

(2011) 11 KAR CK 0139

In the Karnataka High Court

Case No : Regular First Appeal No. 280 of 2001 and Regular First Appeal No. 20 of 2001

Christopher Karkada and Others

APPELLANT

Vs

Church of South India and Others
 Church of South
India Karnataka Southern Diocese and The Church of South
India Trust Association Vs Christopher Karkada and Others

RESPONDENT

Date of Decision : 19-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 7 Rule 11, 92
Transfer of Property Act, 1882 — Section 6

Citation : (2011) 11 KAR CK 0139

Hon'ble Judges : N. Kumar, J;A.N. Venugopala Gowda, J

Bench : Division Bench

Advocate : Udaya Holla, for Sri Sannath Kumar Shetty, Advocate-Appellant No. 4 and M/s. Tarakaram Associates in Regular First Appeal No. 20 of 2001, for the Appellant; S. Vijayashankar and Sri V. Tarakaram for M/s. Tarakaram Associates for R1, 3-7 and 11, Sri G.S. Vishweshwaraiah for R27, Sri S.P. Kulkarni, Advocate for R28 and Sri K.M. Nataraj, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—The appellants-plaintiffs have preferred this Regular First Appeal challenging the judgment and decree of the trial Court dismissing their suit. Respondents 1 to 3 have also preferred a Cross Objection challenging the finding of the trial Court on issue Nos. 12, 21, 23 and additional issue No.6.

2. The suit filed u/s 92 of CPC is for settling a scheme for the proper and due administration and management of the properties of the United Basel Mission Church in India, South Kanara and Coorg. in respect of the plaint A, B, C, D and E Schedule properties and for other consequential reliefs, For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

PLEADINGS

3. The case of the plaintiffs is as under:-

The United Basel Mission Church in India of district of South Kanara and Coorg, for short, hereinafter referred to as "UBMC. is fully evolved evangelical Protestant Christian Church. It is an autonomous administrative unit, independent of all external control and is governed by its own constitution known as "The Constitution of the United Basel Mission Church in India." The said Constitution is in two parts. The first part is the Constitution and the second part is the Church Rules. The plaintiffs in the suit are interested in the Trust properties belonging to UBMC of South Kanara and Coorg and administered by defendant No.32, The United Basel Mission Church in India Trust Association as Trustee, for short, hereinafter referred to as the Trust Association". The Trust Association is a Trustee of UBMC. The plaintiffs are also interested in the proper and efficient management of both the religious and secular institutions, activities, assets and affairs of UBMC. Therefore, the suit is instituted for and on behalf of the said Trust and for the benefit of the numerous members of UBMC, who have some interest in the suit as the plaintiffs.

4. According to the plaint averments, the UBMC is a Presbyterian Church, fundamentally different in faith, doctrine, tradition practices and forms of worship from the Episcopal Church known by the name of the Church of South India, for short, hereinafter referred to as "CSI" which was incorporated on 27.09.1947 by the Union of South India United Church, the South India Province of the Methodist Church and the Churches of the dioceses of Madras, Dornakal, Tinnevely, Travancore and Cochin in the Church of India, Burma and Ceylon. UBMC is fundamentally different from the CSI. UBMC has been consistently opposing the move initiated by certain interested parties, including the 30th defendant, the Evangelical Missionary Society in Basel (Basel Mission), for short, hereinafter referred to as Basel Mission", which had founded the UBMC to merge this Church in CSI. In spite of opposition to this merger, the interested persons in defendant No.28, i.e., the District Church Council of UBMC at its extraordinary meeting held on 09.05.1961. passed a resolution proposing the merger of the UBMC with the CSI. The said resolution was challenged in a representative suit in O.S.NO.221/61 on the file of the Munsiff of Mangalore, filed by certain members of UBMC on behalf of the members of the UBMC for a declaration that this resolution was void, illegal and ultra vires the powers of the District Church Council under the Constitution UBMC in India. They also wanted a declaration that the said resolution is illegal and void as per the provisions of the Religious Societies Act, 1880 and in particular of Section 6 thereof and not valid and binding on the plaintiffs or other members of UBMC of South Kanara and Coorg. They also sought for permanent injunction restraining the defendants from implementing the impugned merger resolution. The order of temporary injunction was also sought. The defendants in the said suit gave an undertaking to the Court that they would not implement the impugned resolution during the

pendency of the suit. The suit was dismissed on 27.05.1968. Aggrieved by the said judgment and decree, an appeal in R.A. 189/68 was filed before the learned Civil Judge, Mangalore. By order dated 15.11.1968, an order of temporary injunction was granted restraining the defendant in the said suit from implementing the impugned resolution and also from transferring the properties, assets institutions and activities of the UBMC to CSI during the pendency of the appeal. The said order of injunction was in force till the dismissal of the appeal on 12.04.1971. Aggrieved by the said judgment and decree of the Courts below, RSA 741/71 was preferred before this Court on 25.08.1971. An order of temporary injunction was granted by this Court, which order was made absolute after hearing the defendants in the suit on 14.10.1971. Ultimately, on 19.04.1974, second appeal was allowed. The judgment and decree of the Court below was set aside and the plaintiffs suit was decreed as prayed for. Defendants-5, 6, 7, 8, 28 and 29 in the present suit preferred SLP No. 2114/74 and the Supreme Court declined to grant order of stay of the judgment and decree passed by this Court.

5. After the dismissal of O.S.No.221/61, O.S.No.345/1968 came to be filed against defendants-1 to 5 herein. In the said suit, the CSI is also a party. An order of temporary injunction also granted even against CSI from implementing the merger resolution and the interim order granted in those proceedings continued to be operative without any interruption from 18.07.1968 to 19.04.1974.

6. The Basel Mission-30th defendant, started its missionary work in South-Western India in 1834, which resulted in Basel Mission Churches coming up. Basel Mission Church came into existence in three separate administrative ecclesiastical districts of South Kanara with Coorg, Bombay-Karnataka or South Maharatta, comprising the districts of Dharwar, Bijapur and Malabar. In connection with the work of these Basel Mission Churches, the landed properties consisting of agricultural and non-agricultural lands were acquired for purposes of Church buildings. Prayer Halls, Meeting Rooms, Graveyards. Schools. Hospitals, Printing Pres. Theological Seminaries, Hostels, Boarding Houses. Sick-houses, Homes for the poor, widows and converts and for the residence of Missionaries and other servants and agents of the Church. With the passage of time, the activities of these Churches increased and they acquired several properties and were managing all those properties. Though the title of the immovable properties stood in the name of General Treasurer of the Basel Mission, according to the plaintiffs, they really belonged to the Churches. The Basel Mission was merely acting as a Trustee of UBMC in India. All these properties were confiscated by the British Government on the outbreak of the First Great War of 1914, as enemy properties and vested in the custodian of Enemy property, Madras. Later, under orders of the Governor-General In Council, the said properties were released by a registered deed dated 26.01.1920 to certain trustees, who came to be later designated as the Mission Trust of Southern India for being managed and used for the benefit of these Churches.

Throughout the period of management, the said properties continued to be in use and enjoyment of indigenous Basel Mission Churches in the several districts as before, without any break. Similarly, all the properties which belong to German Missionaries of Basel Mission was also confiscated and vested in the Missionary Body known as "Kanrese Evangelical Mission" and they confined their activities to the ecclesiastical districts of South Kanra with Coorg and Bombay-Karnataka. The Basel Mission Churches in Malabar, however were affiliated on 01.04.1919 to the South India United Church as its Eighth Church Council. Later, after the British Parliament permitted the German Missionaries to return to India, 30th Defendant, Basel Mission, which is the successor of the original Basel German Evangelical Missionary Society, resumed its work in 1926 in its former sphere of operations in the three ecclesiastical districts. The aforesaid Kanarese Evangelical Mission withdrew from South Kanara with Coorg and Bombay-Karnataka.

7. After the return of Defendant-30-Basel Mission, the Mission Trust of Southern India, which was administering the aforesaid properties which vested with them under the documents dated 26.01.1920, transferred those properties on 09.08.1931 to defendant-30, a Society incorporated in Switzerland and carrying on Mission work in India, West Africa, China and Borneo and represented in India in its secular affairs by its General Secular Agent and Treasurer. In 1933, the Basel Mission relinquished its control over all the Basel Mission Churches in the three ecclesiastical district units and those Churches came to be constituted on 17.10.1933 in the autonomous body of "The United Basel Mission Church in India", each of the three district units being an independent entity vested with the control of the affairs of the Churches within its limits under the revised constitution and Church Rules with effect from 17.10.1933. each of these three ecclesiastical district units became an autonomous unit independent of all control by the Basel Mission. Thereafter, all the properties of UBMC in India belonging to these three district units were vested by the 30th defendant-Basel Mission in Defendant No.32, i.e., Trust Association for management for the benefit and in the interest of UBMC in India, subject to directions of the Church authorities in the respective districts, as expressly stipulated in the relevant declarations of Trust, executed by the Basel Mission on 18.09.1934, for the benefit of the works of the Church founded by the Society. It also executed a document dated 01.08.1939. in respect of properties for the benefit of works of the Mission carried on by the Society in India. These two documents were registered in the office of the Registrar of Madras-Chingalpet on 27.01.1935 and on 29.11.1939 respectively. These two declarations of Trust, which in fact and effect are gift/settlement deeds confirming/creating a Trust, establish beyond doubt or dispute, the exclusive and absolute ownership and beneficiary rights in these Trust properties which have subsisted continuously in UBMC of India, a distinct autonomous religious society governed by its own constitution, independent of any control by the Basel Mission. The Trust properties are fully described in the Schedule annexed to the plaint.

8. Defendant No.30, the Trust Association was a Company registered on 28.08.1934 under the Companies Act, 1913. Under the aforesaid documents dated 18.09.1934. 01.08.1939, it is clearly recited that, if the Society should at any time be desirous of retiring from the office of trustee, it shall have the power to appoint new trustees of these properties. In exercise of its power, the 30th defendant-Basel Mission, relinquished its Trusteeship in respect of all these properties and appointed defendant No.32, the Trust Association and Trustee in its stead as evidence by the following declaration contained in each of the documents No.828 dated 01.08.1939 which are duly registered on 08.04.1936 and 29.11.1939 respectively. The relinquishment was absolute, unconditional and complete and defendant No.32, the Trust Association accepted and acted upon it.

9. The 30th defendant-Basel Mission, since 1948 has been openly attempting to influence the UBMC to merge in the CSI. In 1957, the 30th defendant-Basel Mission in order to coerce the UBMC of South Kanara and Coorg. to merge in the CSI and ultra vires its powers purported to revoke the declarations of Trust in aforesaid documents and drew up fresh declarations of Trust in document dated 03.12.1957, which was registered on the same day, whereby, a new provision was made to enable the defendant No.32, the Trust Association to utilize these Trust properties for the benefit of the district Churches of UBMC in India even if they join CSI. Both these documents were challenged as incompetent and void in the Court of the Subordinate Judge of Palghat in O.S.No.7, in which, the CSI, the CSI Trust Association, the Basel Mission and UBMC in India and defendants. 1. 3, 30 and 32 are also defendants. By judgment dated 07.04.1971. it was held that both these declarations of Trust were incompetent. This finding was affirmed by the Kerala High Court in its judgment on 01.08.1975 in Appeal Suit No.410/71. In spite of the aforesaid declarations, in disobeying the valid orders of injunction of the High Court in RSA 741/71 and of the Civil Judge of Udupi in M.A.No. 16/70, the 30th defendant-Basel Mission, under a document dated 14.03.1972, executed on its behalf by the Treasurer and Attorney Rev. Albert Veigel, which was duly registered on 17.03.1972 purported to transfer all the immovable properties of UBMC of South Kanara and Coorg and of Bombay-Karnataka. described in Schedule-A and Schedule-B respectively, to the third defendant, the CSI Trust Association, without consideration, to hold the same in Trust for the Church of South India. after purporting to revoke by means of documents of 1972, the previous declarations of Trust in earlier documents. Defendant-30 Basel Mission having ceased to be Trustee, it had no subsisting right or interest to execute the aforesaid documents and hence they are void. That apart, the properties purporting to be transferred, belonged to UBMC in India and hence, none including 32nd defendant could have transferred the properties belonging to UBMC in India to CSI. The said documents were executed when litigation concerning the said properties was pending and hence, aforesaid transfers are void and being hit by the principle of lis pendens.

