

(2012) 02 MAD CK 0336

In the Madras High Court

Case No : A.S. No. 582 of 2006 and M.P. No. 1 of 2011

C. Nagamanickaya and Others

APPELLANT

Vs

K. Syamanthakamma and Others

RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 2 Rule 6, Order 21 Rule 95,
Order 41 Rule 27, Order 41 Rule 27(1)
Contract Act, 1872 — Section 229
Evidence Act, 1872 — Section 63, 64, 90, 91, 92
Limitation Act, 1963 — Article 134B, 144
Specific Relief Act, 1877 — Section 31, 31(1), 34, 35, 39
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 40, 6
Transfer of Property Act, 1882 — Section 3, 41
Trusts Act, 1882 — Section 3, 64, 73, 74, 75

Citation : (2012) 02 MAD CK 0336

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : P.K. Sivasubramanian, for the Appellant; S. Vasudevan, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice G. Rajasuria

1. These two appeals are focussed by the defendants as against the common judgment and decrees dated 30.11.2005 passed by the learned Additional District and Sessions Judge, [Fast Track Court No. I] Chennai in O.S.Nos.12891 and 12960 of 1996 respectively. The parties are referred to here under according to their litigative status and ranking before the trial Court.

2. A summation and summarisation of the relevant facts absolutely necessary and germane for the disposal of these two appeals would run thus:

The plaintiffs filed two suits, relating to one big property, by citing almost each half of it in the suits with the following prayer:

O.S. No. 12891 of 1996:

-to pass judgment and decree as against the defendants

a] declaring that the sale deed executed by the defendants 1 to 17 to and in favour of 18th defendant under registered document No. 1028/95 dated 01.09.1995 of the suit property belong to the Chetpet Subbadramma Trust, bearing Old Door No. 34 and New No. 48, now combined as No. 20, Ramakrishnan Street, Madras-1 is null and void and bogus;

b] granting permanent injunction restraining the defendants, their men, agents, servants and all those act under their direction from acting on the basis of bogus documents and from making mutation of records in the TNEB, Corporation of Madras, Revenue Authority, Water and Sewerage Board and also restraining them from entering the suit premises bearing Old Door No. 34 and New No. 48, now combined as No. 20, Ramakrishnan Street, Madras-1 and also from causing disturbances to the tenants of the suit property.

c] staying all further proceedings in the RCOP No. 2684/95 pending disposal in the XIII Court of Small Causes at Madras and RCOP No. 477/96 pending disposal in the X Court of Small causes at Madras filed by the 18th defendant and Mrs. Manju Devi against the chief tenant E.M. Narasimhalu of the plaintiffs till the disposal of the suit

and for costs.

O.S. No. 12960 of 1996:

-to pass judgment and decree as against the defendants

a] declaring that the sale deed executed by the defendants 1 to 17 to and in favour of 18th defendant under registered document No. 1027/95 dated 01.09.1995 of the suit property belong to the Chetpet Subbadramma Trust, bearing Old Door No. 34 and New No. 48, now combined as No. 20, Ramakrishnan Street, Madras-1 is null and void and bogus;

b] granting permanent injunction restraining the defendants, their men, agents, servants and all those act under their direction from acting on the basis of bogus documents and from making mutation of records in the TNEB, Corporation of Madras, Revenue Authority, Water and Sewerage Board and also restraining them from entering the suit premises bearing Old Door No. 34 and New No. 48, now combined as No. 20, Ramakrishnan Street, Madras-1 and also from causing disturbances to the tenants of the suit property.

c] staying all further proceedings in the RCOP No. 2684/95 pending disposal in the XIII Court of Small Causes at Madras and RCOP No. 477/96 pending disposal in the X Court of Small causes at Madras filed by the 18th defendant and Mr. Dinesh Kumar against the chief tenant E.M. Narasimhalu of the plaintiffs till the disposal of the suit and for costs.

(extracted as such)

3. The gist and kernel, the pith and marrow of the averments, as stood exposed from the complaints would run thus:

(i) According to the plaintiffs, the suit property is a Trust property belonging to one Subbadrama Estate, which is a charitable Trust; by virtue of it having been purchased for the Trust by its original trustees namely Vattam Gopala Chetty and Chockanadhan Chetty vide sale deed dated 19.10.1921 (Ex.A1) and found fortified by the mortgage deed dated 19.10.1921 (Ex.A17); the confirmation deed dated 22.12.1926 (Ex.A18) and the discharge receipt dated 22.12.1996 (Ex.A19).

(ii) Vattam Gopala Chetty appointed one Chikkakulam Guruviah Chetty as clerk/accountant to manage the accounts of the said Chetput Subbadramma Trust. The said Vattam Gopala Chetty died leaving behind his only daughter/legal heir, namely, Nagarathinammal, who also reposed confidence in the said C. Guruviah Chetty and asked him to act as a clerk, to look after the suit properties and collect rents; subsequently, he was asked to be the manager to manage the affairs of the Trust. The said C. Guruviah Chetty, during his life time, collected the rents concerning the suit property, on behalf of the Trust. However, he betrayed the confidence reposed in him and destroyed the relevant records relating to the suit property. He also misrepresented himself as the son of Vattam Gopala Chetty before various authorities.

(iii) One Narasimhalu Chetty had been the tenant in the suit property ever since 1933, even under Vattam Gopala Chetty. After the death of Guruviah Chetty, his legal heirs, namely, D1 to D17, taking undue advantage of their position as his legal heirs, sold the suit properties in favour of D18 in both the suits, as per the respective sale deeds Exs.A5 and A6. The said Nagarathinam Ammal died leaving behind his son Anjaneya Chetty, the original plaintiff in both the suits. Upon his death, his legal heirs have been impleaded as the plaintiffs.

(iv) The aforesaid purchasers after such purchase initiated Rent control proceedings so as to evict the tenants from the suit property under the said Trust.

4. Refuting and challenging, impugning and contradicting the averments in the complaint, D1 filed the written statement. The other defendants, namely, D2 to D7 adopted the written statement of D1. Additional written statement was filed by D18. Similarly additional written statement was also filed by D1 to D17.

5. Memo also was filed by D2 to D7, D9 to D11 and D13 to D15 adopting the written statement filed by D1. The gist and kernel of the same would run thus:

(a) There was no Trust as alleged in the complaint and consequently, the suit property, by no stretch of imagination could be treated as a trust property. The said C. Guruviah Chetty referred to in the complaint was enjoying the suit property in his own right and not on behalf of the alleged Chetput Subbadramma Trust or on behalf of Vattam Gopala Chetty or his daughter Nagarathinam Ammal. Guruviah Chetty got his name recorded as owner in the records of the Corporation of

Madras long before 1945 and he had been the owner of the suit property for more than 50 years. He was collecting rent from one E. Munirathinam Chetty-the father of the present tenant-E.M. Narasimhalu Chetty in the suit property. Narasimhalu Chetty was paying rent to Guruviah Chetty. The taxes for the suit property was paid by C. Guruviah Chetty as owner.

(b) Assuming but not admitting Vattam Gopala Chetty was not the father of C. Guruviah Chetty, he became the owner of the suit property in his own capacity as owner and he has been enjoying it for over 50 years and perfected his title to the suit property. The plaintiffs are having nothing to do with the physical possession of the said property. The plaintiffs are having no locus standi to file the suits. In fact, these suits were engineered by the said tenants who occupied the suit property and who also earlier categorically acknowledged their tenancy under C. Guruviah Chetty. In such a case, the plaintiffs had no locus standi at all to file the suits.

6. The written statement of D18 is almost in pari materia with the written statement of D1 and in addition to that D18 in both the suits would also contend that they are the bona fide purchasers for value without notice of any alleged defect in the title of their vendees relating to the suit property and that they initiated rent control proceedings.

7. The trial Court framed the relevant issues.

8. During joint trial, on the plaintiffs' side, P.Ws.1 to 3 were examined and Exs.A1 to A33 were marked. On the defendants side D.Ws.1 and 2 were examined and Exs.B1 to B46 were marked.

9. Ultimately, the trial Court decreed the suits. Being aggrieved by and dissatisfied with the common judgment and decrees of the trial Court, the appellants/defendants preferred these two appeals based on various grounds.

10. Heard both sides.

11. The learned counsel for the appellants/defendants would put forth and set forth his arguments placing reliance on the grounds of appeal, which could tersely and briefly be set out thus:

(a) The trial Court throwing to winds the law relating to burden of proof, simply picked holes in the case of the defendants and decreed the suit.

(b) The trial court failed to take note of the distinction between a Trust property and a mere estate property of an individual.

(c) There is no iota or shred, shard or miniscule extent of evidence to prove that there existed any Trust under the name and style "Chetpet Subbadramma Estate". There is also no evidence to highlight and spotlight the fact that such alleged Trust was created or formed for any charitable activities/purposes. Merely because in the old documents there were some references to the word "Executors and Trustees," of Chetpet Subbadrama estate that would not enable

anyone to presume the existence of any Trust, much less a charitable Trust. But the trial Court failed to distinguish and differentiate this vital difference and adjudged the lis, warranting interference in these appeals.

(d) The plaintiffs as per Section 31 of the Specific Relief Act, had no locus standi at all to seek the Relief No. 1 for getting declared as void or cancelled the sale deeds Exs.A5 and A6. Simply because the plaintiffs contended that they are affected by the sale deeds, they are not justified in invoking Section 31 of the Specific Relief Act.

(e) The suits were bad for want of a prayer for declaration of the title of the Trust relating to the suit property. In the absence of such a prayer, the suits should have been dismissed by the trial Court. The suits filed by the plaintiffs could only be termed as bare injunction suits so far the suit property is concerned; in such injunction suits, simply because an issue was framed by the trial Court relating to the title of the Trust over the suit property, that it does not mean that the law governing frame of suit was satisfied on that aspect.

(f) The clinching documents marked on the side of the defendants would exemplify and demonstrate that over a period of 52 years, so to say, for more than five decades, the suit property has been under the care and custody possession and absolute ownership of the vendors and the vendees contemplated under Exs.A5 and A6 successively.

(g) The plaintiffs at no point of time ever raised their little finger as against the exercise of ownership by C. Guruviah Chetty over the suit property and also the mutation effected in the Corporation records relating to it. The tax receipts also stood in the name of C. Guruviah Chetty and at no point of time, the suit property stood in the name of Nagarathinam Ammal or her legal heirs.

(h) The defendants are entitled to take alternative pleas. They plead that they are the legal heirs of C. Guruviah Chetty who acquired absolutely title over the suit property. They also plead that C. Guruviah Chetty and his legal heirs acquired prescriptive title over the suit property by their long enjoyment and possession for more than 50 years. C. Guruviah Chetty during his life time exercised his full right of ownership and perfected his title to the knowledge of the plaintiffs. The said C. Guruviah Chetty happened to be the biological son of Vattam Gopal Chetty referred to in the earlier deeds and in that capacity also he enjoyed the property and on his death, his legal representatives transferred the property in two moieties in favour of D18 in both the suits.

(i) The learned counsel for the appellants/defendants also would submit that the doctrine of reversion enured to the benefit of C. Guruviaya Chetty and ultimately in favour of the vendors of D18.

12. I would like to refer to the further arguments of the learned counsel for the appellants/defendants on various points then and there in the course of my discussion infra.

13. In a bid to torpedo and pulverise, shoot down and make mince meat of the arguments as put forth on the side of the appellants/defendants, the learned counsel for the respondents/plaintiffs, advanced his arguments inviting the attention of this Court to various portions of the records, a thumbnail sketch of the same would run thus:

(a) Indubitably and indisputably, the suit property is the Trust property and the said fact was admitted by the vendors as well as the vendees in Exs.A5 and A6. One cannot approbate and reprobate; blow hot and cold. In one breath the defendants would contend that the vendors's propositus and the vendors in Exs.A5 and A6 acquired prescriptive title over the suit property and accordingly sold the property in favour of D18; in another breath, the defendants would contend that C. Guruviah Chetty happened to be the biological son of Vattam Gopal Chetty, who was one of the trustees of the said Subbadramma Estate and thereby, as legal heirs of him, they were entitled to sell the suit property in favour of D18. Over and above that, the defendants also would contend belatedly at the time of arguments as though C. Guruviah Chetty happened to be the reversioner of Subbadramma Estate. As such, those pleas are inconsistent with one another.

(b) The evidence on record would demonstrate and evince that C. Guruviah Chetty happened to be the son of Pattabiram Chetty. The defendants produced two death certificates of C. Guruviah Chetty one showing that he was the son of Pattabiram Chetty and another death certificate showing that he was the son of Vattam Gopala Chetty.

(c) The attempt on the part of the legal representatives of Gopala Chetty to get mutation in the Corporation records virtually ended in a fiasco. The records would expose the inconsistent stand of the defendants as to how by hook or by crook they wanted to grab the property of the Trust fraudulently.

(d) The lower Court appropriately and appositely considered that the plaintiffs had locus standi to protect the Trust property and also applied Section 10 of the Limitation Act.

(e) D18 in both the suits cannot even by phantasmagorical thoughts be labelled or dubbed as bonafide purchasers for value, because, on seeing the ancient documents, they ought to have made enquiries and found out as to whether the suit property was a Trust property or not. They have not even chosen to make enquiries with the tenants of the Trust. They have not also verified the authentic municipal records relating to the title of the vendors, but they did choose to simply purchase the suit property in collusion with the vendors and thereby attempted to deprive the Trust of its property.

14. I would like to refer to the further arguments of the learned counsel for the defendants *infra* at the appropriate stage.

15. Considering *pro et contra*, I am of the view that the following points should

be framed for consideration.

(1) Whether the trial court properly applied the law relating to burden of proof in deciding the lis?

(2) Whether the suits were bad for want of a prayer for declaration of title over the suit property?

(3) Whether the plaintiffs had no locus standi to file the suits and more specifically by invoking Section 31 of the Specific Relief Act relating to the first prayer in the plaints?

(4) Whether the trial Court was justified in applying Section 10 of the Limitation Act as against the defendants?

(5) Whether the trial Court was justified in holding that C. Guruviah Chetty was not the owner of the suit property?

(6) Whether the finding of the trial Court that C. Guruviah Chetty and his L.Rs. have not acquired title by prescription over the suit property, is faulty?

(7) Whether the trial Court was justified in holding that Vattam Gopala Chetty happened to be the original trustee of the Trust and that the plaintiffs are the legal representatives of Vattam Gopala Chetty?

(8) Whether the trial court failed to decide properly as in whose possession the suit property was, as on the date of filing of the suit?

(9) Whether the plaintiffs were justified in seeking injunction to protect the occupation of the tenants in the suit property and whether the trial Court was justified in granting such a relief?

(10) Whether the plaintiffs are entitled to the same relief as claimed in the suit, despite pendente lite the superstructure was erased and if so, what remedy they are entitled to?

(11) Whether there is any perversity or illegality in the decision of the trial court?

16. All these points are taken together for discussion as they are inter-linked and inter-woven, entwined and inter-connected with one another.

