants to be in actual possession. It may also be that he may find neither party to be in actual possession and he may pass an order under Section 146 (1) of the Code. It is, therefore, impossible at this preliminary stage, during the pendency of the proceeding under Section 145, to say in favor of which party to the suit the decision of the Magistrate under Section 145 (4) will be. Such possession of the Magistrate, therefore, is not necessarily for the rightful owners,

because, as the Magistrate in a proceeding under Section 145 is concerned only with actual possession, and, not with title, it may be that the party found in actual possession by the Magistrate under Section 145 (4) may be a trespasser, not the rightful owner thereof, and he may have no title to it. The possession during the attachment under Section 145 (4), therefore, did not lie either with the rightful owner, or with the plaintiffs, or the defendants, but with the person, whoever he may be, whether plaintiffs or defendants, or, whether rightful owner or not, who ultimately would be found to be in actual possession by the Magistrate himself under Section 145 (4) of the Code.

87. For these considerations, the argument, in favor of the appeal, that because the land in suit, in the instant case like land attached under Section 146 (1) of the Code, is in custodia legis, and, not in possession of the defendants and as such they are not in a position to deliver possession to the plaintiffs, even if recovery of possession is asked for against them, and, therefore, no "further relief, within the meaning of Section 42 of the Act, was at all available to the plaintiffs against the defendants, no doubt, was not lacking in vigour or ingenuity, but, in my opinion; is not well-founded, and as such, it must be overruled.

88. In my opinion, therefore, "further relief" within the meaning of Section 42 of the Act was open to the plaintiffs, and, as such, unless they asked for it, their suit for a mere declaration, simpliciter, was not maintainable, as it came within the mischief of the Proviso to Section 42 of the Act, and consequently, the Court below rightly held that it could not grant a declaration of title to the plaintiff, without a prayer for a consequential relief, in view of the Proviso to Section 42 of the Act. The first question, posed by me, therefore, must be answered in the affirmative.

89. The next question, which arises, is whether the plaintiffs should be permitted now to amend their plaint by adding appropriate consequential relief. On the facts of the present case, which have already been set out in detail, I am not at all inclined to permit the plaintiffs to amend the plaint. The plaintiffs, in their original plaint, asked for recovery of possession, but on 02-07-1958, even after the order of the High Court setting aside the order under Section 146 of the Code and remanding the proceeding under Section 145 of the Code for a fresh hearing, deleted the relief for recovery of possession. Such a move, on the part of the plaintiffs, cannot be said to be bona fide. It is obvious that in order to evade the payment of ad valorem court-fee they did so. Their action was undoubtedly mala fide. In these circumstances, the plaintiffs cannot be allowed now to amend their plaint and ask for any "further relief", whatever its nature may be. To allow them to do so, would be to put a premium on their dishonest move. The second, question, posed by me, therefore, must be answered in the negative.

90. In view of my decision, therefore, (i) that the suit of the plaintiffs for a mere declaration of their title was not maintainable, in view of the Proviso to Section 42 of the Act, as the Court below could not make such a declaration, and (ii) that the plaintiff now cannot be permitted to amend their plaint, it follows that the appeal must fail on these two preliminary grounds only, which have also been correctly decided by the trial Judge.

91. For these reasons, and, for the reasons given in the court below, with which I agree, I am of opinion that the appeal should be dismissed ; but, in the circumstances of the case, there will be no order for costs of this Court.

Appeal dismissed.

Cases Referred.

Cases Referred.

¹ AIR 1939 Mad 853 : ILR 1939 Mad 986

² AIR 1938 PC 73 : 65 Ind App 106

³ AIR 1926 Cal 782

⁴ AIR 1950 Cal 386

⁵ AIR 1948 Pat 28

⁶ 29 Ind App 24 at P. 33 : ILR 29 Cal 187 (PC)

⁷ 17 Ind App 62 at p. 64

⁸ AIR 1932 Cal 29 at p. 31

⁹ AIR 1932 All 485: ILR 54 All 812 (F.B)

¹⁰ ILR 8 Mad 361

¹¹ ILR 49 Cal 544 : (AIR 1922 Cal 419)

¹² 5 RLR 420 : (AIR 1960 Mys 203)

¹³ AIR 1949 PC 53

¹⁴ AIR 1943 PC 94

¹⁵ AIR 1942 PC 47

¹⁶ 15 Cal WN 758 : ILR 49 Cal 544 : AIR 1922 Cal 419

¹⁷ 14 Pat LT 113 : (AIR 1933 Pat 224)