10. Thereafter, defendant-32, the Trust Association, again in disobedience of the valid orders of injunction referred to supra, purported to transfer certain

properties of UBMC of South Kanara and Coorg. described in Schedule C, to the third defendant-CSI, Trust Association, without consideration to hold the same on Trust and for the use and benefit of the work of 30th defendant and UBMC in India in the district of South Kanara and Coorg, by means of document dated 17.11.1972 registered on the same day, The third defendant-CSI Trust Association, in purporting to receive the properties of the UBMC described in Schedule C, on behalf of first defendant-CSI also acted in contravention of the injunction order of the Civil Judge of Udupi in M.A.No. 16/70. These alleged transfers are illegal, void and of no effect. They are sham, nominal and make-believe, not intended to be acted upon and also hit by the principle of *lis pendens*. These alleged transfers have also been effected by fraudulent collusion between defendant Nos.1, 3, 5, 6, 7, 29, 30 and 32 and are also in clear breach of trust. The collusion between these defendants is apparent, particularly from the recitals in documents of 1972-73. under which the defendant No.30 has revoked its declaration of trust in document of the year 1957 and all the properties covered by the said declaration of Trust to the third defendant by the aforesaid registered documents. Defendants-32 is not desirous of continuing the Trusteeship of such other properties acquired by it and not covered by the transfer deeds of 1972 and is actively contemplating its voluntary winding up as per the provision of the Indian Companies Act. Defendant-32, executed transfer deeds in accordance with the wishes defendant-30 is void and of no effect. After the alleged transfer of properties, defendant-32, the Trust Association, at a Special General Meeting held on 27.12.1972, resolved that the same is hereby wound up voluntarily by members. The alleged winding up of defendant-32 is void in law, in view of the injunction order of the High Court of Karnataka.

11. Therefore, it was contended that the transfer of properties of the UBMC in India held in trust for the use in the interest and for the benefit of UBMC, including the plaint A, B and C, Schedule properties is illegal, void, inoperative and of no effect whatsoever. The plaintiffs are entitled to ignore the said transactions and to treat the UBMC, as still the owner of the plaint A, B and C schedule properties. The Mission also ceased to exist as a separate entity in India since 1952, when it and all activities were integrated in UBMC in India.

12. The defendant-32 has also been registered as a public Trust in Dharwar District. After such registration, an application was filed to Assistant Charity Commissioner to enter the name of third defendant, the CSI Trust Association, in the register of Trusts. The Charity Assistant Commissioner, Belgaum, rejected the said application by an order dated 25.09.1973. The said order is not challenged and it has become final and it operates as *res judicata*, and is not binding. Transfer of Trust properties by defendant-30, to defendant 3 is void, also for want of permission by a competent Court as required by law. The purported transfer is neither for benefit nor for necessity. The purported transfer is a clear case of rank breach of trust and *ultra vires* the powers of the alleged transferor. Defendants-17 and 39 are actively assisting in others, in mismanaging the properties and in breach of trust. The Defendant-30, the Basel Mission,

transferred the properties and the institutions, which are situated on such lands such as Hebich Technical Training Institute to defendant No.40, the Christian Educational Society, a society registered under the Karnataka Societies Registration Act. The transfer of these properties to 40th defendant is void, incompetent and also in contravention of the injunction orders. The said transfers are also not for benefit or necessity. 40th defendant is indulging in illegal and tortuous act on the said properties. The alleged transfer is an attempt to appropriate and divert the properties of the Presbyterian Church of the UBMC, for the benefit of CSI, which is fundamentally different in faith, doctrine, tradition and practices from the UBMC in India. "The beneficiaries have been changed and the properties belonging to the UBMC which is the sole beneficiary have been diverted for the use of CSI, a wholly alien body. Defendant-3 and 40 are ineligible to be Trustees and to manage these properties, though they have been managing these properties in question as de facto trustees or trustees de son tort.

13. Defendant-29 who is managing all these properties is liable to render accounts of income and expenditure of UBMC of South Kanara and Coorg from 01.01.1966 up to date. Defendant-29 is in control of the educational, medical, theological and other institutions, like orphanages, boarding houses, creche centers, farms etc. of UBMC, with scope for providing lucrative employment. This position of vantage has been abused by defendant No.29.

14. The plaintiffs are communicant voter members of UBMC of South Kanara and Coorg in five of its Local Churches. Plaintiff-1 is a member and Pastor of the Gudde Local Church, situated in Gudde of Pangala Village in Udupi Taluk. Plaintiffs-2, 3 and 7 are members of the Udupi Local Church. Plaintiff-3 among them being also a Presbyter of the said Church. Plaintiff-4 is a member of the Malpe Local Church. Plaintiff-5 is a member of the Mercara-Hill Local Church in Mangalore Town. Plaintiff-6 is a member of the Balmatta Local Church in Mangalore Town. The mal-administration of UBMC of South Kanara and Coorg and the illegal and unlawful control exercised by the defendant No.5 to 10 and 29 in the affairs of UBMC of South Kanara and Coorg, in collusion with the other defendants including particularly defendant Nos.1 to 4 and 11 to 27, has created acute discontent in the UBMC of South Kanara and Coorg. Therefore, the plaintiffs are constrained to file this suit in personal capacity as well as in a representative capacity, under Order 1 Rule 8 of CPC on behalf of members of UBMC of South Kanara and Coorg, who are vitally interested in the subject matter of the suit and steps have been taken u/s 92 as well as under Order 1 Rule 8 CPC. to so institute this suit.

15. Defendants-5 to 10 have committed breach of trust and it is highly prejudicial to allow them to be the office-bearers of defendant Nos.28 and 29. It is necessary to remove them and appoint or direct elections to be held to elect office bearers in their place in accordance with the constitution of UBMC. It is also necessary that defendants-1 to 4 and 11 to 27 should be restrained by

permanent injunction, from interfering with the affairs of UBMC of South Kanara and Coorg and even from functioning. It is also essential to frame a scheme for the proper and effective management of the properties, comprised in Schedules A, B, C, D and E and other assets and institutions of UBMC belonging to UBMC. Defendants-5 to 10 and defendants-29 must also be directed to render accounts of UBMC property, funds and income ever since 1966. Defendants-1, 3, 4, 30, 32 and 40 or such of them as may be found liable as Trustees de son tort, are also liable to be divested of the properties of the UBMC, as may be found in their possession and control. They are also bound to render accounts. " Therefore, the plaintiffs have preferred this suit for settling a scheme for the proper and due administration and management of the properties of the United Basel Mission Church in India, South Kanara and Coorg. i.e., the plaint, A, B, C, D and E Schedule properties and for other consequential reliefs.

16. After service of summons the defendants entered appearance and have filed separate written statements. Some of them have adopted the written statements filed by others.

17. The defendants 1 & 2, the Church of South India, contends that the suit is not maintainable u/s 92 of the CPC, as leave of the Court to institute the suit was not obtained before instituting the suit. They deny the allegations in the plaint, regarding the constitution of UBMC. They contend that the churches which came to be known as the United Basel Mission Churches were originally established in the South West of India, i.e. South Kanara and Coorg, in Malabar and in Bombay Karnataka by the Evangelical Society of Basel, Switzerland, i.e. by the 30th defendant society. This society was not a church but a society formed by missionaries drawn from different denominational churches of Switzerland and Germany for spreading the gospel. The society founded the churches from the year 1834 onwards and built churches, schools, hospitals, orphanages, workshops, etc. All the properties belonged to the society and only the use of them was permitted to the indigenous churches, which came to be called Basel Mission Churches. In the year 1933, with intent to give a certain measure of autonomy from the parent society and also to unite the several churches organisationally, a constitution was adopted and the different churches came to be known as the United Basel Mission Churches. Under the Constitution, Basel Mission Churches were grouped into 3 ecclesiastical district of South Kanara and Coorg, Malabar and Bombay Karnataka, each unit with a distinct council and subject to the centralised control of a synod. All the 3 districts churches remained subject in matters of faith and order, to the authority of the Synod, a body composed of representatives of Basel mission apart from representatives of the 3 district churches. Both before the adoption of the 1933 constitution and subsequently also, the Basel Mission Churches have been evolving towards union with other Protestant Christian Churches. As early as the year 1918, the Basel Mission Churches of Malabar had joined the South India United Church, which includes churches founded by the London Missionary Society and other denominational churches. When the United Basel Mission Churches adopted a

constitution in 1933 with a declaration of faith, the Basel Mission Churches of Malabar, which since 1918 had been members of the South India United Church, were accepted as a component unit of the U.B.M.C. In 1947, when CSI was formed, the U.B.M.C. Synod, permitted the Malabar unit to join the CSI. Later in 1953, the UBMC Synod recommended to the UBMC Churches of Bombay, Karnataka and South Kanara and Coorg, a union with the Church of South India. U.B.M.C of Bombay Karnataka joined the C.S.I, in 1958. The further consummation of this evolution towards union with other Protestant churches, by the remaining unit of the U.B.M.C. viz. the UBMC of South Kanara and Coorg joining the C.S.I, was resolved upon by the District Church Council of the U.B.M.C. on 9-5-1961 and the District Church Board of the UBMC was authorised to obtain the approval of the UBMC Synod and to correspond with CSI authorities. On 24-6-1968, the Synod of the UBMC unanimously resolved to permit the U.B.M.C. to join the C.S.I. The averment at para 111(28) of the plaint, that the Synod of the U.B.M.C. has not passed any resolution approving the merger resolution is untrue. Meanwhile on 11-6-1968 the executive Committee of the C.S.I. Synod, resolved to accept the U.B.M.C. into the CSI and appointed representatives to meet the District Church Board Members of the U.B.M.C. for the act of the Union. On 24-6-1968, these representatives appointed by the Executive Committee of the C.S.I. Synod and the District Church Board members of the U.B.M.C. held a joint meeting and declared by the joint resolution that the U.B.M.C. of South Kanara and Coorg has become part of C.S.I. Thus the merger resolution of 9-5-1961 was implemented on 24-6-1968 when there was no injunction of any court against implementation of the merger resolution. Minutes of Union of the two churches dated 24-6-1968, provided for existing arrangements to continue until new order is taken. The contention that the merger resolution dated 9-5-1961 would require the procedure prescribed in Chapter XV of the C.S.I. Constitution is not correct. That Chapter is applicable to the C.S.I, itself merging into another wider union and losing its identity and not to the case of C.S.I, retaining its identity and receiving into its fold another Church, which accepts the C.S.I. Constitution. The Church of South India was not a party to the suit which was the subject matter of RSA. 741/1971 and the CSI is not bound by the judgment therein. The Church of South India being an unincorporated body with a membership of lakhs of persons cannot be sued by naming anyone as a representative without obtaining permission under Order 1 rule 8 CPC, to sue that person as representing the Church. Since no permission of the Court under Order 1 rule 8 of the CPC was obtained in O.S. 345/1968 in Udupi Munisff Court, to sue the Moderator as representing the Church of South India, the temporary injunction order in that suit or in the appeal therefrom viz. M.A. No. 16/1970 does not bind the Church of South India. The Moderator, impleaded in that suit as representing the Church of South India, did not obtain leave of the Court, under order 1 rule 8 to defend the Church of South India. Hence, the Church of South India is not bound by any statement of counter or memo filed by or on behalf of the Moderator. Since the UBMC has merged into the CSI on 24-6-1968 and does not exist as a separate entity, the question of the

CSI committee being inducted into the UBMC of South Kanara and Coorg does not arise. The UBMC became a part of CSI on 24-6-1968, when there was no injunction of any court against the C.S.I, or the UBMC. Even independently of the merger, the CSI has a right to function as a Church in South Kanara and Coorg and to include South Kanara and Coorg as part of a CSI Diocese along with Mysore, Mandya. Hassan and Chickmagalur.

18. The plaint schedule properties belong to the 30th defendant society, which had only permitted the UBMC to use the same and the trusts have been revoked by the 30th defendant society. The revocation is valid for the reasons stated in the written statement of the defendants 3, 30, 31 and 40. On such revocation, the 30th defendant-society has transferred major portion of the properties to the 3rd defendant in trust of the CSI and the remaining portion to the 40th defendant in trust for the Karnataka Theological College and the Hebich Technical Training Institute. Hence the interim Diocesan Administrative Committee of the CSI i.e. the 4th defendant is functioning in respect of CSI Church in South Kanara and Coorg and not in respect of the UBMC and that too on properties neither belonging to the UBMC nor held in trust for the UBMC. There is no place for such committee. The interim Diocesan Administrative Committee of the CSI for Karnataka Southern Diocese was constituted in the year 1972 itself. There is no place for such a committee in the UBMC constitution and that the committee includes defendants 5 to 27. who belong to the CSI and not UBMC are not relevant, since it is a committee for administration of CSI churches functioning for properties held in trust for the CSI. The 5th defendant as CSI Bishop is entitled to ordain church workers in CSI churches. It is not true that such workers are posted to UBMC Churches. After the merger in the CSI on 24-6-1968, there are no UBMC Churches. Also the properties in the use of the CSI in South Kanara and Coorg for its churches are properties vested in the 3rd defendant in trust for the CSI and not UBMC properties. The power of the District Church Council of the UBMC to appoint church workers under Article 9B(2) of the UBMC constitution is not relevant for appointing workers in the CSI Churches. The plaintiffs are not entitled for the relief of framing a scheme and they are also not entitled to other prayers in the plaint.