In re Trust:

17. The bed rock of the plaintiffs' case is that there exists the Trust in the name of Chetpet Subbadrama for doing charitable activities and for that originally Vattam Gopala Chetty and Chockanadha Chetty happened to be the executors/trustees of that trust. However, the defendants would vehemently challenge and dispute those facts. No doubt, it is quite obvious and axiomatic in view of the following maxims:

(i) Affirmantis est probare - He who affirms must prove, and (ii) Affirmanti non neganti incumbit probatio: The burden of proof lies upon him who asserts and

not upon him who denies,

that the initial burden is on the plaintiffs to prove that there exists such a Trust and that Vattam Gopala Chetty and Chockanadha Chetty originally happened to be the executors/trustees of that Trust. It has to be seen as to whether sufficient evidence is available on record to establish and evidence the same.

18. The learned counsel for the plaintiffs would by placing reliance on the certified copies of Ex.A1 of the sale deed Ex.A17 the mortgage deed, Ex.A18 confirmation deed and Ex.A19 the discharge receipt, contend that those documents would unambiguously and unequivocally refer to the Trust referred to supra. Whereas, the learned counsel for the defendants would submit that there is not even any jot or pint of evidence to show that there existed a Trust and that too for charitable purpose; simply because the words "Trustees" are found referred to in those deeds, there is no presumption that there existed such a Trust.

19. At this juncture, it is necessary to extract the relevant portion of those four documents:

Ex.A1 -....."..... the surviving executors and trustees of the Estate of Chetput Subhadramma deceased of Madras hereinafter called the purchasers (which term shall whereas the context so requires as admits mean and include the said Vattam Gopal Chetty G.N. Chockanatham Chetty and their successors in Office as Trustees of the Estate of Chetput Subhadramma deceased of Madras) of the other part....."

Ex.A17 -At Madras this 19th day of October 1921 by Vattam Gopal Chetty S/o V. Ramaswami chetty Vaisya Saivite Merchant residing 68, Narayana Mudali Street, George Town Madras and M.N. Chockanadha Chetty son of Narayana Chetty Vaisya Saivite Merchant residing at No. 24,..... Muthiah Mudali Street.....the said Vattam Gopal Chetty... Chocknadha Chetty and their successors in office as trustees in the Estate of Chetput Subhadramma deceased of Madras..... executors and trustees of the Estate of Chetput Subhadramma deceased)

Ex.A18..... called the Releasor (which term shall wherever the context requires or admits.... and in..... the said releasor, his executors and administrators and legal representatives) of the one part..... in favour of Vattam Gopal Chetty son of V. Ramasami Chetty Vaisya Saivite Merchant residing at No. 68 Narayana Mudali Street, George Town, Madras hereinafter called the Releasees..... the said Vattam Gopal Chetty and G.N. Chocknadha Chetty and their successors in office as Trustees of the Estate of Chetpet Subhadramma deceased of Madras) of the other part....."

(emphasis supplied)

Ex.A19 -Received Rupees seven thousand and four hundred only for the amount of principal due of this mortgage from Messrs. V. Gopal Chetty and G.N.

Chockanadha Chetty Executors and Trustees to the Estate of Chetpet Subadramma (deceased) this 22nd December 1926.....

(emphasis supplied)

20. A mere poring over and perusal of those excerpts including the entire recitals in those documents, would highlight and spotlight the fact that one Vattam Gopala Chetty and C. Guruviah Chetty purchased the suit property from the vendor, who was a minor represented by his guardian at the time of purchase. Hence, precaution was taken to create a mortgage as per Ex.A17 in favour of the same minor and after attainment of majority, the quondam minor discharged the mortgage and executed the confirmation deed Exs.A18 and A19 the discharge receipt confirming the earlier sale as in Ex.A1. Those documents could rightly be termed as ancient documents as well as anti litem motem documents; which emerged at a time when this dispute was not at all in contemplation. As such utmost importance can rightly be attached to those deeds and the recitals therein.

21. Incontrovertibly or unarguably, Vattam Gopala Chetty and Chockanadha Chetty could never, by any stretch of imagination claim to be the absolute owners of the said property and they cannot also be portrayed and projected by any one, as the absolute owners of the suit property and consequently the suit property cannot be termed as their personal property and they are not even related to each other so to say Vattam Gopal Chetty is not the relative of Chockanadha Chetty admittedly.

22. At this juncture, I would like to refer to the definition of Trust. It is settled law that a cue can be had from the Indian Trust Act, 1882 for understanding the various terms as well as the salient features attached to a Trust.

23. It is just and necessary, at the first instance, to refer to the judgement of the Honourable Apex Court reported in (1974) 1 SUPREME COURT CASES 446 - STATE OF Uttar Pradesh V. Bansi Dhar and Others SC. Certain excerpts from it would run thus:

18.The principles relevant for our case may now be considered was the contribution of Rs. 30,000 for a charitable purpose? Lord Sterndale, M.R. said in the Court of Appeal in In re Tutley:

I.....am unable to find any principle which will guide one easily and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down. The whole subje[t] is in an artificial atmosphere altogether.

While in India we shall not be hidebound by English decisions on this point, luckily both sides agree here - and that accords with the sense of the law - that a hospital for women is a charitable object, being for medical relief. Moreover, the beneficiaries are a section of the public, women - that still silent, suffering half of Indian humanity. Therefore, this element cannotes a public trust. The next

question is whether the Indian Trust Act, 1882, applies to the present case. The Courts below have argued themselves into an application of Section 83 of the Trust Act. Sri Dixit rightly objects to this course because that Act relates only to private trusts, public charitable trusts having been expressly excluded from its ambit. But while these provisions *proprio vigore* do not apply, certainly there is a common area of legal principles which covers all trusts, private and public and merely because they find a place in the Trusts Act, they cannot become "untouchable" where public trusts are involved. Care must certainly be exercised not to import by analogy what is not germane to the general law of trusts, but we need have no inhibitions in administering the law by invoking the universal rules of equity and good conscience upheld by the English judges, though also sanctified by the statute relating to private trusts. The court below have drawn inspiration from Section 83 of the Trusts Act and we are not inclined to find fault with them on that score because the provision merely reflects a rule of good conscience and of general application.

24. Section 3 of the Indian Trust Act is extracted here under for ready reference:

Interpretation-clause - "Trust" -A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

"author of the trust", "trustee"; "trustee"; "beneficiary"; "trust property"; "beneficial interest"; "instrument of trust". -The person who reposes or declares the confidence is called the "author of the trust"; The person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject-matter of the trust is called "trust property" or "trust money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the "instrument of trust";

"breach of trust" - A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust";

"registered", expressions defined in Act 9 of 1872 - And in this Act, unless there be something repugnant in the subject of context, "registered" means registered under the law for the registration of documents for the time being in force; a person is said to have "notice" of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, Section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

25. A plain perusal of it would clearly indicate and exemplify that a Trust is an

obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

26. At this juncture, I would like to refer to the admitted factual position. The plaintiffs could not produce any document apart from the four documents, namely, Exs.A1, A17, A18 and A19 in addition to Ex.A16 series-the photos and negatives concerning the suit property, demonstrating that there existed a Trust in the name of "Chetpet Subbadrama" and that too for charitable purpose. Had there been such a direct document produced before the Court, the matter would have been easier and there might not be any necessity for deep and elaborate discussion.

27. On the one hand, the learned counsel for the plaintiffs would argue that the confidence reposed on C. Guruviah Chetty as a clerk as well as the subsequent Manager was misused by him and he committed Himalayan fraud and because of that alone, the plaintiffs are not in a position to lay their finger on any specific document. According to him, accounts were maintained, but they were completely destroyed by C. Guruviah Chetty. According to the learned counsel for the plaintiffs the fence itself mowed the crops, so to say "fence eating the crops" proverb could squarely be pressed into service in describing the conduct of C. Guruviah Chetty.

28. Whereas, the learned counsel for the defendants would vehemently oppose such a contention on the part of the plaintiffs and argue that since in fact there was no such Trust, there were no documents. It is therefore just and necessary to see as what could be deciphered and inferred from the recitals in those four documents, Exs.A1, A17, A18 and A19. Had there been no Trust at all, the term "Trustees" could not have been used in those deeds. In fact, in good English those deeds are found written.

29. At this juncture, I recollect the following maxims:

(a) *Verba generalia genaraliter sunt intelligenda* - General words are to be understood generally.

(b) *Verba ita sunt intelligenda, ut res magis valeat quam pereat* -Words are to be so understood that the matter may have effect rather than fail.

(c) *Qui haeret in litera, haeret in cortice*: One who clings to the letter clings to the shell or surface.

(d) *Mala grammatica non vitiat chartum. Sed in expositione instrumentorum mala grammatics quoad fieri possit evitanda est* - Bad grammar does not vitiate a deed. But in the exposition of instruments, bad grammar, as far as it can be done, is to be avoided.

30. The sum and substance of those maxims would unambiguously and unequivocally point out that a document has to be read as a whole and the spirit

of it should be taken note of, and not to be carried away by the mere the letters found therein. Any one who tries to rely on mere wordings but without keeping in mind the object and spirit of the document, would be considered as a person who has thrown the baby along with the bath water. Accordingly, this Court has to read those three documents and understand the real spirit of those documents. Had really Vattam Gopala Chetty and Chockanatha Chetty wanted to purchase the suit property for their own purpose, the recitals would have been different.

31. Once a Trust always a Trust, is the trite proposition of law, like one another proposition, "once a mortgage always a mortgage". The Trust property cannot be allowed to be dissipated in any manner. Accordingly if viewed, it is clear that there exist a Trust as per the deed.

32. The learned counsel for the defendants would argue that the said Chockanatha Chetty died issueless; whereupon Vattam Gopal Chetty alone was the only person entitled to the property and consequent upon his death on 24.08.1937, his son, C. Guruviah Chetty inherited the property and dealt with it as his own property and got his name recorded in the Corporation registers in that regard and collected the rents from the tenants whom he inducted in the suit property. Absolutely there is no smidgeon or molecular extent of evidence to support such contention of the defendants.

33. At this juncture, the learned counsel for the plaintiffs would convincingly point out that even if, according to the defendants, C. Guruviah Chetty is considered as the biological son of Vattam Gopala Chetty, the son of a Trustee could never become the absolute owner of the trust property. The embargoes as against the Trustees would also be applicable to the legal representatives of the trustee. They could only protect the property and not acquire it as owners and as such, the embargo contained in Section 10 of the Limitation Act would squarely be applicable as against C. Guruviah Chetty and his legal heirs D1 to D17.

34. At this context, I would like to refer to precisely the three broad defences taken by the defendants.

(1) C. Guruviah Chetty happened to be the absolute owner of the suit property, being the only biological son of Vattam Gopala Chetty.

(2) C. Guruviah Chetty acquired title by adverse possession over the suit property during his life time itself.

(3) C. Guruviah Chetty happened to be the reversioner of the said Chetpet Subbadramma Trust. (No back up of pleading).

35. In my considered opinion, these three defences are mutually antithetical to one another. The plea of adverse possession would presuppose the admission of ownership of the real owner and in such a case, the person who is pleading adverse possession cannot also plead that he happened to be the absolute owner by virtue of inheritance. One cannot plead prescription as against his own property. This is found exemplified in the following decision of the Hon'ble Apex

Court:

(i) P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, . An excerpt of it would run thus:

10. In that context it is relevant to refer to JA Pye (Oxford) Ltd. v. United Kingdom wherein the European Court of Human Rights while referring to the Court of Appeal judgment JA Pye (Oxford) Ltd. v. Graham made the following reference:

Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though limitation periods both limited the right of access to the Courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol.

11. This brings us to the issue of mental element in adverse possession cases - intention.

14. Importantly, intention to possess cannot be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialise.

18. On intention, Powell v. McFarlane is quite illustrative and categorical, holding in the following terms:

If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")

If his acts are open to more than one interpretation and he has not made in perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show

that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

(emphasis supplied)

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and the plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of waiving (wilful) or omission (negligent or otherwise) of the right to defend or care for the integrity of property on the part of the paper-owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that does not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the adverse possession law, it is important to understand its nuances from varied angles.

22. A peaceful, open and continuous possession as engraved in the maxim *nec vi, nec clam, nec precario* has been noticed by this Court in *Karnataka Board of Wakf v. Govt. Of India* in the following terms: (SCC p.785, para 11)

Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of

possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner.

31. Inquiry into the starting point of adverse possession i.e dates as to when the paper-owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and other facts such as the manner in which the possession operationalised, nature of possession: whether open, continuous, uninterrupted or hostile possession, have not been disclosed. An observation has been made in this regard in *S.M. Karim v. Bibi Sakina*: (AIR p. 1256, para 5)

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.

(emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In *Karnataka Wakf Board* it is stated: (SCC pp.785-86, para

12) A plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In *P. Periasami V. P. Periathambi* this Court ruled that: (SCC p.527, para 5)

Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with *Mohan Lal V. Mirza Abdul Gaffar* that is similar to the case in hand, this Court held: (SCC pp.640-41 4)

4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53 A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of

the suit. Thereby the plea of adverse possession is not available to the appellant.
(emphasis supplied)

36. The Hon'ble Apex Court dwelt on that point at length and referred to the maxim *nec vi, nec clam, nec precario* also. Accordingly if viewed, the pleas as put forth on the side of the defendants are mutually militating as against one another smacking mendacity and falsity. The third contention that Guruviah Chetty happened to be the reversioner of Subadramma Estate has been put forth for the first time in the written arguments before this court at the appellate stage and it is not having the back up of the pleadings also. I recollect the following maxim:

Judicis est judicare secundum allegata et probata - It is the proper role of a judge to decide according to the allegations and proofs.

37. The learned counsel for the respondent/plaintiff also cited the following decisions of the Honourable Apex Court as well as this Court.

(i) *Karnataka Board of Wakf Vs. Government of India and Others*, , certain excerpts from it would run thus:

12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: *S.M. Karim Vs. Mst. Bibi Sakina*, In *P. Periasami (Dead) by Lrs. Vs. P. Periathambi and Others*, this Court ruled that -"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property." The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with *Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another*, that is similar to the case in hand, this Court held:

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

(ii) Unreported judgement of the Honourable Supreme Court in SLP No. 28034/2011 dated 30.9.2011 - *STATE OF HARYANA v. MUKESH KUMAR AND OTHERS*.