19. Even independently of the merger of the UBMC the CSI has a legal right guaranteed in the Indian Constitution to function as a Church anywhere in India including South Kanara and Coorg and the properties in which the CSI functions in South Kanara and Coorg are properties held by the 3rd defendant in trust for the CSI. The question, what are the properties of the UBMC was not decided in RSA.No.741/1971 of the High Court of Karnataka. No leave of this Court under Order 1 Rule 8 of CPC has been obtained in this suit to Moderator as representing the Church of South India. Hence the Church of South India is not being sued in the only way in which it can be sued. Hence the suit against the Church of South India is liable to be dismissed on this ground also.

20. The defendants 4, 5, 6, 7 & 8 have filed a written statement traversing the

allegations made in the plaint. They have reiterated what has been stated by the defendants 1 & 2 in their written statement. They have denied expressly the allegation of mal administration, misuse of properties, misuse of office alleged against them. They have denied the liability to account to the plaintiffs and therefore, have prayed for dismissal of the suit.

21. Defendants 9 & 10 have filed a memo adopting the statement of defendants 4 to 8.

22. It is in the written statement of defendants 3, 30, 31 and 40, the substance of the defence in the suit is set out. They have also reiterated the stand that the suit purporting to be instituted u/s 92 of C.P.C. has been instituted without obtaining prior leave of the Court. It is not competent. The plaint does not disclose any cause of action for the suit u/s 92 of C.P.C. and has to be rejected under Order 7 rule 11 of C.P.C. The claim of the plaintiffs to the persons interested in the trust properties belonging to the United Basel Mission Church of South Kanara and Coorg, is not true or correct. The properties described in schedules are not trust properties belonging to the United Basel Mission Church of South Kanara and Coorg, nor are these properties administered by the 32nd defendant. The 32nd defendant does not exist at present. The plaintiffs are not the persons interested in the proper and efficient management of the religious and secular institutions activities and assets and affairs of the United Basel Mission Church.

23. The United Basel Mission Church of South Kanara and Coorg has no present existence, having become merged in the Church of South India on 24.6.1968. The plaint schedule properties were never the assets of the UBMC Church. Activities and affairs without property cannot be the subject of a suit u/s 92 of C.P.C. Since the alleged trust has no existence, the plaintiffs cannot be entitled to sue on behalf of the trust.

24. The properties described in Schedules "A" "B" "C" "D" and "E" in the plaint schedule, were acquired by the Evangelical Missionary Society of Basel, Switzerland. It was not a Church but a Society registered in Basel, Switzerland formed by the Missionaries drawn from different denominational Churches of Switzerland and Germany, for spreading the Gospel. The Churches which came to be known as the United Basel Mission Churches were founded by the Society from the year 1934 onwards in South Kanara and Coorg, in Malabar and Bombay Karnataka.

25. It is not admitted that the plaint schedule properties were acquired by or for the Basel Mission Churches, or that the capital invested in the acquisition of the said properties belonged to the Basel Mission Churches, or that members of these Churches contributed money, materials and labour, for construction, repair and maintenance of buildings. or that the title deeds of the properties stood ostensibly in the name of the General Treasurer of the society and that the properties really belonged to the Basel Mission Churches or that the Society was

merely acting as trustee for the UBMC in India. By registered deed dated 26.1.1920, the custodian of property, transferred the properties to 5 trustees known as the Mission Trust of Southern India, to hold the properties in trust for the benefit of the work of any Protestant Missioner Protestant Church including the Evangelical Church. The words, any Protestant Church including the Anglican Church" conclusively negative a trust exclusively for the UBMC Church and would admit even an Episcopal Protestant Church. This deed also gave power to the Mission Trust of Southern India to transfer the properties for money or other valuable consideration as fully as if they were absolute owners. This instrument was expressly validated and the powers conferred on the transferee were confirmed by the legislature by enacting the Enemy Mission Act, 1921. Exercising the powers conferred by the aforesaid Act, the Mission Trust of Southern India transferred the plaint schedule properties to the 30th defendant viz.. Evangelical Missionary Society in Basel for valuable consideration, to hold the same for the use of the Society absolutely.

26. Thereafter, the 30th defendant Society declared 2 trusts, appointing itself the trustee in both cases, with power to retire from trusteeship and to appoint new trustees, reserving to itself in its capacity as author of the trust, the power to revoke the trusts and to declare new trusts, without regard to the original trusts. Since the power of revocation of trusts, is a power which belonged to the 30th defendant Society in its capacity as the author of the trusts, it was expressly stated in both declarations of trust, that the power of revocation would remain in the Society, notwithstanding the appointment of a trustee by the new society. One trust, declared by the Society by Registered document dated 18.9.1934 was in respect of plaint "B" schedule properties and was for the benefit of the work of the Church, founded by the Society in South Kanara and Coorg, Malabar and Bombay Karnataka, known as the United Basel Mission Church in India or of that Church which may be declared to be its successor. The Second Trust, declared by the 30th defendant Society by registered document was in respect of the plaint "A" schedule properties and was for the benefit of the work of the Mission carried on by the Society in India. This second trust was not for the benefit of the work of any church, but for the benefit of the secular activities of the Society. The secular character of this second trust is eloquently illustrated by a Brahmin Girls School established by the Society. Both the trusts having regard to the terms thereof are not public trusts at all.

27. It is not true that these 2 declarations of the trust establish exclusive and absolute ownership and beneficiary rights in the plaint schedule properties in the U.B.M.C. as alleged in the plaint. No ownership was conferred on the U.B.M.C. by either of these 2 declarations. Both the trusts were subject to the power of revocations reserved to the author of the trusts viz., the 30th defendant society. Later in respect of both the trusts, the 30th defendant Society appointed a Company known as the United Basel Mission Church in India Trust Association by registered document dated 19.12.1935 in respect of the Church Trust and by registered document dated 1.7.1939 in respect of the Mission Trust,

28. The 30th defendant Society has always encouraged the movement for church union. As early as the year 1918 the Churches founded by the Society in Malabar were allowed to join the South India United Church. The U.B.M.C. Churches of Bombay Karnataka were in 1958 allowed to join the Church of South India. To facilitate such mergers the 30th defendant Society in the year 1957 revoked both the earlier declarations of Trust viz., declaration dated 18.9.1934 and 1.8.1939 and declared new trusts. By registered document dated 3.12.1957, the previous trust relating to the Church Trust was revoked and a fresh declaration of trust was made for benefit of the work of the Church founded by the Society known as the UBMC Church in South Kanara and Coorg and in Bombay Karnataka and the Church of South India in Malabar or for the benefit of any other Church which shall be declared by the Society to be the successor thereof and the clause 1(b) in the previous trust declaring the celebrations of divine service according to the usage of the U.B.M.C. to be one of the objects of trust was deleted in the new declaration and by registered document dated 3.12.1957, the previous declaration relating to the Mission Trust was revoked and a fresh declaration of trust made for the benefit of works of the Mission started or carried on by the Society and the U.B.M.C. in the South Kanara and Coorg and Bombay Karnataka and by the Church of South India in Malabar. The clause in the previous declaration relating to the Mission Trust declaring the celebration of divine service according to the usage was one of the objects of the trust was deleted in the new declaration. Under both these new declarations of 1957, relating to the Mission Trust and the Church Trust respectively, the 30th defendant Society as author of the trusts, again reserved to itself a power of revocation of the trusts and appointed the U.B.M.C. ITA to be the trustee. These new trusts also are not public trusts.

29. It. is not correct to say, after the 30th defendant society had relinquished the trusteeship and appointed the U.B.M.C.ITA as trustee in its place by registered documents in 1936 and 1939, it had no power to revoke the trusts. The power of revocation belongs to the author of the Trust not to the trustee and even after the Society appointed the U.B.M.C.ITA as trustee, the Society continued to have the capacity and power of author of the trusts to revoke the trusts. Accordingly, the original declarations of trust by the Society had expressly stated that the power of revocation of trust will remain in the Society, notwithstanding the appointment of any new trustee. This aspect was erroneously lost sight of in the Judgment in A.S.No.410/1971 of the High Court of Kerala. The reference to this judgment in Para III (15) of the plaint is a case of suppressio veri and suggestio falsi The truth is that the Kerala High Court dismissed the suit which assailed the 2 documents of revocation of the previous trusts and declaration of new trusts, so that the observations quoted in the plaint are not a binding decision against these defendants.

30. The declaration of trust relating to the Church Trust made by the 30th defendant Society under document no.2504/1957 was revoked by the Society by registered document No. 1164/1972 and the properties were transferred by the

Society by document no. 1166/1972 to the Church of South India Trust Association (3rd defendant) in trust for the Church of South India and the declaration of trust relating to the Mission Trust made by the 30th defendant Society in 1957 was revoked by the Society by registered document no. 1163/1972 and the properties were transferred by the Society in 3 portions under 3 transfer deeds. A major portion was transferred by the Society under registered document of 1972 to the 3rd defendant, in trust for the Church of South India, Another portion was transferred by the 30th defendant Society under registered document to the 40th defendant, in trust for the Karnataka Theological College and a third portion was transferred by the 30th defendant Society under registered document to the 40th defendant, in trust for the Hebich Technical Training Institute.

31. The allegation that the 30th defendant having ceased to be a trustee, had no subsisting right to execute aforesaid documents, is wholly erroneous. The right of revocation of trust was reserved in the declaration of trust to the 30th defendant Society, as author of the trust and even after appointing the UBMCIITA as trustee under document in 1936 and 1939. the 30th defendant retained the capacity and power of authors of the trust. The revocation of trust in exercise of power reserved to the author of the trust in the declaration of trust is allowed by law. Hence on revocation of trust by documents of 1972, the 30th defendant Society was competent to transfer the properties on trust to the 3rd defendant under document of 1972 and to the 40th defendant under Document of 1972.

32. The plaint C schedule properties were acquisitions of the 32nd defendant after it was appointed trustee by the 30th defendant Society in respect of the 2 trusts for the benefit of the work of the Church and the work of the Mission. The acquisitions were from the profits of the trust properties and became accretions to the parent trusts. When the parent trusts were revoked by the parent society in lawful exercise of the power of revocation reserved to it as author of the trust in the declarations of trust, the accretion trust in respect of the plaint schedule properly also stood revoked and since the property is covered by the revoked parent trust was transferred by the 30th defendant Society to the C.S.I.T.A, the properties covered by the revoked accretion trust were also transferred by the ostensible owner viz., the U.B.M.C.LT.A. to the C.S.I.T.A. in trust of the C.S.I, under registered document Insofar 1972-73 as directed by the 30th defendant society.

33. The documents executed in the year 1972-73 are not hit by the principle of *lis pendens*. No litigation was pending in which the right to the plaint schedule properties was directly and specifically in question. The said alienation does not contravene the temporary injunction order granted by the High Court as well as the Court of the Civil Judge. The subject matter of these documents were not the properties or assets of the U.B.M.C. and hence they were not the subject matter of the injunctions. The ad-injunction granted by a Court without territorial jurisdiction is void. The voluntary winding up of 32nd defendant is not a

contravention of the temporary injunction of the High Court Order. The mismanagement and misfeasance alleged in the plaint was denied.

34. The 40th defendant has not committed waste of the plaint "D" and "E" schedule properties by unnecessary demolition of useful old buildings and that construction of new buildings is not waste. Having specifically denied the other allegations in the plaint, they sought for dismissal of the suit. They have also averred that the suit is barred by limitation and the suit is also bad for non-joinder of State Government and the alienees as necessary parties.

35. The defendants 11 - 18, 20 to 22, 24 to 27, 35, 36, 38 and 39, adopted the written statement filed by the defendants 3, 30, 31 & 40.

36. The 34th defendant filed an independent written statement, adopting the statements and the averments on behalf of other contesting defendants. They specifically pleaded that the 34th defendant as per the records maintained in the office of the UBMC Trust association, ceased to be a member of the Managing Committee of the trust w.e.f. 14.7.1969 and as such, the suit of the plaintiff as against him is not maintainable. Therefore, he prayed for dismissal of the suit in so far as he is concerned.