(iii) One other decision of this Court reported in *Vadivelu Mudaliar Vs. C.N. Kuppuswami Mudaliar*, has also been cited by the learned counsel for the

respondents/plaintiffs. Certain excerpts from it would run thus:

34. After the death of Subbaraya, Natesa sought to get possession of the trust properties from Andalammal, the widow of Subbaraya (8th defendant) by Exhibit B-11 dated 16th January, 1939." Natesa was put in possession of some of the trust properties by the 8th defendant. Even before Natesa was put in possession of the trust properties, he executed a registered trust deed on 23rd December, 1938 (the registration copy of which is Exhibit A-2 and the original is Exhibit B-14). It may be necessary to note the recitals in the trust deed in detail as arguments were advanced by the counsel appearing for both sides in respect of the effect of the terms of the will. The recitals reproduced are as follows:

The properties more particularly described in the schedule hereunder and Worth about Rs. 15,000 originally Were belonging to my adoptive father Arunachala Mudaliar and he on 1st May, 1896, executed a will under Which he set up a charity (endowment) and after his life-time, my natural father, Murugesha Mudaliar and after him his son Rao Sahib CM. Subbaraya Mudaliar have been administering charity properties set out in detail hereunder for about 25 years. Since the aforesaid Subbaraya Mudaliar demised, from his wife Andalammal the charity properties described hereunder were taken charge and with a view to permanently carry out the Dharmas this deed of trust is executed. From out of the income derived from these properties after meeting the tax and repair expenses, not more than Rs. 250 shall be spent every year and Vasantha Utchavam of Shri Subrahmanyaswamy Kumarakottam, Kancheepuram. shall be celebrated. From out of the income of these properties, expenses should be made for lighting purposes in the aforesaid temple, carry out the repairs of the choultry set up by aforesaid Arunachala. Mudaliar in Tiruttani and for upkeep and watch and on every Krithiga day" ten pilgrims should be fed. After meeting these expenses the remaining amount shall be augmented and improved and in this way the administration of the properties shall be carried out. Out of the income derived from these endowed properties the charities set out herein shall be performed and under no circumstances the properties shall be alienated or encumbered and no one shall have any right in this regard. As these charities were established by my forefathers for the purpose of properly carrying out these charities and administer, one member from my family i.e., the eldest living shall be the permanent trustee of this Trust. Further my aunt's son, Valavanur Deivasigamani Mudaliar's son, Sethupathy Mudaliar and Porasai Murugesha Mudaliar, residing in No. 9, Subbaraya Mudali Street, these persons shall be the administrators under the Trust whom I have appointed With their consent. These and I, in all three trustees are bound in duty to carry out the charities properly. Among these two trustees, if at any time, vacancy is caused the remaining trustee or trustees can appoint a person or persons whom they consider fit as trustees. Always the trustees shall not exceed more than three. If at any time two vacancies are caused or if one vacancy is caused and disputes arise between the two remaining trustees, then with the help and in the presence of an elderly Honorary Presidency Magistrate appointment shall be made by casting lot in the

name of God. All the business transactions by the Trust Board shall be recorded in the Proceedings Book. Either I, or any of the Trustees shall have no manner of right either to cancel (revoke) or alter the deed of trust.

The deed has referred to Arunachala having set apart properties for the performance of charities under Exhibit A-1 and Murugesu and Subbaraya having administered the trust by performing the charities. Natesa, by this deed provided for the performance of charities mentioned therein from the income of the properties set apart for the trust and mentioned that if there is a surplus from the income after performing the charities, the surplus should be added to the trust and augmented and administered as properties of the trust, apart from appointing himself as a trustee and certain others, he chalked out a line of succession in respect of a permanent trustee by providing that an elder member of his family should be a permanent trustee as the trust was created for the performance of charities by the ancestors. He appointed two persons, namely, one Sethupathi Mudaliar and one Porasai Murugesu Mudaliar as trustees for the purpose of administering the trust along with him. It is the case of the respondents that the two trustees appointed by Natesa were not performing the charities and administering the trust as mentioned in Exhibit A-2. Murugesu Mudaliar,, one of the trustees appointed by Natesa under Exhibit A-2 who was examined as D.W. 3 stated that the trustees mentioned in Exhibit A-2 did not take possession of the properties or perform the charities and they did not agree to be the trustees. The plaintiff who examined himself as P.W. 1 admitted, in cross-examination that the trustees; mentioned in Exhibit A-2 did not take, possession of the properties.

75. D.W. 2 in his evidence stated that Natesa had mentioned two schedules in Exhibit B-1, but he did not leave any properties to the charity as mentioned in B schedule therein. He further stated as follows:

He (Natesa) wanted some charity to be performed from B schedule. It is mentioned in Exhibit B-1, that from the income got from "B" schedule properties the charities mentioned in "G" schedule which he was performing, should be performed...Natesa Mudaliar was a person with pious disposition.... I do not know the reasons why he mentioned in "G" schedule of Exhibit B-1 the charity which he was not performing. In Exhibit B-1, he has directed that Kalyanasundarammal should perform the charities mentioned in G schedule.

When this witness was confronted with the recitals in B schedule in Exhibit B-1, he had stated that the averment in Exhibit B-1, that he was performing the charities mentioned in G schedule was not completely correct and that when he (the witness) wrote Exhibit B-1, he knew that it was not completely correct. He, however, claimed ignorance of Exhibits A-1 and A-2. We have already noted that this witness during the time when he wrote Exhibit B-1, was the Assistant Secretary of the Home Department and he must have known while he wrote Exhibit B-1, the implications of the recitals in Exhibit B-1. The answers given by him in cross-examination create an impression that he was interested in securing

the properties for himself and his brother. We have also observed that in Exhibits A-1 and A-2, both Arunachala and Natesa respectively had stated that no one can alienate the trust property or encumber the same. It appears that the third defendant had purchased the property (item No. 4) without even looking into the prior documents for the purpose of finding out whether defendants 1 and 2 had title to item 4 at all, and if he had been prudent, he would not have purchased this property. The alienation of item 4 in favour of the third defendant is not for the benefit of the trust. The alienation in respect of this item has, therefore, to be set aside and accordingly it is set aside.

38. As such, the three pronged attack levelled as against the plaintiffs' case, ex facie and prima facie in view of my discussion supra, turned out to be misconceived ones, deserving no countenance.

39. Reverting back to the discussion relating to the Trust, I would like to point out that it is better to expect for some more evidence, in support of the Trust, over and above the words used in the aforesaid documents, Exs.A1, A17, A18 and A19, for which, the learned counsel for the plaintiffs would place reliance on Ex.A16 the photos and negatives of the inscription bearing the term "Subbadramma Choultry" found on the suit property. According to him, the said property was used as a choultry and C. Guruviah Chetty was asked to look after it, but he had not acted in commensurate with his duty and that alone resulted in this litigation.

40. The learned counsel for the defendants would dispute the genuineness of the photographs by contending that there is nothing to indicate that those photos were taken focussing the suit property; no door number is also available in the photos. For this I would like to observe that preponderance of probabilities would govern the adjudication in civil cases. Here Ex.A16-photos and negatives were marked at the time of trial itself. Nothing has been placed on record to buttress or fortify the plea of the defendants that the said name plate was put in some other building and photos were taken so as to use them as evidence in this case. It is not as though the said name plate "Subhadramma Choultry" in isolation, was photographed but the surrounding space and the background also could be seen in those photos. As such, the trial Court after analysing the deposition of P.W.1 as well as the photos and negatives, arrived at the conclusion that those photos were taken by focussing the suit property only. There is nothing to indicate that any police complaint was given at the time of allegedly fixing artificially the inscription plate on the suit premises for the purpose of fabricating false evidence by the plaintiffs as against the defendants.

41. The learned counsel for the plaintiffs also would convincingly and appropriately point out the oldness of the building and the location of the name plate "Subhadramma Choultry" by referring to such evidence discussed supra. Wherefore, the contention that the said name plate was fixed somewhere else and fabrication of evidence took place et al, in my considered opinion, is not based on sound reasoning and such a contention on the part of the defendants

cannot be countenanced and upheld by this Court. As such placing reliance on the aforesaid evidence, the learned counsel for the plaintiffs would correctly and legally, acceptably and convincingly submit that the available evidence could rightly be relied on for the purpose of holding that there is Chetpet Subbadrama Trust for charitable purpose and the suit property is the property of that trust. He would also contend properly that the said C. Guruviah Chetty betrayed the confidence reposed on him by uttering out bare faced lies and because of that alone, there occurred sales illegally at the instance of his legal heirs in favour of D18 in both the suits.

42. I could see no contra evidence or any other conflicting materials on the defendants' side to demonstrate and evidence that the Court should necessarily hold that there was no Trust and that the property was not dedicated for that charitable purpose.

43. My mind is redolent and reminiscent of the proposition that witnesses might lie, but circumstances would do so. As such, I proceed to discuss on other aspects of the matter to find out as to whether there is any tinge of truth in the contention of the defendants.

44. The defendants would contend that C. Guruviah Chetty happened to be the biological son of Vattam Gopal Chetty and that Nagarathinam Ammal being the daughter of Vattam Gopal chetty was not entitled to inherit the property of her father during the year 1937. One fact should be taken note of. Disregarding and throwing to winds the proposition of law that the legal heirs of a trustee cannot inherit the trust property, such contention was put forth on the defendants' side. Once it is held that the property is a Trust property and Vattam Gopal Chetty happened to be the Trustee, the question of applying the Hindu law of inheritance would not apply. It is a common or garden principle, that whenever a Trustee dies, his legal representatives, not necessarily only the legal heirs of the deceased trustee, could rightly manage the property till a proper trustee is appointed. Even a trustee de son tort could safe guard the trust property. At this juncture, Sections 73 and 75 of the Indian Trusts Act could fruitfully be referred to as under:

Section 73: Appointment of new trustees on death, etc. -Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months, absent from [India] or leaves [India] for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a Principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by-

a] the person nominated for that purpose by the instrument of trust (if any), or

b] if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the

last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee, the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

.....

Section 75. Vesting of trust property in new trustees - Whenever any new trustee is appointed u/s 73 or Section 74, all the trust property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers of new trustee - Every new trustee so appointed, and every trustee appointed by a court either before or after the passing of this Act shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

(emphasis supplied)

45. Palpably and pellucidly, it is clear that even a legal representative of a deceased trustee for the purpose of protecting the Trust property could act as a trustee. The evidence on record would demonstrate and evince that C. Guruviah Chetty happened to be the son of Pattabiram Chetty but the defendants produced two death certificates of C. Guruviah Chetty, one showing that he was the son of Vattam Gopala Chetty [Ex.B2] and one other death certificate of the same C. Guruviah Chetty showing that he was the son of Pattabiram Chetty(Ex.A27) but Ex.A27 was produced by the defendants to the Tahsildar who in turn, produced before the Court on being summoned. Ex.A3 is similar to as that of Ex.A27.

46. Ex.A2 is the certified copy of the voters list of the year 1984, which would show that Guruviah Chetty's father's name was Pattabiram Chetty.

47. To say the least, hill of beans were sought to be relied on by the defendants to buttress and fortify their untenable pleas.

48. There is one other point incidentally I would like to highlight here. The

contention of the defendants/appellants is to the effect that the said C. Guruviah Chetty, being the biological son of Vattam Gopala Chetty, was adopted by Pattabirama Chetty and such a fact, according to the defendants is found evinced and evidenced in the proposed additional two documents, which they seek to file in the appeals by virtue of M.P.Nos.1 of 2011 in A.S. No. 582 of 2006 and M.P. No. 1 of 2011 in A.S. No. 583 of 2011, which are as under:

1. Certified copy of the discharge of mortgage dated 12.4.1929

2. Certified copy of the bond dated 9.10.1931

49. A perusal of the written statement of D1 would smack vagueness as vagueness could be. In very many terms, in the written statement, C. Guruviah Chetty was not stated to be the biological son of Vattam Gopala Chetty and that subsequently C. Guruviah Chetty was adopted by Pattabirama Chetty.

50. D1 vaguely would contend in the written statement as under:

10..... Assuming but not admitting, Vattam Gopala Chetty was not the father of C. Guruviah Chetty, C. Guruviah Chetty was owner of the suit property and discribed as such owner unconnected with alleged estate of Chetpet Subbadramma in Municipal and Revenue Records for over 50 years and thereby perfected his title to the suit property and the allegation to the contrary is false.

51. If really D1 had a categorical case that Guruviah Chetty happened to be the biological son of Vattam Gopala Chetty, she should have pleaded it clearly in the written statement and she should also pleaded her case that Pattabirama Chetty adopted C. Guruviah Chetty.

52. I recollect and call up the following maxims:

(i) Suppressio veri suggestio falsi- Suppression of the truth is equivalent to the suggestion of what is false.

(ii) Suppressio veri, expressio falsi - Suppression of the truth is equivalent to the expression of what is false.

Since the defendants are having no specific case of their own, the written statements smack their uncertainty about their own pleas.

53. The learned counsel for the plaintiffs would cite the following decisions of the Honouable Apex Court:

(i) (2007) 14 SCC 257 - K.R. Mohan Reddy V. Net Work Inc. Represented Through Md.

15. The High Court, in our opinion, failed to apply the provisions of Order 41 Rule 27 CPC in its correct perspective. Clauses (a), (aa) and (b) of sub-rule (1) of Rule 27 of Order 41 refer to three different situations. Power of the appellate court to pass any order thereunder is limited. For exercising its jurisdiction thereunder, the appellate court must arrive at a finding that one or the other

conditions enumerated thereunder is satisfied. A good reason must also be shown as to why the evidence was not produced in the trial court.

17. It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary.....

18. The Supreme Court in *State of Gujarat v. Mahendrakumar Parshottambhai Desai*¹ relying upon *Municipal Corpn. of Greater Bombay v. Lala Pancham*² held as under: (SCC p. 775, para 10)

"10. ... though the appellate court has the power to allow a document to be produced and a witness to be examined under Order 41 Rule 27 CPC, the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision did not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in the case. It does not entitle the appellate court to let in fresh evidence only for the purposes of pronouncement of judgment in a particular way."

19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction. While saying so, however, we do not mean that the court at an appropriate stage would be precluded from considering the applicability of clause (b).

20. We are, therefore, of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly.

The respondent may file additional affidavit in support of its application under Order 41 Rule 27 CPC within two weeks from the date of receipt of copy of this order. The appellant may file his response both to the original application as also the additional affidavit, if any, within four weeks thereafter.

ii) *Malayalam Plantations Ltd. Vs. State of Kerala and Another*, .

This precedent is also in pari materia with the aforecited decision.

A mere perusal of those precedents would clearly show that in the factual matrix, as set out supra, such additional documents are not at all to be entertained.

54. Even for argument sake it is taken that by 1929 or before that itself, C. Guruviah Chetty became the adopted son of Pattabirama Chetty, yet his capacity as the biological son of Vattam Gopala Chetty would not get erased. Only for the purpose of inheriting the absolute properties of Vattam Gopala Chetty, there might be embargo for C. Guruviah Chetty, after he became the adopted son of Pattabirama Chetty, because the law of adoption would connote and denote that after adoption, he could not inherit the properties of his biological father. But here, the position is that C. Guruviah Chetty being the biological son of Pattabirama Chetty cannot, even by posing himself as the adopted son of Pattabirama Chetty, claim adverse possession, because, the embargo contemplated under the law of trust and limitation, as discussed supra is absolute. A biological son of a trustee, for the purpose of claiming adverse possession, cannot pose himself as the adopted son of one other person and contend that in as much as he became the adopted son, he could acquire adverse possession. No legal representation of the deceased trustees could acquire title in any manner over the trust property. Wherefore, in my considered opinion those two additional documents sought to be filed are not at all borne by pleadings and those documents are also not germane for this case. Hence, the MP.Nos.1 of 2001 in both the appeals are liable to be dismissed.

55. As such in this case, the controversy relating to the fact as to whether C. Guruviah Chetty was the biological son of Vattam Gopala Chetty and thereafter became the adopted son of Pattabiram Chetty, or whether he was only the biological son of Pattabiram Chetty got atrophied and such a plea turned out to be a weak, meek or bleak one also, for the reason that if he happened to be the biological son of Vattam Gopala Chetty, he cannot acquire title by inheritance or by prescription. A biological son of a trustee can never inherit the property over which his father was the trustee. Further more, if the biological son of a trustee enters into possession of the Trust property under his father or on his father's death, once again he being the legal representative of the trustee, as per law is enjoined to protect the trust property and such a person cannot also plead adverse possession and Section 10 of the Limitation Act squarely operates as against C. Guruviah Chetty herein.