37. Defendants 1 & 3 filed an additional written statement bringing on record the subsequent events. They contended that the suit does not survive for consideration as the cause of action (19-4-1974) ceased to exist on account of the Judgment of the Supreme Court of 20th Jan. 1988 in CA. No.84/75 and the date of transfer deeds 14.3.72, 17.11.72, 27.12.72 and 24.6.68 the date of merger barred by limitation on the date of orders passed u/s 92 CPC on 5.7.1992 in Misc. Case No. 44/90 on the file of this Court. There was no other cause of action for the suit. The defendant UBMC against whom main relief is sought in the plaint in para VI (1) is neither a Trust nor does it exist in the said Misc. Case.44/88. Therefore, the suit is not maintainable and the plaint itself ought to have been rejected- The 32nd defendant a company was revoked by an order of the High Court on 31.3.1978 in C.R No.20/1978. It has not been challenged so far and therefore, the suit against the 32nd defendant is also not maintainable. The Supreme Court by its order dated 20.1.1988 held that the resolution dated 9.6.1961 of the UBMC to merge with CSI was valid and was pleased to observe that on 24.6.1968 the Synod of UBMC granted permission for merger and stood dissolved. Therefore, UBMC who were the appellants as functus officio before the Supreme Court deemed to have been ceased to exist from 24.6.1968, For the aforesaid reasons, the suit does not survive for consideration against the defendants 28, 29 and 32 and defendants 30 & 31 have wound up their activities in 1972 in South Kanara and Coorg districts, The plaint schedule properties owned by defendant no.3 for defendant no.1 are properly managed and the income utilised for the purpose for, which it is dedicated ever since the properties are transferred to defendant-3 in 1972 and no breach of any express or constructive Trust whatsoever.

38. The 10th defendant by filing an additional written statement has traversed all the allegations in the plaint and has reiterated the stand of other defendants as set out above and seeks for dismissal of the suit,

39. On the aforesaid pleadings, the trial Court framed the following issues:

(1) Whether the plaintiffs prove that the United Basel Mission Church in India of the District of South Kanara and Coorg is a fully evolved evangelical Protestant Christian Church and is distinct and independent from the Church of South India?

(2) Whether the defendants prove that the resolution proposing the merger of the U.B.M.C. of South Kanara and Coorg dated 9.5.1961 was lawfully implemented on 24.6.1968?

(3) Whether the plaintiffs prove that there can be no lawful and valid merger of the U.B.M.C. in India of the district of South Kanara and Coorg with the C.S.I.. and that the alleged merger is in violation of injunction orders?

(4) Whether the plaintiffs prove that the decision in O.S.No. 221/61 on the file of Munsiff. Mangalore and the decision thereon in R.S.A. No.741/1971 operate as res judicata or otherwise binding between the parties?

(5) Whether the plaintiffs prove that the Temporary injunction orders in O.S.No.345/68 on the file of Munsiff, Udupi and M.A.No.16/1970 on the file of the Civil Judge. Udupi are binding on the Church of South India?

(6) Whether the plaintiffs prove that the properties set out in the plaint "A" schedule belonging to the U.B.M.C. in India of the District of South Kanara and Coorg and that the 32nd defendant was only a trustee thereof?

(7) Whether the defendants prove that the plaint "A" to "E" schedule properties belonged to the 30th defendant and that the plaint "A" schedule properties were declared on trust for secular purposes?

(8) Whether the defendants prove that the power of revocation of property was exercised by the 30th defendant?

(9) Whether the defendants prove that the plaint "C" schedule properties are accretions the alleged trust?

(10) Whether the plaintiffs prove that the purported transfer of properties by documents Nos. 1163 to 1166 of 1972, 1260 and 1261 of 1972 and 1107 of 1972-73 are void and inoperative and sham and nominal and hit by lis pendens?

(11) Whether the plaintiffs prove that the order dated 25.2.1972 passed by the charity Commissioner, Belgaum operates as res judicata and binding on the parties to the suit?

(12) Whether on the plaint averments, the suit is not maintainable u/s 92 of C.P.C?

(13) Whether the plaintiffs prove that the 3rd fourth and 40th defendants have committed acts of waste and damage with respect to plaint "A" to "E" schedule properties?

(14) Whether the plaintiffs prove that the defendants 5 to 10 have committed breach of trust and acts of mismanagement?

(15) Whether the suit is bad in law for want of prior leave of the court to institute the same?

(16) Whether the suit as against the Church of South India is bad in law for want of permission under Order 1 Rule 8 of C.P.C. to sue the Moderator as representing the Church of South India?

(17) Whether the plaintiffs prove that when the constitution of U.B.M.C. Churches was adopted in 1933, the Basel Mission, i.e., the 30th defendant relinquished all control over the same?

(18) Whether the trusts declared by the 30th defendant under the Registered Deeds Nos. 142/1935 and 2388/1939 were public trusts?

(19) Whether the Trusts declared by the 30th defendant under the Registered Deed Nos. 142/1935 and 2388/1939 were revocable trusts and they have been validly revoked?

(20) Whether the trusts declared by the 30th defendant under Registered Deeds Nos.2503/1957 and 2504/1957 were revocable and they have been validly revoked?

(21) Whether independently of the merger of the U.B.M.C. and the C.S.I, the latter has a right to function as a church in South Kanara and Coorg and to include these area as part of a C.S.I Diocese along with other areas?

(22) Whether independently of the merger of the U.B.M.C. and the C.S.I, the plaint D" and "E" schedule properties have become vested in the 40th defendant in trust for the Karnataka Theological College and the Hebich Technical Training Institute and the rest of the plaint "A", "B" and "C" schedule properties became vested in the 3rd defendant in trust for the C.S.I?

(23) Is the suit barred by limitation?

(24) Is the suit bad for mis-joinder of parties?

(25) Whether the plaintiffs are entitled to the relief prayed for?

Additional Issue:

(1) Whether the defendants No.1 to 3 and 10 prove that defendants No A. 5, 28. 29, 30 and 32 were not in existence as on 24-7-1991?

(2) If the answer to the above said first additional issue is in the affirmative, whether the suit filed by the plaintiffs against the above said defendants No.4, 5,

28, 29, 30 and 32 were not in existence as on 24-7-1991, survives for consideration?

(3) Whether the plaintiffs prove that UBMC represented by defendant Nos. 28 and 29 is a trust created for public purpose of a charitable and religious nature?

(4) Whether the 3rd defendant proves that it is the absolute owner of the plaint schedule properties since 14-3-1972 and the income thereof are used for the benefit of the members of the CSI according to the terms of the transfer deeds?

(5) Whether the defendants prove that the suit is bad for mis-joinder of parties as supplemental plaintiffs after 24-7-1991?

(6) Whether the defendants prove that the suit claim was barred by limitation as on 24-7-1991?

40. Additional issues were framed as per order dated 4-9-1995. Issue No.4 was amended as per order dated 16-10-2000.

41. The plaintiffs in order to substantiate their case examined J.W. Ammann as P.W-1. They have produced 62 documents which are marked as Exs.P-1 to P-62. On behalf of defendants, 7th defendant Rev.D.P. Sheetian was examined as D.W-1. They also examined J.S. Sadananda, the 6th defendant as D.W-2 and P.S. Shantha Kumar as D.W-3. They produced 83 documents.

42. The trial Court on consideration of the aforesaid oral and documentary evidence on record held that the question whether United Basel Mission Church in India of the District of South Kanara and Coorg is fully evolved evangelical Protestant Christian Church and is distinct and independent from the Church of South India, would not arise for consideration. It held that resolution proposing the merger of the UBMC of South Kanara and Coorg dated 09.05.1961 was lawfully implemented on 24.06.1968. It negated the contention of the plaintiffs that there can be no lawful and valid merger of UBMC in India of the district of South Kanara and Coorg with the CSI and that the alleged merger is in violation of injunction orders. It held on the question of res judicata, that the finding of the Supreme Court that in case of merger there cannot be any diversion of the properties held in trust by the Society-defendant No.30 and managed by UBMCITA-defendant-32 and the properties would remain as the properties of the Society which holds them for the purposes as mentioned in the deed Ex.A-148, i.e. dated 18.09.1934 marked as Ex.P-35 in this case and the resolution dated 09.05.1961 is valid and there are no fundamental differences between UBMC and CSI in the matters of doctrine, faith, worship and religious practices and the said findings operate as res judicata. In all other aspects it held that it would not operate as res judicata. It held that the order of temporary injunction granted in O.S.NO.345/68 on the file of the Munsiff, Udupi and judgment in M.A.No.16/1970 on the file of the Civil Judge, Udupi are binding on the Church of South India. It negated the contention of the plaintiffs that properties set out in plaint A to E schedules belonging to the UBMC in India of the district of South Kanara and

Coorg and that the 32nd defendant was only a trustee thereof. It held that defendants have proved that plaint A to E schedule properties belonged to the 30th defendant and that the plaint A schedule properties were declared on trust for secular purposes. The 30th defendant as duly exercised the power of revocation of property. Further it held that defendant proved that plaint C schedule properties are accretions to the alleged trust. The plaintiffs have failed to prove that documents which came into existence in the year 1972 are void, inoperative, sham, nominal and hit by lis pendens as contended by them in the plaint. The order dated 25.02.1973 passed by the Charity Commissioner, Belgaum, would not operate as res Judicata and binding on the parties to the suit. It was held that the suit is maintainable u/s 92 of CPC. The plaintiffs failed to prove that the defendants-5 to 10 have committed breach of trust and acts of mismanagement. It held that suit is not bad in law for want of prior leave of the Court to institute the same. Similarly, It held that suit as against the Church of South India is not bad in law for want of permission under Order 1 Rule 8 CPC to sue the Moderator as representing the Church of South India. It held that plaintiffs have failed to prove that when the Constitution of UBMC Churches was adopted in 1933, the Basel Mission, i.e., the 30th defendant relinquished all control over the same. It declared that the Trust declared by the 30th defendant under the registered deed Nos. 142/1935 and 2388/1939 were Public Trusts. It also held that, the said Trust were revocable Trusts and that they have been validly revoked. It also held that Trust declared by 30th defendant in 2503/1957 and 2504/1957 were also revocable and that they have been validly revoked. The Church of South India has a right to function as a Church of South Kanara and Coorg and to include those areas as part of CSI Diocese along with other areas independent of the merger of UBMC with CSI. The plaint D and E schedule properties have become vested in the 40th defendant in trust for the Karnataka Technological College and the Hebich Technical Training Institute and the rest of the plaint A, B and C schedule properties became vested in the 3rd defendant in trust for the CSI notwithstanding the merger of UBMC and CSI. It also held that suit is not bad for non-joinder of necessary parties nor barred by limitation, Defendants-1 to 3 and 10 prove that defendant Nos.4, 5, 28, 29, 30 and 32 were not in existence as on 24.07.1991. Consequently, the second additional issue was accordingly answered. The plaintiffs have failed to prove that UBMC represented by defendant Nos.28 and 29 is a Trust created for public purpose of a Charitable and religious nature. The third defendant also failed to prove that it is the absolute owner of the plaint schedule properties since 14.03.1972 and the income thereof are used for the benefit of the members of the CSI according to the terms of the transfer deeds. The defendants have failed to prove that the suit is bad for mis-joinder of parties as supplemental plaintiffs after 24.07.1991. Therefore, the trial Court dismissed the suit of the plaintiffs.

ARGUMENTS

43. Sri. Udaya Holla, learned Senior Counsel appearing for the plaintiffs-appellants contends that the Trust in question is a public charitable trust. Once

the author of the trust creates a trust and transfers the trust properties to the trustee, the trust property vests with the trust and the author of the trust divest himself of his right, title and interest to the said property. Once the trust was created as a charitable trust, the beneficial interest of the said property vests with the beneficiary. Therefore the charitable trust once created cannot be revoked. Even if a power is reserved in favour of a Settlor to revoke the charitable trust, such a power would be invalid. Therefore, revocation of the trust is void ab initio and non-est in the eye of law. In the alternative he submitted that the trust in question constituted under trust deed dated 18.09.1934 and the trust deed dated 13.12.1935, do not empower the Settlor to revoke the trust. Therefore, the revocation of the said trust is void. Clause (13) of Ex.P-35 and Clause (9) of Ex.P-37 is pressed into service to contend that power of revocation is reserved in favour of the Settlor. What is reserved is not the power to revoke the trust, but to revoke the trust powers and to declare new or additional trust powers. The revocation deed is executed by a Attorney, who had no power to execute such document. Consequently, the revocation is one without authority, void ab initio. He further submitted that the Apex Court in the earlier judgment between the parties though up held the resolution passed for merger, it has categorically declared that in the case of merger, there cannot be any diversion of the properties held in trust by the society and managed by UBMC Trust Association. The properties will remain the properties of the society which holds them only for the purpose as mentioned in the said deed. In other words, even if there is merger, the properties or income thereof will be utilized only for the benefit of the members of the UBMC, South Canara. Therefore, even if the resolution is up held, merger is held to be legal, it would not have any effect on the properties of the trust. Therefore, the transfer of the said property after revoking the trust in favour of respondent-3 and 40, is without authority, void ah initio and would not convey title in the trust property to them. Therefore, in respect of the said properly, this Court has to frame a scheme for its administration. Further, he contended that in the aforesaid judgment, it has been further categorically held that the question is not whether there has been any implementation of the resolution or not, but the question is whether the District Church Council had the authority to pass such resolution. Therefore he contends that in terms of the resolution passed, the actual merger has not taken place, as throughout there was injunction not to implement the resolution for merger. Therefore the merger is also not implemented. It is not in dispute that the trust properties had been transferred. The said action amounts to breach of trust. Therefore the suit instituted u/s 92 of the Code is maintainable. A case for direction for administration of property is made out before the Court.