56. At this juncture, I would like to extract here u/s 10 of the Limitation Act:

10. Suits against trustees and their representatives - Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Explanation - for the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property

shall be deemed to be the trustee thereof.

(emphasis supplied)

57. A mere reading of the said Section would unambiguously and unequivocally convey and portray the fact that no trustee or his legal representatives can plead prescription. Here the defendants pleaded that they are the legal heirs of C. Guruviah Chetty, the biological son of Vattam Gopal Chetty, who was one of the original trustees of the said Trust and in such a case, his legal representatives cannot plead adverse possession at all and even any act of ownership exercised by C. Guruviah Chetty quite antithetical to the legal embargoes, the Court cannot countenance on the part of C. Guruviah Chetty as ones enuring to his benefit for acquiring title over the suit property. The whole kit and caboodle of facts and evidences would exemplify and establish that the alleged acts of C. Guruviah Chetty were extra jus.

58. To the risk of repetition and pleonasm, but without being tautologous, I would like to point out that a Trust is always a Trust. u/s 10 of the Limitation Act, the terminology "legal representative" also is contemplated specifically. Exception is only in favour of bona fide assignees and not for legal representatives. At any rate, a legal representative of a Trustee cannot plead that Section 10 of the Limitation Act would not be operative as against him, because the law enjoins a legal representative of a Trustee to protect the trust property till a proper trustee is appointed. Wherefore, the lower Court in my considered opinion appropriately and appositely ushered in Section 10 of the Limitation Act also and decided the lis.

59. At this context, I would like to refer to the decision cited on the side of the appellants/defendants.

Jagadguru Gurushiddaswami Vs. Dakshina Maharashtra Digambar Jain Sabha, certain excerpts from it would run thus:

3. To appreciate the contentions that have been canvassed before us, a brief resume of the material facts will be necessary. The plaintiff appellant in the spiritual head or Mathadhipati of a Lingayet Math known as Murusavirmath situated within Hubli Taluka in the district of Dharwar. On November 13, 1887, Gurusidhwaswami, who was the then head of this religious institution, granted a permanent lease of a tract of land belonging to the Match and forming part of R. S. No. 34, in favour of one Pradhanappa and the rent agreed to be paid by the lessee was Rs. 50 per annum for the first six years and thereafter at the rate of Rs. 25 annually. On June 19, 1892, Pradhanappa sold a portion of the leasehold property, which is described in Schedule 1(b) to the plaint, to a person named Bharamappa. In 1897 Gurusidhwaswami died and was succeeded by his disciple Gangadhar Swami who did not repudiate the permanent lease granted by his predecessor and went on accepting rents from the lessee in the same way as before. In April, 1905, another part of the land, which is described in Schedule 1(a) to the plaint, was put up for sale in execution of a decree against

Pradhanappa's heirs and it was purchased by one Kadayya, and Kadayya in his turn sold the same to Bharamappa who had already purchased Schedule 1(b) plot by private purchase. On April 8, 1910, Bharamappa made a gift of the entire premises consisting of plots 1(a) and 1(b) to the Dakshina Maharashtra Digambar Jain Sabha, a registered body, for the purpose of building a school upon it for the education of Jain students. On August 31, 1920, Gangadhar Swami died and for some time after his death the affairs of the Math were in the hands of a committee of management. On November 25, 1925, the present plaintiff Gurusidhaswami became the head of the Math. On August 27, 1932, the plaintiff instituted a suit, being Suit No. 80 of 1932, against the heirs and successors of Bharamappa for recovery of possession of the land comprised in the permanent lease on the allegation that there being no legal necessity for granting the lease, the alienation was not binding on the Math and became void on the death of the last Mahant. The Jain Sabha was impleaded as defendant No. 23 in the suit, but under a wrong name. The suit was dismissed by the trial judge but on appeal by the plaintiff to the High Court of Bombay, the trial court's judgment was reversed and the plaintiff's claim for khas possession was allowed in respect of the suit land against all the defendants with the exception of defendant No. 23 who was dismissed from the suit on the ground of misdescription. The judgment of the High Court is dated the 26th of November, 1942. On 3rd December, 1943, the plaintiff appellant commenced the present suit against the respondent Jain Sabha claiming khas possession of the land gifted in its favour by Bharamappa, alleging that as the original permanent lease was not binding on the Math for not being supported by legal necessity, the defendant could not acquire any title by grant from the successor of the lessee. The defendant Sabha resisted the suit and the two material questions round which the controversy centered were : (1) whether the original permanent lease was supported by legal necessity, and even if it was not, (2) whether the plaintiff's suit was barred by limitation under article 134-B of the Indian Limitation Act ? The trial judge decided the first point in favour of the plaintiff, but on the question of limitation the decision was adverse to him. The result was that the plaintiff's suit dismissed. Thereupon the plaintiff took an appeal to the High Court of Bombay and the learned Judges, who heard the appeal, concurred in the decision of the court below and dismissed the appeal and the suit. It is the propriety of this decision that has been challenged before us in this appeal.

8. As regards the other ground raised by the Attorney-General, we are of opinion that the point is without any substance, and Section 10, Limitation Act is of no assistance to the plaintiff in the present case. In order that a suit may have the benefit of Section 10, it must be a suit against a person in whom the property has become vested in trust for any specific purpose or against his legal representatives or assigns, not being assigns for valuable consideration. It may be taken that the word "assign" is sufficiently wide to cover a lessee as well; but the difficulty is, that as the lease was for valuable consideration the case would come within the terms of the exception laid down in S.10 and consequently the

defendant would not be precluded by reason of the fact that the property was to his knowledge a trust property, from relying on the provisions of the statute which limit the time within which such suits must be brought.

The Attorney-General contended rather strenuously that the transfer here was not for valuable consideration inasmuch as the rent reserved for a large tract of land which had immense potential value was Rs. 50 only for the first six years and the again it was to be reduced to Rs. 25 which would continue all through. We desire to point out that the expression "valuable consideration" has a well known connotation in law and it is not synonymous with "adequate consideration". It may be that judged by the standard of modern times, the rent reserved was small; but as has been found by both the courts below the consideration was not in any sense illusory having regard to the state of affairs prevailing at the time when the transaction took place. This is a concurrent finding of fact which binds us in the appeal.

60. A bare poring over and perusal of the above precedent would highlight that it was a case wherein their Lordships of the Supreme Court held that for the purpose of protecting the trust property, the Court was approached long after 12 years from the date of such occurrence of transfer of the trust property and as such, in the facts and circumstances, the said precedent cannot be pressed into service by the defendants because he plaintiffs herein set the law in motion shortly after the emergence of Exs.A5 and A6-the sale deeds in favour of D18 in both the suits.

61. The learned counsel for the defendants would argue that admittedly the plaintiffs were not in physical possession of the property; the corpus possessionis was not with them and in such a case, how can they be termed as persons having locus standi to file the suit so as to protect the alleged Trust property. Inveighing and refuting such argument, The learned counsel for the respondents/ plaintiffs would submit that Vattam Gopala Chetty during his life time administered the suit property by leasing it out to tenants and collected rents; while so, the tenants had been in occupation for a pretty long time and the tenants' possession tantamount to possession of the Trust and there could be no doubt about it. In this context, I would like to extract here under the concepts "corpus possessionis and "animus possidendi", as found in the famous treatise Salmond's Jurisprudence 12th Edition page Nos.272 and 273.

Salmond considered that possession consisted of a corpus possessionis and an animus possidendi. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant.....

The test then for determining whether a man is in possession of anything is

whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others. (emphasis supplied)

It is quite apparent that the aforesaid concepts "animus possidendi" and "corpus possessionis, as extracted supra, would adequately explain the position.

62. There are two elements involved in the concept possession, namely, "corpus possessionis" and "animus possidendi" The owner need not necessarily be in physical possession at all times. His possession through his tenant would be sufficient to constitute the owner's possession. It all depends upon the animus. Here in this case, on the one hand, the plaintiffs would contend that the tenants have been in occupation of the suit property and recently that is pendente lite the tenants were dispossessed by D18 through Rent Control Proceedings; whereas, on the defendants' side it has been contended that those tenants were not at all the tenants under the plaintiffs or under the alleged Trust, but they were tenants inducted by C. Guruviah Chetty.

63. C. Guruviah Chetty as per the defendants themselves happened to be the biological son of Vattam Gopala Chetty, who happened to be one of the original trustees; the relative of Vattam Gopala Chetty cannot be heard to say that while he was in possession of the property, he inducted his own tenants and that those tenants happened to be tenants independent of the Trust. A fortiori, I hold that the defendants plea itself is fraught with inconsistencies and mendacity and it cannot be countenanced as legal. As has been already highlighted supra, if possession is through the tenant, that would be sufficient for the trust, the legal heirs of the trustee to seek injunction for the purpose of protecting the interest of such tenants and in such a case, the contention on the part of the defendants falls foul of the admitted settled propositions of law.

64. The learned counsel for the defendants would also submit that there is not even a miniscule extent of evidence to convey or portray that rents were collected by the plaintiffs, but voluminous evidence produced to show that C. Guruviah Chetty collected the rents. Any amount of dilation in the argument centering on C. Guruviah Chetty would boomerang as against the defendants, in view of my discussion supra.

IN RE EVIDENCE RELATING TO PUBLIC RECORDS:

65. The appellants/defendants would, by placing reliance on Exs.B2, B11, B13 to B37, B43 and B44, would submit that in the official records, the name of Guruviah Chetty got incorporated as owner of the suit property and accordingly, the suit property was treated as his absolute property.

66. At this juncture, I recollect and call up the following maxims:

(i) Nul Prendra advantage de son tort demesne - No one shall take advantage of his own wrong.

(ii) Nullus commodum capere potest de injuria sua propria - No one can gain advantage by his own wrong.

67. A person cannot capitalize his own mistake or wrongful act. The learned counsel for the plaintiffs/respondents would dispute the correctness of the plea taken by the defendants/appellants that it was C. Guruviah Chetty who paid taxes to the Corporation and to other authorities relating to the suit property. According to him, the name of original Guruviah Chetty, so to say, the grant father of the vendor under Ex.A21 is referred to in those official records and receipts.

68. Ex.A31 is the copy of the report of the Deputy Thasildar concerned; Ex.A32 is the notes of the Deputy Thasildar and they are extracted hereunder:

Ex.A.31-Tmt.C.Nagamanikya and 13 others have applied for issue of patta for R.S. No. 6543 of Voc.

I submit my report as follows:

On the three points raised in the forwarding endorsement:

(1) The applicant is not having any records with him to show how the applicant's husband came into possession of the property R.S. No. 6543. She is not also in a position to prove the ownership of the above property by her husband. Hence, the ownership could not be established by her.

(2) and (3) The applicant has produced xerox copy of the Comp. Tax receipt for 1/91-92, 2/58-59, 1/57-58 and xerox copy of the legal heir certificate No. 00297/91 dt 29.1.92 of F.T.Tk and death certificate of Guruviah Chetty in original. The house is occupied by tenants. Enquiry with the tenants shows that they are paying rent to the applicant.

(emphasis supplied)

Ex.A.32-File to the R.S.III he should submit his report on the following points:

1) R.S. No. 6543 of V.O.C. Nagar stands registered in the name of V. Gopala Chettiar. V. Gopala Chetty become the R.H. Of property as per release deed Doc. No. 4203 of 1926. He should verify how the applicant's husband come into possession of the property.

2) He should also verify possession of the property and state whether the applicant or her late husband was paying the property tax for the past 13 years.

3) A xerox copy of the legal heir certificate already issued by this office should be received from the applicant.

(emphasis supplied)

69. The above exhibits would clearly show as to how D1 to D17 were not justified in trying to get incorporated their names in the Chennai Corporation Register

relating to the suit property as though they are the owners. In the wake of it, reliance placed by the defendants on Ex.B1, Ex.B11, B13, B18 to B36, B43 and B44 (tax receipts and other related receipts issued by the authorities) can never be taken as weighty evidence showing their alleged ownership of C. Guruviah Chetty over the suit property.

70. I am of the considered view that even assuming for argument sake that the records stood in the name of C. Guruviah Chetty, my discussion supra would answer the plea of the defendants/appellants that C. Guruviah Chetty-the legal representative of Vattam Gopala Chetty, even by paying taxes in his own name or getting his name incorporated in the records relating to the suit property, cannot be deemed to have acquired any legal right, quite antithetical to the well established law that a legal representative of a trustee cannot become the owner of the trust property.

71. For comprehensively dealing with the matter, I would like to continue the discussion relating to Exs.B11, B13 to B37, B44 and B45.

72. The deposition of P.W.3 -the then Tahsildar, would reveal that even though in Ex.A26-the petition given by Nagamanickiah, there was a reference to a sale deed allegedly got executed by C. Guruviah Chetty in her favour relating to the suit property, no such sale deed was produced by her. It is therefore just and necessary to refer to Ex.A26:

73. I would like to extract hereunder the contents of the said Ex.A26 itself for better appreciation.

The property under R.S. No. 6543 at V.O.C. Nagar bearing old No. 40, New No. 20, Ramakrishna Street, Madras-1 has been purchased from one Thiru. Vuppala Pulliah during the year 1926 (document No. 4203) by my husband Thiru - C. Guruviah Chetty and he died on 17.7.1989. He left behind me with 13 children as his legal heirs. In this connection, I enclose herewith a copy of sale deed, Old patta, for the above property, a copy of the death certificate of my husband issued by the Corporation of Madras and a copy of the Legal heirship certificate issued by the Tahsildar, Fort - Tondiarpet Taluk, Madras-1 vide D.Dis. (AS)/00297/91, dt.29.1.91 with Sl. No. 37/92 dt.29.1.92 for your kind perusal. I request that necessary changes in the names to be made in the old patta and issue me a fresh patta in my favour with 13 others of my childrens and oblige.

(emphasis supplied)

74. The averments underlined as found set out in Ex.A26 is, obviously and axiomatically a bare faced lie which displays and demonstrate that the legal heirs of the deceased C. Guruviah Chetty were bent over backwards to get the public record mutated with their blatant black lies and virtually they hoisted with their petard. Hardly they realised that they shot themselves in the foot. It is not the categorical case of the defendants in the written statement that C. Guruviah Chetty purchased the property at any time, but in Ex.A26, such a plea is found

dished out by them. As such, the learned counsel for the plaintiffs would acceptably project and portray the conduct of the defendants to the effect that they had the mala fide intention to get mutated the Corporation records, as though they are the owners of the suit property.

75. P.W.3-the Tahsildar would further depose that Ex.B27 (Ex.A18) along with the tax receipts were produced by Nagamanickiah to the then Tahsildar, and based on that, mutation was got effected. He would also refer to Ex.B.28 series - the water tax receipts.

Ex.A28 is reproduced here under for ready reference:

Statement of Tmt. C. Nagamanikya w/o.Guruviah Chetty, residing at No. 108, Varada Tuttiahappam Street, Madras-1.

I am the wife of C. Guruviah Chetty and my age is 72. My husband bought the property in R.S. No. 6151 and 6543 of VOC Nagar. My husband died on 17.7.89 leaving behind him the following as his surviving legal heirs.

1. Nagamanickaya
2. Ragavendra Arya
3. Mayurinathan
4. Balaji
5. Krishna
6. Gurumurthy
7. Sathinarayanan
8. Viswanathanall sons
9. Rajeswari
10. Rathna
11. Anuradha
12. Umamahiswari
13. Giruja
14. Padma all daughters.

We the legal heirs of Guruviah Chetty are in possession of the above two properties after his death. The present door Nos. of the properties are 108, Varadha Muthiappan St., and 20, Ramakrishnan St., Madras-1.

I hereby declare that there are no other legal heirs to Guruviah Chetty except the above 14 persons.

I also declare that there are no other person claiming ownership for the above

two properties. We are the only owners for the above two properties and there is no dispute or case is pending in any Court of law.

I hereby declare what is stated above is true to the best of my knowledge and belief. I have not conceded any facts or given anything false.

G. Nagamanikya.

76. As such, P.W.3-the Tahsildar would depose that mutation was wrongly effected in the name of the legal heirs of C. Guruviah Chetty during the year 1992, at a time when the matter was not scrutinized as keen as mustard. Hellacious lies were put forth before the public authority and it cannot be glossed over by using Churchillian term "terminological inexactitude" were uttered out by the defendants.

77. At this juncture, I would like to refer to the following decision of the Honourable Apex Court *The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao*, , certain excerpts from it would run thus:

9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, .

10. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. (See *Ram Chandra Singh Vs. Savitri Devi and Others*, ."

In fact the said decision reiterates the maxim "*fraus et just nunquam cohabitant* - Fraud and justice never dwell together.

78. It is quite obvious that such effecting of mutation was wrong and illegal, because Ex.B27 (Ex.A18) is not a sale deed in the name of C. Guruviah Chetty, but it was a confirmation deed executed by the quondam minor, who became major, confirming the sale deed as found exemplified in Ex.A1.

79. I recollect the maxims:

(i) "Naturali ratione inutilis"

(ii) "Non videntur qui errant consentire" - They who err are not considered as consenting

Any act performed out of misconception should be held to have got vitiated.

80. There is also one other point which I would like to spotlight and indicate. Had really C. Guruviah Chetty, during his life time validly got his name incorporated by way of mutation relating to the suit property in the Corporation records, then further probe might not have been under taken by the Corporation officials, because, the Tahsildar/Corporation was expected to ascertain as to who were the legal heirs of C. Guruviah Chetty, whereupon, he was expected to incorporate the name of the legal heirs in the place of C. Guruviah Chetty. The very thing that the Tahsildar did choose to embark upon the task of enquiring into the fact as to how C. Guruviah Chetty acquired the suit property itself exemplifies and demonstrates that the name of C. Guruviah Chetty was not incorporated legally in the registers concerned in the Corporation.

81. The "onus probandi" is ambulatory and not static. Regarding each and every plea it has to be considered as on whom the burden lies to prove such plea. Here, the appellants/defendants came forward with the categorical plea that there occurred mutation, but the evidence on the defendants' side, as discussed supra, is murky and not at all straight forward and clear, on the other hand, it speaks against them. As such, the deposition of PW.3, coupled with those documents analysed supra would clearly show that legally C. Guruviah Chetty had not acquired any title over the suit property and consequently, his legal heirs cannot claimed to be the absolute owners of the suit property.

82. It is also common knowledge that so far Municipal authorities and Revenue authorities are concerned, they are in the habit of receiving taxes from persons, who pays the tax without verifying in whose name the records stand and whether the person pays the tax is under the legal liability to pay such tax. But in some cases, they are meticulous in specifying in the tax receipt the name of the original owner and incorporating the name of the person who pays the amount, but that is not scrupulously followed in all cases. As such, on surmises and conjectures, the Court cannot come to a conclusion in favour of the defendants. If at all there had been any mutation in favour of C. Guruviah Chetty, there must be some specific order to that effect. In the absence of such order, there could be no presumption that C. Guruviah Chetty was treated as the owner by the Corporation.

83. The learned counsel for the appellants/defendants would put forth his arguments to the effect that the plaintiffs were not at all entitled to seek a prayer for getting the sale deeds-Exs.A4 and A5 declared as void, as Section 31 of the Specific Relief Act does not enure to their benefit. In support of his contention,

he would cite the following decisions:

1. Muppudathi Pillai Vs. Krishnaswami Pillai and Others,

11. In order to appreciate the principle on which the aforesaid decisions are based, it is necessary to refer to the relevant provisions of the Specific Relief Act. Section 41 of the said Act is contained in Chapter V which deals with the cancellation of the instruments. It runs:

On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

It is clear from the provisions of the section that the jurisdiction to award compensation would arise when the Court adjudges the cancellation of an instrument. The relief as to cancellation of an instrument is provided for u/s 39 of the Act. It becomes, therefore, relevant to consider as to what are the cases to which Section 39 would apply and whether it would comprehend the case of an instrument executed by a person claiming under a title different from and hostile to the person "seeking cancellation. Section 39 states:

Any person against Whom a written instrument is void or voidable, Who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

It may be noticed that the above section applies not merely to the case of an instrument which is voidable but also one that is void. Section 35 provide for the case of rescission of voidable contracts. It is evident that Section 39 covers not only a case contemplated u/s 85, but also a wider field, that is, a case of a void document, which under the law need not be set aside.

12. The principle is that such documents though not necessary to be set aside may, if left outstanding, be a source of potential mischief. The jurisdiction u/s 39 is, therefore, a protective or a preventive one. It is not confined to a case of fraud, mistake, undue influence, etc., and as it has been stated it was to prevent a document to remain as a menace and danger to the party against whom under different circumstances it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. If that were so he might be in a disadvantageous position if the impugned document is sought to be used after the evidence attending its execution has disappeared. Section 39 embodies the principle by which he is allowed to anticipate the danger-and institute a suit to cancel the document and to deliver it up to him. The principle of the relief is the same as in quia timet

actions.....

16. Let us take as example a trespasser purporting to convey the property in his own right and not in the right of the owner, In such a case a mere cancellation of the document would not remove the cloud occasioned by the assertion of a hostile title, as such a document even if cancelled would not remove the assertion of the hostile title. In that case it would be the title that has got to be judicially adjudicated and declared, and a mere cancellation of an instrument would not achieve the object. Section 42 of the Specific Relief Act would apply to such a case. The remedy u/s 39 is to remove a cloud upon the title, by removing a potential danger but it does not envisage an adjudication between competing titles. That can relate only to instruments executed or purported to be executed by a party or by any person who can bind him in certain circumstances. It is only in such cases that it can be said there is a cloud on his title and an apprehension that if the instrument is left outstanding it may be a source of danger. Such cases may arise in the following circumstances. A party executing the document, or a principal in respect of a document executed by his agent, or a minor in respect of a document executed by his guardian de jure or de facto, a reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by the benamidar, etc. This right has also been recognised in respect of forged instruments which could be cancelled by a party on whose behalf it is purported to be executed. In all these cases there is no question of a document by a stranger to the title. The title is the same. But in the case of a person asserting hostile title, the source or claim of title is different. It cannot be said to be void against the plaintiff as the term void or voidable implies that but for the vitiating factor it would be binding on him, that is, he was a party to the contract.

There is one other reason for this conclusion. Section 39 empowers the Court after adjudicating the instrument to be void to order the instrument to be delivered up and cancelled. If the sale deed is or purported to have been executed by a party, the instrument on cancellation could be directed to be delivered over to the plaintiff. If on the other hand such an instrument is executed by a trespasser or a person claiming adversely to the plaintiff it is not possible to conceive the instrument being delivered over not to the executant but his rival, the plaintiff.

(ii) Joseph Carlos, Xavier Louis Anthony Benedict Aldo Costa Vs. Stanislaus Costa and Others, ;

(11) Bearing these principles in mind, we have to consider whether there was fraud and collusion by the mission authorities in dealing with the executor and in purchasing the suit properties. We have also to consider whether there is any evidence that the trustee misapplied the sale consideration. There is evidence to show that the mission authorities were interested in the family of the defendants in one of the letters addressed by the third defendant (exhibit A-42) to the mission authorities, he acknowledged the valuable services and timely help

rendered by them to his family at a very critical moment. The third defendant carried on a lengthy correspondence with the mission authorities after the sale for a period of twelve years. He could have charged the mission authorities in any one of the numerous letters that they had played a fraud. He never made any such suggestions; nor did he charge them with having colluded with his brother with a view to conferring an advantage upon him; nor even that the properties were sold for an inadequate price. On the other hand, he requested them to use their influence to settle his claim with the first defendant not only in respect of the suit properties but also in regard to the various other disputes existing between himself and the first defendant. Though it was not their concern to interfere in the family affairs, still the mission authorities with the zeal of missionary spirit, used their influence and prevailed upon the brothers to come to an amicable arrangement which resulted in the exchange of letters, exhibit B-9 and exhibit B-10, thereby ratifying the sale effected by the first defendant in favour of the tenth defendant.

The mission authorities, before they took the conveyance from the first defendant, obtained legal opinion that the instrument, i.e., the Will of Joseph Costa (senior) authorised the executor to sell the suit properties for the purpose of administering the estate. The recitals in the sale deed state that the first defendant had paid all the legacies as directed by his father in his Will, from and out of the moneys raised by him on loan, not carry out the directions for payment of the legacies to the various beneficiaries excepting the fifth defendant who is one of the daughters of Joseph Costa (senior) and also a legatee under the Will. Even the evidence of the fifth defendant who supported the case of the plaintiff is to the effect that though she has not been paid her annuity at the rate of Rs. 10 per mensem, she did not take any proceedings against the executor (first defendant). It is true that at the time of taking the conveyance from the executors, the mission was aware that certain directions had been given to the executor to sell the suit properties in order to carry out the obligations created by the Will, it was also informed that the first defendant had paid all the legacies. At that time, it was not aware nor was it possible for it to know that the first defendant was not intending to purchase immovable properties in Ceylon, from and out of the sale proceeds as directed by the testator. But an assurance was given by the trustee that he was selling the suit properties under his unfettered power of sale not only for the purpose of discharging all the legacies but also to purchase immovable properties in Ceylon. There is no evidence adduced to show that the mission authorities colluded with the first defendant in the misapplication of the sale proceeds.

.....

(12) The next question for consideration is whether the subsequent purchasers from the tenth defendant, i.e., defendants 11 and 12, were liable to answer the claim of the plaintiff, Mr. Gopalaswami Ayyangar, learned Counsel for the eleventh and twelfth defendants, contended before us, that the first defendant

had a dual capacity, viz., he was appointed as executor to sell the suit properties and he was also directed to invest the residue of the sale proceeds in purchasing immovable properties in Ceylon. The first defendant might have failed to invest the surplus of the sale proceeds in purchasing immovable properties in Ceylon. But the first defendant as executor, had an unfettered power to sell the suit properties, and he exercised that power by conveying the properties to the tenth defendant, from whom his clients purchased the properties. It is true that there are recitals in the sale deed that there was a Will executed by Joseph Cost (senior) appointing the first defendant as executor to sell the suit properties and invest the surplus of the sale proceeds in purchasing properties in Ceylon. But, as subsequent purchasers from the tenth defendant, they should not be charged as parties to the breach of trust, even if there was any. They are bona fide purchasers for valuable consideration. The plaintiff has not alleged in his plaint not adduced any evidence to prove that defendants 11 and 12 had any mala fides in purchasing the suit properties. they had no notice of any breach of trust excepting the existence of an instrument, viz., the Will of Joseph Costa (senior). The mere notice of an instrument, viz., the Will of Joseph Costa (senior) in the sale deed could not be deemed to be notice of the breach of trust. Keeton in his law of Trusts (eighth edition) at page 338, while dealing with the special rights of a beneficiary, says:

..... a purchaser without notice from a purchaser with notice takes the legal estate free from the beneficiary's interests for his own good faith shelters him.

Further, the eleventh and twelfth defendants purchased the suit properties from the tenth defendant, after twelve years from the date of the original sale in the year 1932. The learned District Judge negatived the plaintiff's claim on this ground, namely, that the plaintiff had no right to follow the trust property in the hands of the defendants 11 and 12, as they had purchased the properties after the tenth defendant had perfected title by adverse possession. We agree with and we hold that the eleventh and twelfth defendants are not in any way liable to the claim of the plaintiff.

....

(22) In that connection, they referred to a decision of the Privy Council in AIR 1923 175 (Privy Council) where in the presence of a purchaser it was declared that the trust had been validly created and that the property was in fact trust property. At the time when the decree was passed the possession of the property was adverse, and no further step was taken in consequence of the declaration immediately, and when they filed the suit after some time, it was too late. Relying on the above observations, learned Counsel for the tenth defendant contended that even though there is a declaration and even though the appellant succeeded in getting a new administrator appointed and even if the new administrator would take steps for recovery of the properties, still his client would be entitled to avail himself of article 144 of the Limitation Act. In any event, u/s 10 of the Limitation Act, the 10th defendant would be protected, as he

was a bona fide purchaser for valuable consideration. We have already held that the mission authorities did not concert with the executor by obtaining the trust property at a nominal price or at a fraudulent value or in extinguishing the private debt of the executor or in any other manner contrary to the duty of the office of the executor.

Therefore, whether article 134 or article 144 applied, the plaintiff's suit must fail, on the ground that the sale in favour of the tenth defendant was valid and binding on him, as his father (third defendant) on behalf of himself and his son (plaintiff) settled the disputes, adjusted the claims and agreed to receive some portion of the immovable properties belonging to the first defendant in full and final discharge of the suit claim.

(23) In the result, the appeal is demised. In the circumstances, there will be no order as to costs."

(iii) Debi Prasad and Others Vs. Smt. Maika and Others,

4. Section 31(1) of the Specific Relief Act is in these terms:-

31 (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable and the court may, in its discretion, so ad-judge it and order it to be delivered up and cancelled.

It is clear from a reading of Section 31(1) that a suit for cancellation of a written document can lie only at the instance of a person against whom the instrument is void or voidable and secondly who has a reasonable apprehension that such instrument, if left outstanding, will cause him serious injury. I am of opinion that this is not a case in which it can be said that the sale-deed impugned by the respondents was void or voidable against them. The question whether an instrument can be said to be void or voidable against a person claiming relief under the aforesaid provision came to be considered by a Full Bench of the Madras High Court in the case of Muppudathi Pillai Vs. Krishnaswami Pillai and Others, "

84. A plain reading of those decisions would clearly indicate that the facts involved in those cases are entirely different from the facts involved in this case.

85. It is axiomatic that a precedent can be pressed into service only in respect of the ratio decedendi pertaining to it and the facts should be almost similar to the case on hand. But here, my discussion supra would indicate and connote that even as per the defendants, C. Guruviah Chetty happened to be the biological son of Vattam Gopala Chetty the original trustee and the legal heirs having stepped into the shoes of C. Guruviah Chetty virtually sold the property in favour of D.18. Wherefore, the factual matrix is entirely different from the cited precedents on the defendants' side.

86. Incidentally I would like to refer to certain other facts also. Exs.A5 and A6 would refer to Exs.A1, A17 and A18 as the antecedent title deeds and at no point of time, they ventured to disassociate themselves from those documents, but on the other hand, they very much relied upon them.