44. Per contra, Sri V.Tarakaram, learned Senior Counsel appearing for defendants-respondents-1 to 7 contended that the question, whether the 30th respondent has jurisdiction to transfer the properties of the trust in favour of the 3rd respondent, was an issue in the earlier proceedings, as is clear from the points which arose for consideration in the Regular Appeal and it has been held in

favour of the 3rd respondent. This judgment though set aside by the High Court, was restored by the Apex Court. Therefore, the said issue which is re-agitated in the suit is hit by the doctrine of res judicata and to that extent, the learned trial Judge was in error in holding otherwise.

Secondly, he contended that, to the knowledge of the plaintiffs, all these deeds have come into existence under which the properties now vested in the 3rd respondent. Even to this day, the plaintiffs have not made any attempt to get those deeds set aside or cancelled or they have not even sought for a declaration, that it is not binding on them. Even if those deeds are void, ah initio, as the 3rd defendant is in possession of the properties and some plaintiffs are not in possession, they have to seek appropriate declarations within the time prescribed under law. That having not been done, the suit filed is clearly barred by law of limitation.

Lastly, he contended that though leave was granted to institute the suit u/s 92 CPC, after hearing the respondents, except two plaintiffs among the original plaintiffs are dead and it was incumbent on other plaintiffs who have come on record to obtain leave before prosecuting the matter, which has not been done. Even otherwise, it is open to them to contend that the grant of leave was illegal and the suit is liable to be dismissed. In support of the contentions, he relied upon the judgment of the Apex Court in the case of Vidyodaya Trust Vs. Mohan Prasad R. and Others, .

45. Sri. S. Vijaya Shankar, learned Senior Counsel appearing for defendant - respondents, supporting the argument of Sri. V. Tharakaram, pointed out the relevant portions in the Judgment of the Apex Court in the earlier suit i.e., The District Council of United Basel Mission Church and Ors Vs. Salvador Nicholas Mathias & ors in C.A.84/197 and submitted that the subject matter of the earlier proceeding was a declaration that the resolution dated 9.5.1961 passed in the extra-ordinary meeting of the District Church Council of UBMC of South Kanara and Coorg proposing the merger of UBMC of South Kanara and Coorg with the Church of South India was void, illegal and ultra vires of the Constitution of UBMC and also the provisions of the Religious Societies Act, 1880 and not binding on the plaintiffs or other members of UBMC of South Kanara and Coorg. There was also a prayer for a permanent injunction restraining the defendants for implementing the said resolution. One of the principal objections of the plaintiffs to the merger of UBMC with CSI was that. CSI believes in Episcopacy which is said to have been rejected by the UBMC and Episcopacy means. Church ruled by Bishops. In answering the said contention, the Supreme Court held that there is neither apostolic succession nor historical Episcopacy in CSI as contended on behalf of the plaintiffs. The CSI has already accepted the form of worship which the members of UBMC used to follow before the Union of UBMC with CSI. In view of this specific finding. he argued it is difficult to accept the contention of the plaintiffs that in case of merger or implementation of the impugned resolution, the right of worship of the members of UBMC will be affected. There is no cause

for apprehension of the plaintiffs in case of merger, the Apocrypha will be imposed upon them which is repugnant to their religious faith.

Further he contended that the present suit is filed on 23.8.1977 along with an application u/s 92 of the Civil Procedure Code, seeking leave to prosecute. An ex parte order granting leave was passed. The said order was challenged in this Court and that this Court set-aside the said order and remanded the matter back to the Civil Court for reconsideration. It is thereafter the trial Court heard both parties and again granted leave and the suit was registered on 5.7.1991. The suit was filed on the basis of the Judgment of the High Court in the earlier proceedings which had held that the resolution dated 9.5.1961 is void and there is no merger and a case of breach of trust is made out. Once the said judgment is set-aside by the Apex Court holding the resolution is valid, merger is valid and there is no breach of trust, the said order granting leave is illegal, in the light of the Judgment of the Apex Court and therefore, the plaint should be rejected at its threshold.

Next, it was urged by the learned Senior Counsel that the Trust in question is not a public Trust, it is a private trust and therefore, S.92 CPC is not attracted. Though leave was granted under S.92 by the Trial Court, the said order was challenged before this Court in a civil revision petition and the Court did not go into the merits of the same on the ground that if and when an occasion arises and if the ultimate judgment of the Trial Court goes against them, they could agitate the matter in appeal and the correctness of the order granting leave has to be gone into this appeal.

When once a Trust is evidenced by a registered document, it is only by reading the document we have to decide the question, whether it is a public or a private trust. The words in the deed Ex.P35 makes it very clear that the property is endowed for the use and admit the use of the same for the benefit of the Church founded by the society. The beneficiary are ascertainable. The members who attend the Church are also ascertainable and once the beneficiaries are ascertainable, it is a private trust and the finding recorded by the trial Court that it is a public trust is illegal.

Next, he contended that the Judgment of the Apex Court in the earlier proceedings operates as res-judicata as between the same parties, The Apex Court has upheld the impugned resolution and held the merger is valid and also held that there is no breach of trust and therefore, the said matters cannot be re-agitated in these proceedings. Further, he contended that the trial Court committed a serious error in holding that the suit is maintainable and the dissolution and the merger of D.32 and D.30 would in any way affect the maintainability of the suit and therefore, he submits in view of the Judgment of the Apex Court in the earlier proceedings, the suit ought to have been rejected as not maintainable.

He further contended that the Supreme Court allayed the fears of the plaintiffs in

the suit, notwithstanding the upholding the resolution of the merger and the merger taking place, the benefits to which these plaintiffs are entitled under the earlier trust deed continues to flow to them notwithstanding the merger and therefore, they can not have any grievance what-so-ever.

46. Sri G.S.Vishweshwara, learned Senior Counsel who appeared for respondents-28 and 40, submitted that Clauses (13) and (9) in Exs.P35 and 36 reserve the power of revocation in the society, which power is invoked to revoke the trust and for constitution of new trust in the year 1957. The words "trusts power" used in these two paragraphs is a mistake. It is to be read separately as trusts, powers. Then the meaning becomes clear. Otherwise, there should be an apostrophe before the letter "s" i.e., trust's. In subsequent matters, this mistake has been corrected which has been taken note of by the Court. Once it is interpreted trusts only, the power of revocation is vested and that power has been lightly used. Secondly, he contended in the entire body of the plaint, the allegation is only regarding the properties belonging to the Churches. Properties which are earmarked for missionary work is not the subject matter of the suit, except in the prayer column it has been included and therefore, the question of formulating any scheme in respect of the properties earmarked for missionary work in the trust, would not arise. Thirdly, it was contended that UBMC has no legal existence at all. They constituted several churches and were managing them. Now those churches are merged with the Church of South India, thereby few more churches which are under the control of UBMC is not added to these trusts. The ultimate beneficiary of this trust is the churches and by the so called merger or revocation of the earliest trusts, creation of new trusts, in no way the beneficiary is affected. Beneficiary continues to have the benefit of this trust properties and therefore, there is no breach of trust as alleged in the plaint. Hence, seen from any angle, there is no merit in this appeal.

47. In the light of the aforesaid facts and rival contentions, the points that arise for our determination are as under: -

- (1) Whether the Trust in question is a Public Trust or a private trust?
- (2) Whether the suit prosecuted by the plaintiffs, who came on record after the death of the original plaintiffs, without leave of the Court in their favour is maintainable?
- (3) Whether the suit is filed to vindicate the private rights of the plaintiffs and therefore Section 92 of CPC is not attracted?
- (4) Whether the judgment of the Apex Court rendered earlier operates as res judicata?
- (5) Whether in terms of the resolution passed for merger, actual merger has taken place?
- (6) Whether in law, the Public Religious and Charitable Trust, can be revoked at all?

(7) Whether Clause (13) in Ex.P35 and clause (9) in Ex.P37, confer or reserve power of revocation of Trust in the another Trust?

(8) Whether the suit is barred by limitation?

(9) Whether the Trust deed. Sale deeds executed vesting the property in the 3rd defendant as well as the

40th defendant are valid, legal, and binding on the plaintiffs?

(10) Whether the plaintiffs are entitled to possession of the plaint schedule properties?

(11) Whether the breach of Trust alleged has been proved?

(12) Whether a case for issue of direction to frame a scheme for administration of the Trust property has been made out?

48. Before we answer these points, it is necessary to notice the origin of concept of Trust. What is a Trust? What is the difference between a Private and a Public Trust? What does a charitable Trust means? What is the position of Church in law and also the scope of Section 92 of the Code of Civil Procedure.

ORIGIN OF CONCEPT OF TRUST

49. Religious and Charitable Trusts are found to exist in some shape or other, in almost all the civilized countries. Instincts of piety and benevolence, which are implanted in human nature, finds expression in religious and charitable trust. In Roman law, properties dedicated to Gods formed a species of res Publicae. They were not the objects of ownership or transfer and no action could be in respect of them in a Court of law. The only juristic person recognized in early Roman Law was the State, but it was a public and not a private person. The idea of a corporate body as a new subject to rights and duties distinct from all its members was fully recognized in Rome, during the Imperial period. In English Law, there is something technical in the conception of trust, which had its origin in dual system of law and dual system of ownership which came into existence in England, under peculiar historical and political conditions. The trust property in English Law vests in the trustee, who holds it for the benefit of certain persons or for the fulfillment of certain purposes and the beneficiaries are regarded as having what is equal, a equitable society or interest in the subject matter of the trust. The conception of trust in its technical sense was devised by the Chancery Courts in England. These principles were imported to a large extent from the Roman Civil Law. Several jurists have attempted to define the word "trust" But it is not complete in all respects. The concept of trust, over the years have undergone considerable change. Charitable trusts were enforced in England long before the seventeenth century. Prior to the time when the chancellor first began in the fifteen century to enforce uses and trusts, gifts for charitable purposes, whether inter vivos or testamentary, were protected to a certain extent by the courts of law. The principal charities were those of a religious nature.

50. Modern writers on the Law of Trust do not however lay stress on the trustee having a legal estate or on his being the owner of the trust property. It is enough to constitute a person, a trustee, if he has control over the trust property or can exercise any powers in respect of the same and there is a duty cast on him to hold the property or exercise his powers for the benefit of other person or for the accomplishment of some particular purpose. Thus, in Halsbury's Laws of England, a trust has been defined as a confidence reposed in a person with respect to property of which he has possession or over which he can exercise a power, to the intent, that he may hold the property or exercise the power for the benefit of some other person or object.

WHAT IS A TRUST

51. Indian Trust Act, 1882 defines the word Trust". It means, the 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. The word "trust" has been used in section 92 in a general and not in a restrictive sense. It connotes an obligation or duty attaching to a person in charge of properties dedicated to religious or charitable purposes, which could be enforced either in law or equity. It is akin to that of a trustee in English law without any legal estate in the property which the English trustee has got. The trust need not be express, it may be constructive as well. Section refers to both express or constructive trust.

52. A distinction may be drawn between express trusts and trusts arising by operation of law. Generally speaking, an express trust may be said to arise from the intention of a person to create a trust declared directly or indirectly. Precatory trusts, that is trusts created by expressions of wish or desire which on their true construction amount to declarations of trust, are express trusts, because in such cases, the court finds as a matter of construction that the settlor expressed, indirectly, an intention to create a trust. Trusts arising by operation of law are trusts which are not declared by any person, either by clear or doubtful words. Trusts arising by operation of law may be further divided into implied or presumptive, resulting trusts. A constructive trust includes only trusts Imposed by law against the trustee's will, for instance, where a trustee renews a trust lease in his own name, but which is sometimes used to include all trusts other than express trusts.