87. My mind is reminiscent and redolent of the following maxims:

(i) "Verba relata inesse videntur" - Words to which reference is made are considered incorporated.

(ii) "Verba illata inesse videntur" - Words referred to are considered as if incorporated.

(iii) "Verba Relata Hoc Maxime Operantur per referentiam ut in eis inesse videntur - Words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them. - Certain excerpts from Broom's Legal Maxims (Tenth Edition), would run thus:

Another important application of the maxim before us occurs where reference is made in a will to an extrinsic document, in order to explain the testator's intention, in which case such document will be received as part of the will, from the fact of its adoption thereby, provided it be clearly identified as the instrument to which the will points"

88. The cumulative effect of those maxims are to the effect that if a document is referred to in one other document, it amounts to incorporating the entire former document in the latter document.

89. Accordingly if viewed D18, in both the suits, the purchasers were deemed to have knowledge of Ex.A1 as well as Exs.A17 and A18 and the recitals therein. It cannot be their case that the versions as contained in those ancient and antecedent title deeds are false. No doubt, in the litigative process, the defendants tried to project as though a portion of the recitals in those Exs.A1, A17, A18 and A19 was correct and the remaining portion was not correct.

90. In my considered opinion one cannot approbate and reprobate; blow hot and cold. Having chosen to rely upon those documents verbatim in the sale deeds Exs.A5 and A6, the seller as well as the purchasers under those deeds are squarely bound by that. The matter would have been entirely different had they given a go-bye to those ancient title deeds and had set up their independent title. They based their title under those ancient documents and in such a case, either they should take them as whole or disown them. They cannot pick and choose certain words and try to project that Vattam Gopala Chetty in stricto sensu allegedly purchased the property for himself.

91. I would like to refer to Sections 91 and 92 of the Indian Evidence Act and quite against those sections, the defendants cannot be heard to contend otherwise and that too, after adopting Exs.A1, A17 and A18 as part and parcel of Exs.A5 and A6.

92. The learned counsel for the plaintiffs would cite the following decision of this Court:

Sankaranarayanan Iyer Vs. Sri Poovananathaswami Temple and Others, certain excerpts from it would run thus: 36. I have not been able to find, I must say, any decided case or any passage in any text book on the English law of trusts to the specific effect that a trustee de son tort, in either sense imputed to the expression in English law, has or has no right of suit of the kind now in question. Generally it is stated in the books that a trustee must take all reasonable and proper measures including the institution-, of legal proceedings, if necessary, to obtain possession of trust property, if outstanding. That a trustee de son tort must not take such proceedings is nowhere stated.

37. It follows from the foregoing that a trustee de facto like a trustee de, son tort with whom the learned Judges who decided Vedakannu Nadar v. Ranganatha Mudatir (1938) M.L.J. 663. equate him, cannot be regarded, so far as the expressed principle of the reasoning of that decision is concerned, as lacking in the locus standi to maintain a suit of the kind with which we are concerned.

38. I must confess, however, that I should have experienced greater difficulty in the determination of the point in controversy, had there not been available to me the guidance afforded by the two Privy Council decisions reported in Mahant Ramcharan Das v. Naurangilal (1933) 64 M.L.J. 505 : L.R. 60 IndAp 124 : ILR 12 Pat. 251 (P.C.) and Mahadeo Prasad Singh v. Karia Bharti (1934) 68 M.L.J. 499 : L.R. 6 IndAp 47 : ILR 57 AH. 159 (P.G.), and had I not found myself on principle able to conclude that a trustee de son tort has the right of action now in dispute. I quite agree that there are fundamental points of difference between the conception in English law of trust strictly so called which is embodied in the Indian Trusts Act and the conception of trust" associated in India with Hindu and Muhammadan religious and charitable endowments which are expressly excluded from the operation of the Indian Trusts Act. I entertain my own doubt however whether this consideration per se would have persuaded me to hold that a de facto manager of a temple or mutt is entitled to institute proceedings for recovery of property belonging to the institution.

39. Even assuming that, whether in the case of the Dharmakarthas of a temple or in the case of the head of a mutt, the position occupied by the human agency functioning is that of a manager on behalf of the institution which is itself a juristic entity capable of holding property in ownership, the question still remains why in either case where the human agency is functioning de facto and not de jure, there should be a right of suit which is ordinarily available only to a person functioning de jure. In the case of a strict trust as well as in the case of a trust connected with a mutt or temple you have an officer functioning, and there is an office of which he is the incumbent. The officer is a fiduciary in both the cases, though the description " trustee " may not be strictly applicable to the latter. Assuming that the title to the mutt or temple property is different and distinct from the title of a person to represent the mutt or temple property in a litigation,

is not a proper representation of the mutt or temple by the de jure manager a matter on which the defendant is entitled to insist in his own interest in order to escape the avoidable harassment of unnecessary suits at the instance of possibly irresponsible individuals as well as in the interests of the institution ? Is it so clear that a de facto manager can sufficiently represent the institution to render all decrees and decisions to which he is a party as its representative binding on the institution ? In the case of mutts or temples, as my Lord has pointed out, the worshippers, the Advocate-General, a prospective she bait, and any person interested in the temple or mutt are allowed to institute a suit for the enforcement of the rights of the temple or mutt; but does it therefore mean that you can add to the recognised classes the de facto manager so called ? The worshippers have the right of suit, I think, because they are beneficiaries, at any rate " in a spiritual sense " to use the language of Bhashyam Aiyangar, J., in *Vidhyapurna Thirthaswami v. Vidhyanidhi Thirthaswami* (1904) 14 M.L.J. 105 : ILR 27 Mad. 435. The rights of action of the Advocate-General and of the relators are statutory. That of a prospective she bait recognised in cases like *Gopal Jew v. Baldeo Narainsingh* (1947) 51 C.W.N. 383 and *Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others*, is because he is in the line of succession and is a reversionary, although I have to observe in this connection that there are two reported decisions of this Court in which such recognition has been refused—*Ramaswami Goundan v. Singaperumal Kadavul* (1923) 50 M.L.J. 42 and *Aravamudhu Aiyangar and Others Vs. Ramanuja Aiyangar and Others*, ., it being pointed out in the former of them and accepted in the latter that the appropriate course is for the worshippers to file a suit of the kind prescribed by Section 92 or Order 1, Rule 8, Civil Procedure Code. But. whence comes the right of the de facto manager to sue ?

40. Then, again, where and how are we to draw the line between a manager de facto and a manager ad hoc exercising isolated acts on particular occasions ? I respectfully agree with my learned brother Viswanatha Sastri, J., in his picturesque observation that one swallow does not make a summer; but the practical question still remains, how many do ? Even in the case of a de facto guardian in Hindu law that difficulty has been felt, and it is bound to be felt similarly in the case of a de facto manager. In the case of the former the tendency has now a days been, in fact, to confine his powers to the limits already recognised by decisions on the principle *stare decisis* and not to extend them beyond such limits. (Vide *Myneni Pundarikakshayya Vs. Kondamudi Sreeramulu*, and *Ramaswami Pillai v. Kasinatha Iyer* (1927) M.W.N. 356.) One eminent Judge, Beaumont, C.J., of the Bombay High Court now on the Privy Council, has even refused to recognise a de facto guardian as guardian at all in his dissident judgment in *Tulsidas v. Vaghel Raisinghji* ILR (1932) 57 Bom. 40 holding that his situation which is that of an unauthorised person cannot be bettered, to use the language of Lord Robson in the Privy Council decision reported in *Matadin v. Ahmed Ali* (1912) 23 M.L.J. 6 : L.R. 39 IndAp 49 : ILR 34 All. 213 (P.C.) by describing him as a de facto guardian.

41. Can anybody then sue on behalf of the institution as "anybody can on behalf of a minor ? Is the analogy between a minor and an institution to be pushed so far as to attract to the latter the provisions of Order 32, Civil Procedure Code, applicable to the former ? If not, (as ruled for instance in *Doongarsee Syamji v. Tribhuvan Das* AIR 1947 All. 375., how best to make sure that the person suing on behalf of the institution does not enter into improper agreements or compromises pre-decretal or post-decretal, or walk away with the monies representing the fruits of a particular decree obtained on behalf of the institution ? If that is not possible, is it any consolation that at the hands of a de jure manager too the institution may sustain sometimes a similar detriment?

42. Thoughts such as these, I may say, exercised my mind in no inconsiderable measure the argument as well as after reservation of judgment. But the existence of binding precedents of the highest authority which are undistinguishable in principle and the conclusion reached by me that a de facto trustee or a trustee de son tort has, as a constructive trustee, a right to sue of the kind now in question render the pursuit of the, lime; of thought involved in such queries and enquiries at once otiose and impermissible. Apparently the Privy Council proceeded in ruling, as it did in *Mahant Ramcharan Das v. Naurangilal* (1933) 64 M.L.J. 505 : L.R. 60 IndAp 124 :I.L.R. 12 Pat. 251 (P.C.) and *Mahadeo Prasad Singh v. Karia Bharti* (1934) 68 M.L.J. 499 : L.R. 62 IndAp 47 :I.L.R. 57 All. 159 (P.C.), on the view that possession of the institution and management of its affairs is itself good title effective to clothe anybody who has such possession., and management with the right to institute suits for recovery, not merely of property of which he or the institution represented by him gets dispossessed after his assumption of management, on the basis of possessory title well-known to law (vide for instance *Perry v. Clissold* (1907) A.C. 73. and *Narayanarao v. Dharmachar* (1902) 13 M.L.J. 146 : ILR 26 Mad. 514; but also of trust property which had before such assumption of management been wrongfully alienated or had otherwise passed out of the possession of the head of the mutt or the idol of the temple. Presumably the interests of the institution have been regarded. by the Privy Council as so far paramount as to justify the conclusion that a de facto manager should in the absence of a de jure manager be allowed the right to maintain, such suits, and it would require more than ordinary courage on the part of any one to suggest that such a point of view which finds warrant in principle as well as in decisions of the highest authority binding on all Courts in India is still open to-consideration here and now.

93. A bare perusal of it would amply make the point clear that even a trustee de son tort or a defacto manager of a trust is entitled to institute suit for preserving the property.

94. The learned counsel for the plaintiffs also cited the following decision of the Honourable Apex Court reported in *A.A. Gopalakrishnan Vs. Cochin Devaswom Board and Others*,

One T.K. Asokan filed a complaint before the High Court of Kerala alleging that

Respondents 3 and 4 had encroached upon the said land, and were in illegal possession. The complaint was registered as CDB No. 3 of 1996. The High Court by order dated 12-6-1997 held that the said Sy. No. 1042/2 (21 cents) was part of the property of Karikkode Sastha and Vishnu temple and gave a direction to the Board to take possession of the said land without delay. Respondents 3 and 4 challenged the said order before this Court in SLP (C) No. 12985 of 1997 contending that they had acquired title over the said land by their long possession. This Court disposed of the said petition by the following order dated 30-3-1998:

In the facts and circumstances of this case, having heard learned counsel for the parties, we do not think it a fit case for our interference against the impugned direction of the High Court. The property in question should be delivered to the Devasthanam, if it has not been delivered in the meantime. But since the High Court has given a declaration in respect of the property in a summary proceedings, it would be open for the petitioners to establish its title in a regularly instituted civil suit, if so advised and in the event such a suit is filed, the finding of the High Court will not be a bar for the civil court."

In view of the said order of this Court, the High Court closed the complaint (CDB No. 3 of 1996) by order dated 9-9-1998, with a direction to the Devaswom Board to take possession of the said land, by taking police help, if necessary.

10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/shebait/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation.

95. In the above precedent their Lordships of the Supreme Court held that temple properties should be protected and from that a cue can rightly be taken that trust property also should be protected.

In re purchaser of the property:

96. The learned counsel for the appellants/defendants would submit that D18 in both the suits happened to be the persons who are bona fide purchasers for value without notice of any alleged defect in the title of the vendors and their right should be protected.

97. It is just and necessary to refer to certain definitions:

a] Section 3 of the Transfer of Property Act, 1882

Interpretation clause: -In this Act, unless there is something repugnant in the subject or context,

.....
.....

a person is said to have notice" of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search, which he ought to have made, or gross negligence, he would have known it

b] Section 52 of the Indian Penal Code -"Good Faith" - Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

98. A cumulative reading of those provisions would portray and project that nothing can be said to have been done in good faith if care and caution is not taken before performing such act.

99. The learned counsel for the defendants would, by referring to Exs.A45 and 46-paper publications, would submit that if really the sellers and purchasers had the mala fide intention, they would not have gone to the extent of making such publications.

100. Whereas, the learned counsel for the plaintiffs would submit that mere marking of such publications would not enure to their benefit to plead that they had no mala fide intention, because they ought to have made diligent enquiries, but they failed to do so, those publications are nothing but a mala fide intention to conceal and camouflage their wrongful act. Indubitably the D18 in both the suits withheld also part of the sale consideration which smacks that they in their heart of heart realised all was not well with the title of the vendors in Ex.A5 and A6.

101. Wherefore, I am of the view that publication in news paper would not in any way cure the defect and that too, in the facts and circumstances of this case highlighted supra.

102. The learned counsel for the plaintiffs would cite the decision of the Honourable Apex Court reported in Smt. Dayamathi Bai Vs. Sri K.M. Shaffi, to the effect that even a certified copy of a sale deed, which is of 30 years old attracts Section 90 of the Indian Evidence Act.

103. So far this case is concerned, in Exs.A5 and A6, the ancient documents Exs.A1, A17 and A18 were referred to and relied on and as such, undoubtedly those old documents are ancient documents within the meaning of Section 90 of the Indian Evidence Act.

104. There is also one other decision of this Court dated 30.6.2011 in S.A.Nos.85 and 86 of 2006, cited on the side of the plaintiffs and it is also inconcinnity with

the aforesaid earlier decision cited supra.

105. The learned counsel for the plaintiffs would correctly cite the following decisions of this Court:

1. B. Suresh Chand Vs. State of Tamil Nadu, BY The Secretary, Revenue Department, Madras and Another;

2. 30. The distinction between "material facts" and "particulars" cannot be overlooked. Material facts are primary and basic facts which must be pleaded by the party in support of the case set up by him, either to establish his cause of action or defence. Since the object and purpose is to enable the opposite party to know the case he has to meet, in absence of pleading a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit. Particulars, on the other hand, are the details of the case. They amplify, refine and embellish material facts. They give the finishing touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative.

31. If in the light of the provisions contained in Order 6 Rule 2(1) of C.P.C. the averments in the plaint are considered, it can easily be seen that all the primary facts which must be proved at the trial by the plaintiffs to establish their case that they are bonafide purchasers for value without notice have not been stated in the plaint. It is pertinent to point out at this juncture that nowhere in the plaint the plaintiffs pleaded that S.V. Traders, Kancheepuram was a proprietary concern and it was not a partnership firm. Likewise nowhere in the plaint it has been stated that the plaintiffs either enquired with their vendors or with the authorities of the sales tax department as to whether any sales tax arrears is due from their vendors.

(ii) (2007) 2 MLJ 937 - Inbamathi V. Ramar and Others

13. Basing reliance upon the above said observations contained in the above decisions, the learned Counsel for the appellant submitted that under Ex.B-1-Will, a Trust is created by the testator and therefore the defendants are not entitled to claim any right over the suit properties as per Section 63 of the Act. The learned Counsel further submitted that the appellant is a transferee in good faith for consideration without having notice of the Trust and even when the purchase-money was paid, or at the time the sale deed was executed, the appellant was not aware of the trust and the appellant has purchased the suit property in good faith for consideration and as such the Courts below ought to have granted a declaration of title in favour of the appellant.

14. This Court is unable to accept the said contentions of the learned Counsel for the appellant for the following reasons: There is absolutely no pleading on the part of the appellant to show that she was not aware of the creation of the Trust and she had no knowledge about the Trust and she had purchased the suit properties in good faith for consideration. Section 64 of the Act gives protection

to the purchasers in good faith without notice, therefore it is incumbent on the part of the appellant to have raised appropriate pleadings as to how she is entitled to claim the protection u/s 64 of the Act and adduced evidence to show that the appellant had no notice. As pointed out above, no plea has been raised based on Section 64 of the Act and there is no plea regarding the steps taken by the appellant to investigate the title of the properties. In the absence of appropriate pleadings and appropriate issues, the above said contentions raised by the learned Counsel for the appellant cannot be decided in the abstract, such plea having not been raised before the Courts below, no exception can be taken to the correctness of the judgments of the Courts below. Unless the factual foundation is laid, claiming benefit u/s 64 of the Act and to prove the same, acceptable legal evidence is adduced, the claim of the appellant based on Section 64 of the Act cannot be entertained. Therefore, this Court is of the considered view that the legal principles laid down in the decision reported in Jayanta Mohan Chatterjee Vs. Jagat Mohan Chatterjee and Others, cannot be applied to the facts of this case for want of appropriate pleadings.

16. Admittedly, as pointed out above, there is no pleading in the plaint setting out the material facts as to how the appellant claims to be a bona fide purchaser for valid consideration and how the transfer made in her favour is saved by the provisions contained in Section 41 of the T.P. Act and Section 64 of the Indian Trusts Act. It is also pertinent to point out that no such issue was also framed and no evidence was let-in by either party. Had there been an issue framed and the parties adduced evidence on such issue, then, even in the absence of pleadings, it could be said that the parties to the suit were conscious of the issue involved and adduced evidence and the unsuccessful party could not be permitted to question the findings rendered on such issue on the ground of want of pleadings. In the instant case, there was no pleading, no issue framed and no evidence adduced. At the stage of second appeal, the appellant cannot be permitted to claim the benefit u/s 41 of the T.P. Act and Section 64 of the Indian Trusts Act, when the appellant had failed to plead the necessary material facts in the plaint and put the other side on notice. It is settled law that the opposite party should not be taken by surprise. If the facts on record warranted the application of the provisions contained in Section 41 of the T.P. Act and Section 64 of the Indian Trusts Act and the Courts below had failed to apply the same, or any legal principle applicable to the facts of the case had been failed to be applied by the Courts below, then this Court even in a second appeal can permit the appellant to raise a pure question of law, but that is not the case here. The contention put forth by the learned Counsel for the appellant cannot be decided in the abstract, in the absence of necessary pleadings.

106. Placing reliance on those decisions, he would argue that D18 in both the suits can never be treated as bona fide purchasers for value without notice of the alleged defect in the title of the vendors over the suit property.

107. Here, D18-Manjudevi in O.S. No. 12891 of 1996 is the sister-in-law of D18-

Dineshkumar in O.S. No. 12960 of 1996. But neither of them entered into the witness box to speak about their alleged good faith and their absence of knowledge about the trust and other details. Only D.W.2-the father-in-law of Manjudevi and father of Dineshkumar appeared and deposed, but he was not the vendee.

108. In this connection I recollect the following decisions of the Honourable Apex Court:

(i) Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, certain excerpts from it would run thus:

15. Apart from what has been stated, this Court in the case of Vidhyadhar Vs. Manikrao and Another, observed at page 583 SCC that "where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

(ii) Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha,

This precedent is similar to the afore-cited decision.

109. No doubt, D.W.2 happened to be the power agent of D18 in both the suits. He had also been authorised to depose on behalf of D18. Even then, the core question arises as to whether that could meet the requirements of the law. With reference to the decisions of the Honourable Apex Court, if the matter is analysed, it is quite axiomatic that good faith and absence of knowledge of certain facts on the part of the vendees could be spoken only by them and not by their power agent, who never figured as the power agent in Ex.A5 and Ex.A6. Wherefore it is clear that D18 in both the suits shunned the witness box and as a sequela, their plea that they are the bona fide purchasers for value remains unsupported and unproved.

110. A prudent purchaser is expected to make enquiries as contemplated in the Transfer of Property Act. If a person refrains from making such enquiries and keeping himself well informed about the title relating to the property, which he is going to purchase, then he cannot try to press into service the plea of good faith in his favour. In this case, as observed supra, an old building was the superstructure in the suit property. A prudent purchaser is expected to approach the occupants of that premises and ascertain from them the relevant facts. Here, it is not even the case of D18 that before such purchases as per Exs.A5 and A6 they approached the occupants, namely, the tenants and ascertained from them the details; such conduct itself would speak volumes that they had no good faith in purchasing the suit property. Had they sincerely made efforts and that too, in the wake of the recitals in Exs.A1, A17 and A18, as discussed supra, certainly, they would have gathered ample evidence and they could have refrained from purchasing the suit property. A fortiori, in my considered opinion, they cannot be termed as bona fide purchasers for value without notice of the trust and in such

a case, they cannot also carve out an exception to the application of Section 10 of the Limitation Act, as against them.

In re absence of prayer for declaration of title:

111. The learned counsel for the appellants/defendants would contend that the suit was bad for want of a prayer for declaration of title relating to the suit property. In this connection he would cite the following decisions.

AIR 1984 NOC 80 (AP) - Vemula Maniamma V. Allugada Venkatamma and Others; Section 31 does not give a right to sue to all persons for cancellation. The section describes the class of persons who are given the right to sue for cancellation of the written instrument and the circumstances in which they can so sue for cancellation. Such right is available only to persons who have a reasonable apprehension that such instrument if left outstanding may cause him serious injury and against whom a written instrument is void or voidable.

Where the sale deeds, the cancellation of which was sought were documents executed by third parties in assertion of hostile independent title claimed by the vendors under those documents, held that the plaintiff's suit for cancellation of the documents was not maintainable. Plaintiff should have filed the suit for declaration of her title and consequential reliefs.

1993 SC 957 - Vinay Krishna V. Keshav Chandra and Another 8. The next submission of the learned counsel is that Section 42 (present Section 34) of the Specific Relief Act is not exhaustive. Therefore, even outside the purview of Section 42, there could be a declaration as laid down in Supreme General Films Exchange Ltd. v. Brijnath Singhji Deo². The Court ought to have granted at least with reference to the portions in which the plaintiff has been in possession. These are the only submissions made before us.

12. We have carefully considered the above arguments. We are clearly of the view that bar u/s 42 of the Specific Relief Act would undoubtedly operate in this case. (We may add that present Section 34 is in pari materia.) Section 42 of the Specific Relief Act, 1877 reads as under:

"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.

112. I would like to refer to the decision of the Honourable Apex Court reported in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, , certain excerpts from it would run thus:

21. To summarise, the position in regard to suits for prohibitory injunction

relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar*⁷). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case..... "

113. Section 31 of the Specific Relief Act is extracted hereunder for ready reference:

Sec.31. When cancellation may be ordered (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

114. The learned counsel for the plaintiffs/respondents cited the following decisions:

(i) Supreme General Films Exchange Ltd. Vs. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Others,

15. The result is that Section 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside Section 42.

16. We think that the circumstances in which a declaratory decree u/s 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration u/s 42, Specific Relief Act with reference to the legal character or the property involved. Such, however, is not the case before us. The plaintiff-Respondent, in the case before us, had not only the rights of a mortgagee decree-holder with regard to the property involved, but he was also the assignee of the rights of the bank which had got the property in question attached in execution of its decree. We find, from connected special leave petitions against orders under Order 21 Rule 95 of the CPC that the plaintiff's wife became the auction-purchaser of this property during the pendency of the litigation now before us. At the time when he filed the suit the plaintiff may have been looking forward to purchasing the property. Although, the mere possibility of future rights of an intending purchaser could not, by itself, be enough to entitle him to get a declaration relating to a purported lease affecting the right to possess and enjoy the property, yet, we think that the plaintiff possessed sufficient legal interest in the theatre, as a mortgagee as well as an assignee of a decree holder who had got the property attached before he filed his suit, so as to enable him to sue for the declarations he sought. He was not seeking a merely whimsical or eccentric or an unreasonable declaration of a right in property with no enforceable legal claims over it which could remain unaffected by the defendant-appellant's claims as a lessee.

(ii) [1966] SUPP SCR 270 Verua Reddi Rama Raghava Reddy and others v. Konduru Seshu Reddy and two others.

Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and courts have power to grant such a decree independently of the requirements of the section.

The relief sought for in the present case was for a declaration that the compromise decree was null and void. Such a declaration is in itself a substantial relief and has immediate coercive effect and the deity would be restored to its rights in the trust properties. The suit fell outside the purview of S.42 and would be governed by the general provisions of the CPC and was therefore maintainable even though the worshipper was not suing as a person entitled to any legal character or to any right as to any property as required by S.42 of the Specific Relief Act.

115. The learned counsel for the plaintiffs would submit that the first relief prayed in the plaint is covered by Section 31 as well as Sec.42 and also Section 9 of C.P.C. According to him, under no circumstances, the first relief could be held to be not legally maintainable at the instance of the plaintiffs.

116. Now, the discussion supra of mine has got boiled down the issue as under:

Whether some of the legal heirs of the original trustee can sue some other legal heirs of the same deceased trustee for declaring the sale deed executed by the later in favour of a 3rd party, namely, D.18?

117. The answer is quite obvious and it is an elephant in the room that the plaintiffs herein had ample legal right to get such dubious deeds Exs.A5 and A6 erased by making such a prayer and there is no speck of doubt in my mind. No further elaboration is required to highlight that Exs.A5 and A6 which were intended to dissipate the trust property by some of the legal representatives of the original trustee should be got declared as void by some other legal representatives (the plaintiffs) of the same original trustee.

118. Not to put too fine a point on it the plaintiffs being the legal representatives of a trustee could protect the trust property from being dissipated or fritted away in any manner. Accordingly, the plaintiffs being the legal representatives of the original trustee Vattam Gopala Chetty undoubtedly are having locus standi to protect the suit property, which is a trust property intended for charitable purpose.

119. The learned counsel for the plaintiffs would cite the following decision of the Honourable Apex Court:

1963 SCR (3) 623 - Sheikh Abdul Kayum V. Mulla Alibhai, certain excerpts from it would run thus: 17. It is true that s. 1 of the Indian Trusts Act makes provisions of the Act inapplicable to public or private religious or charitable endowments; and so, these sections may not in terms apply to the trust now in question. These sections however embody nothing more or less than the principles which have been applied to all trusts in all countries. The principle of the rule against delegation with which we are concerned in the present case, is clear; a fiduciary relationship having been created, it is against the interests of society in general that such relationship should be allowed to be terminated unilaterally. That is why the law does not permit delegation by a trustee of his functions, except in

cases of necessity or with the consent of the beneficiary or the authority of the trust deed itself; apart from delegation "in the regular course of business", that is, all such functions which a prudent man of business would ordinarily delegate in connection with his own affairs.

28. Accordingly, we allow the appeal and order that it be decided that the defendants 1 to 11 are not validly appointed trustees in respect of the trust properties mentioned in the list M annexed to the plaint; that the defendants be removed from the management of these properties and they be ordered to render an account of their administration of these properties. Necessary directions for the rendering of accounts will be made by the Trial Court and in doing so, credit will be given to defendants 2 to 11 of Rs. 15,000/- and odd already paid by them. The plaintiffs-appellants admit that it is not necessary to frame any scheme for the administration of the trust and we agree that this is not necessary -at least for the present. It is necessary however that new trustees be appointed for the administration of the trust. Of the original 18 trustees all except one are dead and sole survivor is admittedly too old to carry on the administration successfully. The very fact that for many years he has not discharged any functions as a trustee also makes it necessary that new trustees should be appointed. We therefore direct that suitable persons be appointed by the Trial Court as new trustees after giving an opportunity to the plaintiffs and other responsible members of the Daudi Bohra Community to place their recommendations and objections in this matter.

120. A mere poring over and perusal of those precedents would unambiguously and unequivocally highlight the point that a bar suit for injunction is not maintainable when there is serious title dispute between the plaintiff and the defendant.

121. The learned counsel for the defendants/appellants would invite the attention of this court to the last sentence in para No. 33 of the plaint and contend that the plaintiffs have prayed for declaring that the suit property belongs to them absolutely; whereas the learned counsel for the respondents/plaintiffs would refute it by saying that the scope of the suit is not so and their intention is not to project themselves as absolute owners of the suit property.

122. A mere wrong sentence in the plaint would not change the scope of the suit, as the prayers in the plaints extracted supra would clearly indicate and exemplify that the plaintiffs wanted the property to be declared as the trust property and not as the personal property of any one.

123. It is quite obvious, so far this case is concerned, that this is not a bare suit for injunction. The first prayer itself involves the title to the property. The trial Court framed the first issue, the translation of which would run thus:

Whether the suit property is a trust property?"

Issue No. (2) is that:

"whether the plaintiffs are the trustees?"

124. In this connection I would like to point that the decision of the Honourable Apex Court reported in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, would contemplate that there should be an issue framed relating to the title so that partition could understand and adduce evidence and even in injunction suit there could be an issue framed to that effect, so that the parties could be given opportunity to adduce evidence.

125. would like to reiterate that the suits herein are not mere injunction suits. There are prayers for declaring the sale deeds-Exs.A5 and A6 as null and void, because the suit property happened to be the trust property. As such, in that first prayer itself there is a prayer for getting the title of the trust declared over the suit property, is found imbedded and unless that issue relating to title is decided, the question of declaring the sale deeds as null and void would be a well-nigh impossibility. The trial Court au fait with law appropriately and plausibly, as delineated supra, framed the necessary issues relating to title and in such a case I do not think that in any manner the defendants are prejudiced. Had there been no issue relating to the title in respect of the suit properties, then at least it could be contended that the defendants were not posted with the fact as on which issue they should adduce evidence relating to title etc. But the records bespeak by themselves that both sides understood properly the controversy between them and adduced voluminous evidence relating to title and in such a case, simply because there is no separate prayer for getting the title declared with regard to the trust properties, the suits cannot be held to be one bad for want of a prayer for declaration of title over the suit property.

126. The Honourable Apex Court also under clauses (c) and (d) in paragraph No. 21 of the judgement reported in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, referred to supra, reiterated that framing of an issue relating to title is a must whenever there is title dispute involved in a matter so as to enable the parties to adduce evidence in that regard. But in this case, issues have been framed relating to title and the parties also adduced evidence. Surprisingly, in the written statement, the defendants have not taken any specific plea that the suit was bad for want of a prayer for declaration of title and in such a case, it is too late in the day on the part of the defendants to contend in appeal that the suits were bad, in the absence of a specific prayer for declaration of title over the suit property.