53. Salmond on Jurisprudence. Eleventh Edition, at page 307 observes as under:
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A trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust-ownership; the latter is called the beneficiary, and his is beneficial ownership. As between trustees and beneficiary, the law recognises

the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed, with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large.

54. In AIR 1931 196 (Privy Council) , it was held as under; -

The Indian Law does not recognize legal and equitable estates. By that law therefore there can be but one ""owner", and where the property is vested in a trustee, the "owner" must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882: see Ss. 3, 55, 56, etc..... they think that the question is of no importance in the present case, as the material provisions of the Act, only embody the principles upon which the law has been administered in India from very early times. The trustee is, in their Lordships opinion, the "owner" of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him.

55. A Division Bench of this Court in the case of Padmavathi and Another vs Raghu Tippanna Ruge and Others [1968(1) MYS. L. J 583], relying on the passages in Shivramdas vs Nerukar [39 Bom LR 633], held that,

A trust is not complete until the trust property is vested in trustees for the benefit of the cestui que trust If there was only the manger he would be holding it on behalf of the owner but in the case of trustee, he would not be holding it on behalf of the owner or on behalf of the beneficiary, but for the benefit of the "cestui que trust". The distinction between "ownership" and "legal ownership" is clarified in the observation made at page 50 of Mulla's T.P. Act The legal ownership is referred to as the legal estate in this observation. The observation is "Thus in a trust of land the legal estate is in the trustee and the interest of the cestui que trust or beneficiary is an interest in the land called the equitable interest." Therefore, what vests in the trustee is only the legal estate or the legal ownership as mentioned in the decision of the Supreme Court cited above.

56 In Ramabai Govind Vs. Raghunath Vasudeo, , it is held as under:

A trustee no doubt is a legal owner of the property, the beneficial ownership in the same vesting in the beneficiary or the cestui que trust. Merely because the property is vested in the trustee or the legal owner, the trustee is not entitled to sell the same. He is not the full owner of the property in the real sense of the term, because there is a beneficial Interest and the ownership therein carved out in the property. The legal ownership which vests in the trustee is for the purposes of the trust and the administration of the provisions of the trust Because the beneficiary, until the trusts are carried out, is not entitled to deal with the property, the trustee is the person who is empowered to deal with the same, but he can only deal with it in accordance with the provisions of the deed of trust.

57. A Division Bench of the Gujarat High Court in the case of Suleman Isubji

Dadabhai Vs. Naranbhai Dahyabhai Patel and Others, ,

pointing out the difference between gift and trust, has held as under: -

16..... Therefore, in the view of the Calcutta High Court transfer contemplated by Section 6 of the Trusts Act not only includes a sale, mortgage, lease, exchange and gift but also includes a vesting declaration. Therefore, what a person does by creating a trust in respect of his immovable properties and appointing himself as the sole trustee of the trust is to make a vesting declaration and not to make a gift of the property. It is this vesting declaration which invests him with the legal ownership of the property, divests him of the beneficial ownership and transfers the latter to the beneficiaries of the trust

Therefore, when the appellant created Dadabhai Trust and appointed himself as the sole trustee, what he did was to make a vesting declaration and not to make a gift. Since he appointed himself as the sole trustee, he did not bring about the transfer of the property as contemplated by Section 122 of the Transfer of Property Act but produced a situation contemplated by Section 6 of the Trusts Act. If we take a different view and hold that such a transfer creates both a gift and trust, then we shall be creating a conflict between Section 122 of the Transfer of Property Act and Section 6 of the Trusts Act. We say so because, in our opinion, whereas Section 122 in terms contemplates the transfer of that property to the donee and acceptance thereof by and on behalf of the donee. Section 6 of the Trusts Act does not contemplate the transfer of property to oneself. That, in our opinion, is the effect of the expression which appears in brackets in Section 6 of the Trusts Act. In our opinion, therefore, what the appellant did was to make a vesting declaration by creating Dadabhai Trust and to appoint himself as the sole trustee and did not make a "gift" of the property. Therefore, the transaction in question did not amount to "gift". With respect, therefore, we are unable to uphold the conclusion recorded by Mr. Justice T V Mehta in his interlocutory judgment in this case and reported in *Naranbhai Dahyabhai Patel v. Suleman Isubji Dadabhai* (1975) 16 Guj L R.289. The finding recorded by him is, therefore, set aside.

58. Thus, a trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that, one of them is under an obligation to use his ownership for the benefit of the other. As between trustees and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is, the "owner" of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him. A trust is not complete until the trust property is vested in trustees for the benefit of the cestui que trust. A trustee no doubt is a legal owner of the property, the beneficial ownership in the same vesting in the beneficiary or the cestui que trust. Merely because the property is vested in the trustee or the legal owner, the trustee is not entitled to sell the same. He is not

the full owner of the property in the real sense of the term, because there is a beneficial interest and the ownership therein carved out in the property. The Indian Law does not recognize legal and equitable estates. By that law, therefore, there can be but one "owner", and where the property is vested in a trustee, he is the "owner". What a person does by creating a trust in respect of his immovable properties and appointing himself as the sole trustee of the trust is to make a vesting declaration and not to make a gift of the property. It is this vesting declaration which invests him with the legal ownership of the property, divests him of the beneficial ownership and transfers the latter to the beneficiaries of the trust. 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. Trustees cannot transfer their duties, functions and powers, to some other body of men and create them trustees in their own place, unless this is clearly permitted by the trust deed or agreed to by the entire body of beneficiaries.

PRIVATE AND PUBLIC TRUST:

59. The trusts may be broadly classified into public and private. The line of distinction between a public purpose and a purpose which is not public is very thin and technical and is difficult of an easy definition. If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose with reference to those particular individuals which would be charitable, if not so confined. On the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose, it is charitable. Religious endowments are of two kinds, public and private. In a public endowment, the dedication is for the use or benefit of the public at large or a specified class. But when property is set apart for the worship of a family god, in which the public is not interested, the endowment is a private one. It is a question of fact, whether a temple is a private or a public one. Whether the trust is public or private, would have to be decided in each case with reference to the terms of the document, if any; and if there is no document or its language is ambiguous, the decision would depend upon inferences which could be legitimately drawn from the evidence adduced in the case, the material evidence being the actual user and public repute. The essence of a public foundation consists in dedication to the public and whether there has been any dedication or not, must be ascertained with reference to circumstances of each individual case.

CHARITABLE TRUST

60. It is a relationship "arising as a result of a manifestation of an intention to create it. A charitable trust, like an express private trust, and unlike a constructive trust, is created, because a person having power to create it has manifested by his words or conduct, an intention to create it. It is a relationship "subjecting the person by whom the property is held to equal duties/ A charitable

trust may be created by any of the methods used in creating a private trust. Thus, the owner of property can create a charitable trust, either by conveying it inter vivos to another person as trustee or by devising or bequeathing it upon a charitable trust. So also the owner of property can create a charitable trust by declaring himself trustee of the property for a charitable purpose. The trustee of a charitable trust are under a duty "to deal with the property for a charitable purpose." In the case of a charitable trust, property is devoted to the accomplishment of purposes which are beneficial or may be supposed to be beneficial to the community. This, indeed, is the fundamental distinction between private trusts and charitable trusts. A trustee of a charitable trust is clearly under a duty, properly to administer the trust, but it is difficult to see who has the correlative right.

A trustee of a charitable trust owes duties, but the duties are not owing to any person or persons in particular. A charitable trust is a relationship "with respect to property". Neither a charitable trust nor a private trust can be created, unless there is some property which is the subject of the trust. The property may, of course, be an interest in a tangible thing, it may be a chose in action, it may be an equitable interest. The principles in regard to what property may be the subject of a charitable trust are the same as the principles applicable to private trusts.

A trust, in order to be charitable, must be of a public character; that is, it must be for the benefit of the community or an appreciably important section of the community. This requirement may involve the consideration of two questions which are closely related, first, whether the purposes of the trust confer a benefit on the public or a section of the public, and secondly, whether the class of persons eligible to benefit constitutes the public or a section of it. So far as the first question is concerned, this is a matter to be determined by the Court, not by the founder of the alleged charity. Not every purpose that is beneficial to the public is charitable. Where, however, the purpose appears to be for the relief of poverty or the advancement of education or the advancement of religion, the court will assume it to be for the benefit of the community and, therefore charitable, unless the contrary is shown. In such a case, it is for those who dispute the validity of the gift or trust, to satisfy the court that the community will not be benefited in a way which the law regards as charitable because the purpose is not within the spirit and intendment of the preamble. No trust can be charitable, if it is illegal or contrary to public policy.

61. With regard to the second question, whether the class of persons eligible to benefit constitutes the public or a section thereof, it has long been established that in order to be charitable, the trust must not be merely for the benefit of particular private individuals, and, if it is, then, it will not be in law a charity, even though the benefit taken by those individuals is of the very character stated in the preamble. The question often arises as to, whether in a particular case a particular class of persons constitutes a sufficiently important section of the

public to establish the validity of a trust alleged to be charitable, and it is difficult and perhaps impossible to formulate a satisfactory test in general terms.

62. Learned Author Tudor in the 5th Edn. of his book Tudor on Charities, summed up the principles deducible from the cases on the subject:

"If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose with reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose charitable within the meaning of the Statute of Elizabeth, without giving to any particular individual the right to claim the funds, the gift is charitable.

63. The position is thus stated in the book Lewin on Trusts, Fifteenth Edition pp. 15-16:

By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained....

64. In B.K. Mukherjea: The Hindu Law Religious and Charitable Trust. Tagore Law Lectures, the distinction between a public and private charitable trust has been set out in the following terms:

Religious endowments are of two kinds, public and private. In a public endowment the dedication is for the use or benefit of the public at large or a specified class, But when property is set apart for the worship of a family god, in which the public is not interested, the endowment is a private one. It is a question of fact whether a temple is a private or a public one. The devotees, the supervision exercised by the founder and his descendants, whether the rents and profits are exclusively utilised for the temple for a long period, as also public visiting the temple for darshan and worship, appearance of the temple, association of members of public with the management and earlier statements or admission of parties are relevant factors to be taken into consideration as to whether a temple is a public one or a private one.

65. The Apex Court in the case of Deoki Nandan Vs. Murlidhar, , it has been held as under:-

5. It will be convenient first to consider the principles of law applicable to a determination of the question whether an endowment is public or private, and then to examine, in the light of those principles, the facts found or established. The distinction between a private and public trust is that whereas in the former

the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.

66. A Constitution Bench of the Apex Court in the case of *Ram Saroop Dasji Vs. S.P. Sahi*, Special Officer-in-charge of The Hindu Religious Trusts and Others, , the distinction between a public and private religious endowment has been stated as under:-

In order to appreciate this argument, it is necessary to state first the distinction in Hindu law between religious endowments which are public and those which are private. To put it briefly, the essential distinction is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private trust the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust. The distinction in this respect between English law and Hindu law has been thus stated by Dr. Mukherjea in his *Tagore Law lectures on the Hindu Law of Religious and Charitable Trusts* (1952 edition, pp. 392-396):

"In English law charitable trusts are synonymous with public trusts and what is called religious trust is only a form of charitable trust. The beneficiaries in a charitable trust being the general public or a section of the same and not a determinate body of individuals, the remedies for enforcement of charitable trust are somewhat different from those which can be availed of by beneficiaries in a private trust. In English law the Crown as *parens patriae*" is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern.....One fundamental distinction between English and Indian law lies in the fact that there can be religious trust of a private character under Hindu law which is not possible in English law.¹

67. In the case of *Mahant Shri Srinivasa Ramanuj Das Vs. Surajnarayan Dass and Another*, . a Constitution Bench of the Apex Court has explained the distinction between the Public Trust and Private Trust as under:-

The distinction between a public trust and a private trust is, broadly speaking, that in a public trust the beneficiaries of the trust are the people in general or some section of the people, while in the case of a private trust the beneficiaries are an ascertained body of persons. The beneficiaries of a math are the members of the fraternity to which the math belongs and the persons of the faith to which the spiritual head of the math belongs, and constitute, therefore, at least a section of the public. Maths, in general consequently, are public maths. We say

nothing as to whether there can be a private math or not Mukherjea states at P.390, in his "Law of Endowments", 1st Edition:

By private math should he meant those institutions where the head or superior holds the property not on behalf of an indeterminate class of persons or a section of the public but for a determinate body of individuals, viz., the family or descendants of the grantor.

68. The Apex Court in the case of Kuldip Chand and Another Vs. Advocate General to Government of Himachal Pradesh and Others, , has laid down the guidelines to determine, whether an endowment is of a public or of a private nature. After explaining the meaning and application of public process, in para 39 at end, in the end at para 47, the following guidelines have been laid down:

47. This Court laid down the following tests as sufficient guidelines to determine on the facts of each case whether an endowment is of a public or private nature:

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right.

(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large.

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself this will be a conclusive proof to show that the endowment was of a private nature.

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.

69. The Apex Court in the case of Thayarammal (Dead) by LR vs. kanakammal and Others, reported in AIR 2005 SC 1588, dealing with a question whether a Dharma Chatra, a Choultry of South India, would constitute a Trust, has held as under:-

14. Dharmachatram is "Choultry" of South India meaning a place where pilgrims or travellers may find, rest and other provisions. Hindus in India consider the establishment of temples, mutts and other forms of religious institutions or excavation and consecration of tanks, wells and other reservoirs of water, planting of shady trees for the benefit of travellers, establishment of Choultries, sarais or alms houses and Dharmasala for the benefit of medicants and

wayfarers and pilgrims as pious deeds which would bring heavenly bliss and happiness to a Hindu. The PROPATHA of the Vedas is the same thing as Chuntry or Sarai and sometimes it is described as PRATISHREYAGRAH" (see: BK Mukherjea on Hindu Law of Religious and Charitable Trusts, Fifth Edition by AC Sen, pages 15, 16 & 26)

15. The contents of the stone inscription clearly indicate that the owner has dedicated the property for use as "Dharmchatra" meaning a resting place for the travelers and pilgrims visiting the Thyagraja Temple. Such a dedication in the strict legal sense is neither a "gift" as understood in the Transfer of Property Act which requires an acceptance by the donee of the property donated nor it is a "trust. The Indian Trusts Act as clear by its Preamble and contents is applicable only to private trusts and not to public trusts. A dedication by a Hindu for religious or charitable purposes is neither a "gift nor a "trust in the strict legal sense. (See BK Mukherjea on Hindu Law of Religious and Charitable Trusts, Fifth Edition by AC Sen. pages 102, 103).

16. A religious endowment does not create title in respect of the property dedicated in anybody's favour. A property dedicated for religious or charitable purpose for which the owner of the property or the donor has indicated no Administrator or Manager becomes res nullius which the learned Author in the Book (supra) explains as property belonging to nobody. Such a property dedicated for general public use is itself raised to the category of a juristic person, Learned author at page 35 of his commentary explains how such a property vests in the property itself as a juristic person. In Manohar Ganesh V.Lakshmiram (ILR 12 Bombay 247), it is held that "the Hindu Law like the roman Law and those derived from it recognizes not only corporate bodies with rights or property vested in the corporation apart from its individual members, but also juridical persons and subjects called foundations. The religious institutions like mutts and other establishments obviously answer to the description of foundations in Roman law. The idea is the same, namely, when property is dedicated for a particular purpose, the property itself upon which the purpose is impressed, is raised to the category of a juristic person so that the property which is dedicated would vest in the person so created." And so it has been held in Krishna Singh Vs. Mathura Ahir and Others, that a matt is under the Hindu Law a juristic person in the same manner as a temple where an tool is installed.

17. The learned judge of the High Court was right In coming to the conclusion that the property in suit which was a dedication for charitable purposes, cannot be claimed by the plaintiff as a trustee or the defendant as owner. Having thus come to the conclusion, the High Court failed to make a distinction between a "trust" in strict legal sense and a "religious or charitable endowment as understood in customary Hindu Law, it is because of its failure to see this distinction that it committed an error in directing that Administrators General in accordance with the provisions of Administrators General Act No.45 of 1963 and

an official, trustee under Official Trustee Act No.2 of 1913 should take over the property for administration.

70. The Apex Court, in the case of State of West Bengal and Others Vs. Sri Sri Lakshmi Janardan Thakur and Others, , dealing with the distinction between the public trust and private trust, has stated as under:-

13. In B.K.Mukherjea: The Hindu law of Religious and Charitable Trust Tagore law Lectures the distinction between a public and private charitable trust has been set out in the following terms:

"Distinction between public and private purpose-Gifts for individuals-The line of distinction between a public purpose and a purpose which is not public is very thin and technical and is difficult of an easy definition.

15. In order to ascertain whether a trust is private, the following factors are relevant:

- (1) If the beneficiaries are ascertained individuals.
 - (2) If the grant has been made in favour of an individual and not in favour of a deity.
 - (3) The temple is situated within the campus of the residence of the donor.
 - (4) If the revenue records or entries suggest the land being in possession of an Individual and not in the deity. On the other hand an inference can be drawn that the temple along with the properties attached to it is a public trust:
- (1) If the public visit the temple as of right
 - (2) If the endowment is in the name of the deity.
 - (3) The beneficiaries are the public.
 - (4) If the management is made through the agency of the public or the accounts of the temple are being scrutinised, by the public.

WHAT IS THE POSITION OF CHURCH

71. The word "CHURCH" has been defined in Blacks Law Dictionary, as under:

Church. In its most general sense, the religious society founded and established by Jesus Christ, to receive, preserve, and propagate His doctrines and ordinances. It may also mean a body of communicants gathered into church order; body or community of Christians, united under one form of government by the profession of the same faith and the observance of the same ritual and ceremonies; place where persons regularly assemble for worship; congregation; organization for religious purposes; religious society or body; the clergy or officialdom of a religious body.

72 In Law Lexicon by P RAMANATH IYER, Church is defined as under:

Church. A building where "the sacraments are administered as of right" (Cowel Ecclesia). A temple or building consecrated to the honour of God and religion, and anciently dedicated to some Saint, whose name it assumed; or it is an assembly of persons united by the profession of the same Christian faith, met together for religious worship. A Church to be adjudged such in law must have administration of the sacraments and sepulture annexed to it. (Tomlines Law Dict). A church is a voluntary association of Christians united for discipline and worship, connected with and forming a part of some religious society having a legal existence. The word "Church" in the phrase "any Particular Church, or Denomination," "does not mean Building; but means a Religious Society of some sort.

73 In the NEW INTERNATIONAL BIBLE DICTIONARY, Church is defined as under:

Church. The English word derives from the Greek Kuriakos (belonging to the Lord), but it stands for another Greek word ekklesia (where "ecclesiastical"), denoting an assembly. This is used in its general sense in Acts 19:32, but had already been applied in the LXX as an equivalent for the "congregation" of the OT. Stephen's speech makes this equation (Acts 7:38), and in this sense it is adopted to describe the new gathering or congregation of the disciples of Jesus Christ.

74. In HALBURY'S LAWS OF ENGLAND, 14TH EDITION, the meaning of Church" is given as under:-

Church when used in relation to a religious body, has two distinct meaning; it may mean either the aggregate of the individual members of the church or it may mean the quasi-corporate institution which carries on the religious work of the denomination whose name it bears.

75 Therefore, a church is a voluntary association of Christians, united for discipline and worship. It is an assembly of persons united by the profession of the same Christian faith, who meet together for religious worship. A body of communicants gathered into church order; body or community of Christian. It denotes an assembly. It is adopted to describe the disciples of "Jesus Christ". It does not mean a building. It means a religious society, founded and established by "Jesus Christ", to receive, preserve and propagate "His doctrines and Ordinances" it has two distinct meanings. It may mean either the aggregate of the individual members of the church or it may mean the quasi corporate institution, which carries on the religious work of the denomination, whose name it bears. It is a religious institution. At any particular point of time, the members who constitute the church, may be certain, but it is a fluctuating body of persons, answering a particular description. The fact that the fluctuating body of persons is a section of the public, following particular religious faith or is only a sect of persons of a certain religious persuasion, would not make any difference in the matter. Moreover, the distinction in this respect between the English Law and Hindu Law is to be kept in mind. In English Law, charitable trusts are

synonym with public trusts and what is called religious trust is only a form of charitable trust. One fundamental distinction between English Law and Hindu Law, lies in the fact that there can be religious trusts of a private character under Hindu Law, which is not possible in English Law. The church is meant for religion, for charity. It is not meant for any private individuals. It is meant for a body of individuals or community of Christians. It is fluctuating body of persons belonging to a particular religious denomination, who form a section of the public. Therefore, a trust created for the benefit of church is a public religious and charitable trust and is not a private trust.

SCOPE OF SECTION 92

76. In order to answer the maintainability of the suit u/s 92 of the Code, it is necessary to look into the statutory provision and the law on the point. Section 92 of the Code, which deals with Public Charities, reads as under:

"Section 92 Public charities:-

(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the

Court may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree,-

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

(d) directing accounts and inquires;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act 1863 (20 of 1863), or by

any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with provisions of that subsection.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied by pres in one or more the following circumstances, namely :-

(a) where the original purposes of the trust, in whole or in part

(i) have been, as far as may be, fulfilled: or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust: or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,-

(i) been adequately provided for by other means; or

(it) ceased, as. being useless or harmful to the community, or

(iii) ceased to be, in law, charitable; or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust

77. To attract the operation of section 92, the suit must be of a certain character and pray for certain reliefs. In the first place, the suit should relate to a trust, created for public purposes of a charitable or religious nature. In the second place, it must proceed on an allegation either of breach of trust or of the necessity of having directions from the court for the administration of trust. In the third place, the reliefs claimed must be one or other of the reliefs specified in the section and. lastly, the suit: must be one brought in a representative capacity, in the interests of the public or of the trust itself and not for vindicating

the private rights of the plaintiff. If these conditions are present, the suit can be brought in conformity with the section 92 of the Civil Procedure Code.

78. The Supreme Court in the case of Pragdasji vs. Ishwarlalbhai, AIR 1952 Supreme Court 143, has held as under : -

10. A suit u/s 92. Civil Procedure Code, is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration thereof and it must pray for one or other of the reliefs that are specifically mentioned in the section. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of section 92, Civil Procedure Code. As was observed by the Privy Council in *Abdur Rahim v. Md. Barkat Mid*) 55 Ind APP 96 PC, a suit for a declaration that certain property appertains to a religious trust, may lie under the general law but is outside the scope of section 92, Civil Procedure Code. In the case before us, the prayers made in the plaint are undoubtedly appropriate to the terms of section 92 and the suit proceeded on the footing that the defendant, who was alleged to be the trustee in respect of a public trust, was guilty of breach of trust. The defendant denied the existence of the trust and denied further that he was guilty of misconduct or breach of trust. The denial could not certainly oust the jurisdiction of the court, but when the courts found concurrently, on the evidence adduced by the parties, that the allegations of breach of trust were not made out, and as it was not the case of the plaintiffs, that any direction of the court was necessary for proper administration of the trust, the very foundation of a suit u/s 92, Civil Procedure Code, became wanting and the plaintiff's had absolutely no cause of action for the suit they instituted. In these circumstances, the finding of the High Court about the existence of a public trust was wholly inconsequential and as it was unconnected with the grounds upon which the case was actual by disposed of it could not be made a part of the decree or the final order in the shape of a declaratory relief in favour of the plaintiffs. It has been argued by the learned counsel for the respondents that even if the plaintiffs failed to prove the other allegations made in the plaint they did succeed in proving that the properties were public and charitable trust properties-a fact which the defendant denied. In these circumstances, there was nothing wrong for the court to give the plaintiffs a lesser relief than what they actually claimed. The reply to this is, that in a suit framed u/s 92 of the Civil Procedure Code, the only reliefs which the plaintiff" can Claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under me provision of section 92, Civil procedure Code. The finding as to

the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit. The result is that in our opinion the decision of the High Court should stand, but the decree and the concluding portion, of the judgment passed by the trial court and affirmed by the High Court on appeal shall direct a dismissal of the plaintiffs' suit merely without its being made subject to any declaration as to the character of the properties. To this extent the appeal is allowed and the final decree modified.

79. The Apex Court in the case of *Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another*, has held as under;

10. A suit u/s 92 is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the Court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the Court for proper administration of the trust the very foundation of a suit under the Section would fail; and, even if all the other ingredients of a suit u/s 92 are made out if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92, (see *N. Shanmukham Chetty Vs. M. Govinda Chetty and Others*, ; *Tirumalai Devasthanams v. Krishnayya*, AM 1943 Mad 466 (FB) ; *Sugra Bibi Vs. Hazi Kummur Mia, & Mulla*; Civil Procedure Code, (13th ed.) (Vol 1, p, 400) A suit whose primary object or purpose is to remedy the infringement of an individual right or to vindicate a private right does not fall under the section. It is not every suit claiming the reliefs specified in the section that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights, and in deciding whether a suit falls within Section 92 the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit was brought. This is the reason why trustees of public trust of a religious nature are precluded from suing under the section to vindicate their individual or personal rights. It is quite immaterial whether the trustees pray for declaration of their personal rights or deny the personal rights of one or more defendants. When the right to the office of a trustee is asserted or denied and relief asked for on that basis, the suit falls outside S.92.