127. From the records of the trial Court, what I could understand is that there was some dispute relating to payment of Court fee and the matter came before this Court, which in its order directed the plaintiffs to pay ad valorem Court fee, invoking Section 40 of the Court Fees and Suits Valuation Act.

128. I would like to refer to Section 6 of the Court Fees Act also.

Section.6: Multifarious suits - (1) In any suit in which separate and distinct reliefs are sought based on the same cause of action, the plaint shall be

chargeable with a fee on the aggregate value of the reliefs:

Provided that, if a relief is sought only as ancillary to the main relief, the plaint shall be chargeable only on the value of the main relief.

(2) Where more reliefs than one based on the same cause of action are sought in the alternative in any suit, the plaint shall be chargeable with the highest of the fees leviable on the reliefs.

(3) Where a suit embraces two or more distinct and different causes of action and separate reliefs are sought based on them, either alternatively or cumulatively, the plaint shall be chargeable with the aggregate amount of the fees with which plaints would be chargeable under this Act if separate suits were instituted in respect of the several causes of action:

Provided that, where the causes of action in respect of reliefs claimed alternatively against the same person arise out of the same transaction, the plaint shall be chargeable only with the highest of the fees chargeable on them.

Nothing in the sub-section shall be deemed to affect any power conferred upon a Court under rule 6 of Order II of the Code of Civil Procedure, 1908 (Central Act V of 1908).

(4) The provisions of this section shall apply mutatis mutandis to memoranda of appeals, applications, petitions and written statements.

Explanation - For the purpose of this section, a suit for possession of immovable property and for mesne profit shall be deemed to be based on the same cause of action.

129. I would like to disabuse and undeceive the doubt by highlighting that when there are several prayers and for the largest relief the highest Court fee has been collected, once again Court fee need not be collected on similar or lesser reliefs. As such, now Court fee issue also is not involved. Invoking Section 40 of the Tamil Nadu Court Fee and Suits Valuation Act, Court fees were paid on ad valorem basis and that is the Court fee for the relief relating to declaration of title also. As such, comprehensively in all fours the law has been complied with. Wherefore, I am of the considered view that the suit is not bad for a separate prayer for declaration of title over the suit property.

In re the rent control proceedings and its relevance in this matter:

130. The learned counsel for the defendants, by inviting the attention of this Court to the Rent Control proceedings would submit that this Court in C.R.P.Nos.3670 and 3671 of 2008 dealt with the matter at length, and vide its order dated 11.12.2008, found that the tenants' plea setting up title in a trust was untenable and that they cannot take shelter under it.

131. Whereas, the learned counsel for the plaintiffs would, in my opinion, appropriately and appositely replied to the effect that the findings in rent control

proceeds are not at all having the binding effect on the civil Court.

132. The fight in the rent control proceedings is between the alleged landlords and the tenants. The definition of landlord under the Rent Control Act is wide enough to include the persons, who are receiving rents. Above all, even in the High Court's judgment in the said C.R.P., it was observed that the proceedings under the Rent Control are summary in nature. The learned counsel for the plaintiffs would also clarify that attempts were made by the plaintiffs to get themselves impleaded at the appeal stage of the rent control are summary in nature. The learned counsel for the plaintiffs would also clarify that attempts were made by the plaintiffs to get themselves impleaded at the appeal stage of the rent control proceedings, but they were not permitted to do so. The operative portion of the order dated 6.8.2007 passed by this Court in C.R.P.Nos.1511 and 1513 of 2006, would run thus

8..... Even assuming that the property belonged to the trust, of which the petitioners are the trustees, now the appeal is pending, where the rights of the parties are yet to be adjudicated upon and hence, only after the same it could be resolved. At this juncture, it is not necessary to implead them as parties to the proceedings. If it is finally decided by the civil Court that the property belonged to the trust, the present petitioners can well work out their remedies at that necessary juncture and not at this stage.

133. As such, it needs little emphasis that the finding of the civil Court will have over riding effect on any finding in the rent control proceedings and there could be no second thought over it.

134. On the plaintiffs' side, Suresh Babu-the second plaintiff deposed on his behalf and on behalf of the other plaintiffs narrating the facts. The suit was originally instituted by Anjaneyalu Chetty, describing himself as the son of Nagarathinam Ammal, who happened to be the daughter of the said Vattam Gopala Chetty and regarding their lineage is concerned, there is no dispute. In fact, the 3rd wife of Vattam Gopala Chetty executed Ex.A20-the settlement deed dated 26.4.1975, wherein she described Nagarathinam Ammal as the daughter born to Vattam Gopala Chetty through his first wife and that buttresses and fortifies the stand of the plaintiffs clinchingly.

135. P.W.2-Ramachandran is the brother of Narasimhalu Chetty-the tenant in the suit property and he would support the contentions of the plaintiffs.

136. D.W.1 spoke on behalf of his mother and brothers, which is a formal one, but it turned to be his ipse dixit in the wake of my discussion supra.

137. The contentions on the side of the defendants, are that there was admittedly no document produced by the plaintiffs to prove the factum of they having received the rent from the tenants, which fact would speak against them and that the collusive nature of the tenant and the plaintiffs could be noted from the admitted fact that it was the tenant, who is funding this litigation.

138. The learned counsel for the plaintiffs would explain and expound that the plaintiffs reposed confidence on Guruviah Chetty and it was he who was receiving rents and because Guruviah Chetty did not act in concinnity and inconsonance with the confidence reposed on him, the defendants cannot try to find fault with the plaintiffs as though the plaintiffs had not produced any document evidencing the receipt of the rents etc. I could see considerable force in the above submission, in view of my discussion relating to the role of Guruviah Chetty and his status in the family of Vattam Gopala Chetty, even as per the defendants.

139. Ex.A23 is the letter sent by the deceased Anjaneyalu Chetty's son Sureshbabu-one of the plaintiffs, to Narasimhalu-the tenant in the suit property, calling upon him to withdraw the sum of Rs. 52,485.50 from the bank account, in which the tenant Narahimhalu chetty was called upon to deposit the rent, as per the earlier communication dated 15.2.1995 sent by the deceased Anjaneyalu Chetty-the original plaintiff.

140. Ex.A24 is the reply sent by Narasimhalu Chetty to that letter, enclosing a cheque for the said amount of Rs. 52,485.50.

141. During the year 1995 there were exchanges of correspondences between the plaintiffs and the tenant-Narasimhalu. Whereupon the plaintiffs called upon Narasimhalu to deposit the rent in a separate bank account. No doubt, instead of depositing the amount in the name of the plaintiffs, the tenant deposited the rents in his own name to show his bona fides, because there was dispute. The plaintiffs, who were admittedly not deriving any income for the trust from the suit property, were in need of money for paying Court fee in these suits, as already discussed supra, and at that time only the plaintiffs got the money from the tenant and paid the Court fee and that cannot be found fault with in the peculiar facts and circumstances of this case. Wherefore there is no question of champerty and maintenance, arising in this case, because here it is an attempt on the part of the plaintiffs to save the trust property from being fritted away.

142. Ex.A28 is the property tax collection receipt and it is not virtually tax assessment order as tried to be projected by the defendants.

143. Ex.A29 is the legal heirship certificate of deceased C. Guruviah Chetty showing that D1 to D17 happened to be the legal heirs of C. Guruviah Chetty, over which there is no dispute.

144. Ex.A4 is the certified copy of the letter sent by Anjaneya Chetty-the original plaintiff to the tenants, calling upon them to deposit the rent, in regard to which, P.W.2-Ramachandran the tenant also reposed.

145. Ex.A7 is the plaintiff's lawyer's notice to defendants. Exs.A8, A9 and A10 are the reply notices sent by the defendants. Exs.A11 is the rejoinder sent by the plaintiffs' lawyer's notice. Exs.A12 and 13 are all correspondences which emerged between the rival parties, after the arisal of the dspute. Exs.A14 and A15 are encumbrance certificates relating to the suit property, which are formal

documents. Ex.A21 is the death certificate of Anjaneyalu Chetty-the original plaintiff and Ex.A22 is the legal heirship certificate showing that plaintiffs 2 to 8 are the legal representatives of the original plaintiff, over which there is no controversy.

IN RE REVERSIONARY RIGHT

146. In the grounds of appeal, ground Nos.47 and 48 are extracted here under:

47. The learned Judge failed to consider that Vatttam Gopala Chetty could have left the suit property to the reversioner of the Estate of Chetpet Subadramma and Chikkakulam Guruviah Chetty is the nearest reversioner of Chetpet Subadramma and happen to be the grandson of the sister of Chetpet Subadramma.

48. The appellants have been able to secure important documentary evidence which are being filed as additional document before this Hon"ble Court to the effect that Chikkakulam Guruviah Chetty was legal heir and a reversioner of the estate of Chetpet Subadramma and it has come to light from the last Will and Testament of Vatttam Sathakeerthi Amma in the year 1975 that Vatttam Gopala Chetty died on 24.8.1937 and no new trustees were appointed as per Section 73(b) of the Indian Trust Act, and Chikkakulam Guruviah Chetty happen to be the adopted son of Pattabirama Chetty and Chikkakulam Guruviah Chetty is the Grand son of Chikkakulam Rangamma being the sister of Chetpet Subadramma and therefore as the nearest legal heir of the Chetpet Subadramma, Chikkakulam Guruviah Chetty inherited the property and has been enjoying the property in his own right for more than 52 years which has not been taken into consideration by the learned Trial Judge.

As such entirely a new case without having the back up of the pleadings was sought to be put forth before this appellate Court for the first time in the form of grounds of appeal. I am at a loss to understand as to how such grounds could be pressed into service for the first time before the appellate Court.

147. Further my discussion supra would clearly expose the case of the defendants as to how their pleas are totally contrary to law.

IN RE THE PRESENT LEGAL POSSESSION OF THE SUIT PROPERTY:

148. The indubitable and indisputable, incontrovertible and unassailable facts are that soon after the emergence of Exs.A5 and A6, there arose dispute; whereupon, the purchasers filed RCOPs to evict the tenants. On coming to know of that, the plaintiffs filed the present two suits and also they wanted to see that the tenants of the trust property are not dispossessed. As has been held by me above, possession of the tenant would tantamount to possession of the trust and if the party purchasers (D18) dispossess them, it will lead to discomfitures and complications. As such, the two suits were filed during the year 1996. Pendente lite, the tenant and D18 fought the litigation in the for a contemplated under the Rent Control Act and even plaintiffs were not allowed to get themselves

impleaded there. In such a case, pendente lite what had happened, will not in any way strengthen the case of the defendants and consequently would not make the case of the plaintiffs weak, meek and bleak. As on the date of the filing of the suit, the tenants of the trust were in occupation of the suit property and any dispossession based on the rent control proceedings would not in any way change the legal position. Possession of the trust, through tenant should necessarily be recognised as one that of the Trust, which is deemed to be in possession.

149. The learned counsel on both sides would bring to the knowledge of this court the order passed by my learned Predecessor in M.P.Nos.1 and 1 of 2009 in A.S. No. 582 and 583 of 2006 dated 25.06.2009, which is extracted here under for ready reference:

Heard both sides. The learned counsel for the respondents wants time to file counter. However, he would submit that there will not be any alienation of the suit property till the disposal of the appeal. Recording the undertaking given by the learned counsel for the respondents. This matter is adjourned to 02.07.2009 for filing counter.

150. The learned counsel for the plaintiffs/respondents would cite the following decisions of the Hon''ble Apex Court:

(i) K.T. Venkatagiri and Others Vs. State of Karnataka and Others, certain excerpts from it would run thus:

29. The appellants admittedly took benefit of the interim order passed by this Court in Khoday case¹. They cannot, having regard to the doctrine of "unjust enrichment", retain the undue advantages derived by it. They must be asked to pay back the amount received either directly or indirectly on account of MSIL. The doctrine of restitution must, thus, be applied in these appeals..... "

(ii) South Eastern Coalfields Ltd. Vs. State of M.P. and Others,

Liability of the consumers/purchasers to pay interest to the Coalfields:

(b) for the period for which the restraint order passed by the Court remained in operation.....

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision.....

27..... In Jai Berham v. Kedar Nath Marwari¹¹ Their Lordships of the Privy Council said: (AIR p. 271)

It is the duty of the court u/s 144 of the CPC to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed". Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

Cairns, L.C. said in *Rodger v. Comptoir D'Escompte de Paris*¹²: (ER p. 125)

"[O]ne of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, "the act of the court" is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case."

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (*A. Arunagiri Nadar v. S.P. Rathinasami*¹³). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.....

151. Both sides also in unison would further submit the factual position that pending these appeals, the said building was demolished by D18 in both the suits after taking delivery through rent control proceedings and in such a case, when there is no building at all, the defendants are not entitled to interfere with the suit property, by contending that they had already taken delivery of the suit property and demolished the super structure as per the order in the Rent control proceedings and in the consequent Execution proceedings.

152. I am of the considered view that the concept restitution need not be ushered in, as the legal possession is deemed to be with the Trust only. Anything happened pendente lite will have no binding effect on the civil court and possession is deemed to be with the Trust and by way of disambiguating ambiguity if any, now it is recorded that the suit property is a vacant plot of land and the defendants are having no right to interfere with it and there is no necessity of formally ordering redelivery to the trust, as legally trust is in possession of the suit property. The points are decided accordingly in favour of the respondents/plaintiffs against the appellants/defendants, as under:

Point No. (1) is decided to the effect that the trial court properly applied the law relating to burden of proof in deciding the lis.

Point No. (2) is decided to the effect that the suits are not bad for want of a prayer for declaration of title over the suit property.

Point No. (3) is decided to the effect that the plaintiffs had locus standi to file the suits and more specifically by invoking Section 31 and other related provisions of the Specific Relief Act relating to the first prayer in the plaints.

Point No. (4) is decided to the effect that the trial Court was justified in applying Section 10 of the Limitation Act as against the defendants?

Point No. (5) is decided to the effect that the trial Court was justified in holding that C. Guruviah Chetty was not the owner of the suit property.

Point No. (6) is decided to the effect that the trial Court was justified in holding that C. Guruviah Chetty and his L.Rs. have not acquired title by prescription over the suit property.

Point No. (7) is decided to the effect that the trial Court was justified in holding that Vattam Gopala Chetty happened to be the original trustee of the Trust and that the plaintiffs are the legal representatives of Vattam Gopala Chetty.

Point Nos.(8), (9) and (10) are decided to the effect that the trial court properly understood the law relating to possession and granted injunction, so as to protect the possession of the plaintiffs through their tenants.

153. In the result, I could see no perversity or illegality in the common judgement and decrees of the trial court and the same are hereby confirmed and the appeals are dismissed; however, there is no order as to costs. Consequently, connected miscellaneous petitions are dismissed.

154. On hearing the judgement pronounced by me, the learned counsel for the appellants/defendants would submit that pending appeals, as undertaken by him, status quo was prevailing, now on the strength of the dismissal of the appeals, the plaintiffs may meddle with the suit properties to the detriment of the defendants in seeking their remedy before the Hon"ble Apex Court. Whereupon, the learned counsel for the respondents/plaintiffs would submit that for three months from to-day the plaintiffs would not in any way alienate or encumber the suit property or raise any construction thereon and it is hereby recorded. In view of my findings supra that the suit property is a trust property, meant for charitable purposes, the same should be adhered to in stricto sensu, as per law.