14. It is, no doubt true that it is only the allegations in the plaint that should be looked into in the first instance to see whether the suit falls within the ambit of Section 92 (See *Association of Radhaswami Dera Baba Bagga Singh and Another Vs. Gurnam Singh and Others*, ; *Sohan Singh Vs. Achhar Singh and Others*, and AIR 1948 203 (Oudh) . But, if after evidence is taken, it is found that the breach

of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in facts or reason but is made only with a view to bring the suit under the section, then a suit purporting to be brought u/s 92 must be dismissed. This was one of the grounds relied on by the High Court for holding that the suit was not maintainable under Sec. 92.

80. The Apex Court in the case of R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others, , dealing with the legal position in respect of a suit u/s 92 of CPC, has held as under:-

9. The legal position which emerges is that a suit u/s 92 of the Code is a suit of a special nature for the protection of Public rights in the Public Trusts and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust It is for the vindication of public rights. The beneficiaries of the trust, which may consist of public at large, may choose two or more persons amongst themselves for the purpose of filing a suit u/s 92 of the Code and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are on the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust all such interested persons would be considered in the eyes of law to be parties to the suit A suit u/s 92 of the Code is thus a representative suit and as such binds not only the parties named in the suit-title but all those who are interested in the trust. It is for that reason that explanation V1 to Section 11 of the Code constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit u/s 92 of the Code.

81. The Supreme Court in the case Vidyodaya Trust Vs. Mohan Prasad R. and Others, , held as under: -

12..... Merely because their objections or views did not find acceptance by majority, that cannot be a ground to lay a suit u/s 92 CPC questioning legitimate decisions taken by the majority. The Court does not deal with administration of trusts. Only if the pre-conditions are satisfied then only leave can be granted as provided in Section 92. There must be an element of dishonest intention and lack of probity. When action is taken bona fide though there may be mistaken action, that would not amount to breach of trust.

13. To find out whether the suit was for vindicating public rights there is necessity to go beyond the relief and to focus on the purpose for which the suit was filed. It is the object and purpose and not the relief which is material A cotrustee is not remediless if the leave is not granted u/s 92."

18.....The object of Section 92 CPC is to protect the public trust of a charitable and religious nature from being subjected to harassment by suits filed against them. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. If the persons in

management of the trusts are subjected to multiplicity of legal proceedings, funds which are to be used for charitable or religious purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of public trusts. Thus, there is need for scrutiny.

19. In the suit against public trusts, if on analysis of the averments contained in the plaint it transpires that the primary object behind the suit was the vindication of individual or personal rights of some persons an action under the provision does not lie. As noted in *Swami Parmatmanand's case* (AIR 1974 SC 214) a suit u/s 92 CPC is a suit of special nature, which presupposes the existence of a public trust of religious or charitable character. When the plaintiffs do not sue to vindicate the right of the public but seek a declaration of their individual or personal rights or the individual or personal rights of any other persons or persons in whom they are interested. Section 92 has no application.

20. In *Swamy Parmatmanand's case* (AIR 1974 SO 214) it was held that it is only the allegations in the plaint that should be looked into] in the first instance to see whether the suit falls within the ambit of Section 92, But if after evidence is taken it is found that the breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in fact or reason but is made only with a view to bringing the suit under me Section then suit purporting to be brought u/s 92 must be dismissed"

26. To put it differently, it is not every suit claiming reliefs specified in Section 92 that can be brought under the Section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights As a decisive factor the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought The Courts have to be, careful to eliminate the possibility of a SUM being laid against public trusts u/s 92 by persons whose activities were not for protection of the interests of the public trusts.

82. From the statutory provision and judgments, noticed supra, the law is fairly well settled.

A suit u/s 92 of the Code is a suit of a special nature for the protection of Public rights in the Public Trusts and Charities. It presupposes the existence of a public trust of a religious or charitable character. A suit for a declaration that certain property appertains to a religious trust may lie under the general law, but is outside the scope of section 92, Civil Procedure Code. A suit framed u/s 92 of the Civil Procedure Code, the only reliefs which the plaintiff can Claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section, if the plaintiff is held

entitled to it. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust- It is for the vindication of public rights. A suit u/s 92 of the Code is thus, a representative suit and as such binds not only the parties named in the suit-title but all those who are interested in the trust. In deciding, whether a suit falls within Section 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit was brought. It is only the allegations in the plaint that should be looked into in the first instance, to see, whether the suit falls within the ambit of Section 92. If on analysis of the averments contained in the plaint, it transpires that the primary object behind the suit was the vindication of individual or personal rights of some persons, an action under the provision does not lie. But, if after evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in facts or reason, but is made only with a view to bring the suit under the section, then a suit purporting to be brought u/s 92 must be dismissed. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. It is not every suit claiming reliefs specified in Section 92 that can be brought under the Section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights. As a decisive factor, the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought. The Courts have to be careful to eliminate the possibility of a suit being laid against public trusts u/s 92, by persons whose activities were not for protection of the interests of the public trusts. First and the foremost requirement for an application u/s 92 is, the plaintiffs should bring the suit to vindicate the right of the public. In the suit, if they are seeking a declaration of their individual or personal rights or individual or personal rights of any other person or persons in whom they are interested, then the suit would be out side the scope of Section 92 of the Code. In order to find out, whether the plaintiff in such a suit is vindicating the right of the public or his personal right, what is to be seen is, allegations in the plaint. In the first instance, if the allegations in the plaint do not indicate that the plaintiffs have approached the Court to vindicate the rights of the public, on the analogy of Order 7 Rule 11 of Code of Civil Procedure, the plaint can be rejected on the ground that the plaint does not disclose a cause of action. However, if it is not rejected and enquiry is conducted, evidence is taken and thereafter, it is found that breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in facts or reason, but is made only with a view to bring the suit under the Section, then the suit purported to be brought u/s 92, must be dismissed. Therefore, even if all the other ingredients of a suit u/s 92 are made out. if it is clear that the plaintiffs are not suing to vindicate the right of the public, but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92. A suit

whose primary object or purpose is to remedy the infringement of an individual right or to vindicate a private right, does not fall under the Section.

83. Now, in the background of these well established legal principles, the points that arise for determination in this appeal have to be answered.

POINT NO.1: IS IT A PRIVATE TRUST OR A PUBLIC TRUST?

84. The suit has been brought u/s 92 of the Code, for settling the scheme for the proper and due administration and management of the properties Of the UBMC in India, South Canara and Coorg, i.e., plaint A.B.C.D and E schedule properties and for the proper and due administration of the affairs of the church, its properties, institutions, assets and activities or in the alternative, by making necessary provision for the same in the scheme to be settled and for other reliefs. Plaintiffs rely on the registered trust deeds, Exs.P-35. P-36, P-37 and P-38 to substantiate their contentions that the trust in question is a public trust and therefore they are entitled to the relief sought, for the reasons set out in the plaint.

85. Defendants-3, 30, 31 and 40, specifically contend that the suit schedule properties are not trust properties belong to UBMC of South Canara and Coorg. Ex.P-35. the trust deed dated 18.09.1934 was in respect of the plaint B schedule properties and was for the benefit of work of the Church founded by society in South Canara and Coorg, Malabar and Bombay-Karnataka. The second trust dated 01.08.1939, was in respect of plaint "A" schedule property and was for the benefit of the work of the Mission carried by the society in India. It was not for the benefit of the work of any Church, but for the benefit of the activities of the society and therefore, both the trust deeds, having regard to the terms thereof, are not public trust at all. Therefore, this suit filed u/s 92 is not maintainable.

86. The learned trial Judge, on consideration of the pleadings, oral and documentary evidence produced in the case, considering the respective contentions, categorically held while answering issue No. 18, that intent and purport of the trust created under Ex.P-35 in respect of plaint B schedule properties and the trust created under Ex.P-37, in respect of A schedule properties, are trusts created for the benefit of the work of the Church and Missionaries and they are all for public, religious and charitable purposes.

87. In fact, before us, in the first session of the arguments, which was spread over for more than ten days, the respondents did not dispute the fact that, trusts in question were public trusts for religious and charitable purpose. It is only when it was pointed out that the Indian Trusts Act of 1982 is applicable to only private trusts, which enactment provides for revocation of the trust, which provision has no application to the public trust, time was sought, to look into the legal position and then make submissions. After a gap of 8 weeks, when hearing was resumed, the respondents gave up their stand that the trust in question is a public trust and contended that the trust in question is a private trust and therefore, the provisions of the Trust Act is applicable and Section 92 is not

applicable. In this context, it is necessary for us to first decide, whether the trust in question is a public trust or a private trust.

HISTORY OF TRUST

88. The defendant No.3, Basel Mission, had started its Missionary Work in South-Western India in 1834. As a result of the labours of the Basel Mission, Basel Mission Churches had come into existence under the control of the Basel Mission in the three separate administrative ecclesiastical districts of South Kanara with Coorg. Bombay-Karnataka or South Maharatta comprising the districts of Dharwad and Bijapur and Malabar. In connection with the work of these Basel Mission Churches, landed properties consisting of agricultural and non-agricultural lands were acquired for purposes of Church buildings, Prayer halls, Meeting Rooms, Graveyards, Schools, Hospitals, Printing Press, Theological Seminaries, Hostels. Boarding Houses, Sick-houses, Homes for the poor, widows and converts and for the residence of Missionaries and other servants and agents of the Church. Some of the agricultural and non-agricultural lands were leased out and the income from these properties were being utilised for the benefit of these Churches and their work. The members of the Churches were also making payments of Church Tax and other voluntary freewill offerings, for the support of the Churches and for building up their assets and institutions. The printed reports of the Basel German Evangelical Missionary Society,- the successor of which since 1926 is the defendant 30 Basel Mission,- published annually from about 1841 onwards upto about 1913, the issues of the "official Gazette" of the Basel Mission published periodically, the Rules of the Basel German Evangelical Mission, the second edition of which was printed in 1903, and also the "Constitution and Rules of the Mission and Church in the districts of South Kanara (with Coorg), South Mahratta and Malabar pinte in 1931, prove that all these properties, both movable and immovable, were acquired for the benefit and work of the indigenous Basel Mission Churches, with their distinctive faith, worship, practices and Presbyterian form of Church government, that the capital invested in these properties belonged to the Churches which are provided with their own "Church and School Fund" etc., that certain properties thus acquired were specially set apart for the "Catechists Pension Fund" and "School masters" Pension Fund", that the members of the Churches had contributed money, materials and labour for the construction, repairs and maintenance of the Church buildings and other properties of the Churches and the representative bodies including the local Presbyteries were associated in the management of these properties. Though the title deeds of all the immovable properties ostensibly stood in the name of the General Treasurer of the Basel Mission, these properties really belonged to the Churches. The Basel Mission, though its general Treasurer and Attorney in India, was merely acting as trustee of the U.B.M.C. in India. This is evident from the fact that, these properties, which, on the outbreak of the First Great War of 1914, were confiscated by the British Government as enemy properties and vested in the Custodian of Enemy Property, Madras. It was later released and entrusted, under orders of the Governor General in Council, as per Document

No.2036 of 1920 of Book I registered in the office of the Registrar of Madras Chingleput on 26-1-1929, to certain trustees, who came to be later designated as the Mission Trust of Southern India, for being managed and used for the benefit of these churches. Throughout the period of management under the said Mission Trust, the properties, forming the subject matter of the aforesaid registered document No.2036 of 1920, continued to be in the use and enjoyment of the indigenous Basel Mission Churches in the several districts, as before, without any break.

89. Besides, the sequestration of properties as aforesaid, all the German Missionaries of the Basel Mission were also interned as enemy aliens on the outbreak of the First Great War of 1914. As a result, a Missionary body known as the "Kanarese Evangelical Mission" assumed charge and control of the Mission and Church work in the two ecclesiastical districts of South Kanara with Coorg and Bombay-Karnataka. The Basel Mission Churches in Malabar, however, were affiliated on 1-4-1919, to the South India United Church, as its Eighth Church Council. Later, after the British Parliament permitted the German Missionaries to return to India, the 30th defendant Basel Mission, which is the successor of the original Basel German Evangelical Missionary Society, resumed its work in 1926, in its former sphere of operations in the three ecclesiastical districts referred to above. At this juncture, the aforesaid Kanarese Evangelical Mission withdraw the South Kanara with Coorg and Bombay Karnataka.

90. After the return of defendant No.30 Basel Mission, the Mission trust of Southern India, which had been administering the properties vested in it under document No.2036 of 1920, registered in the office of the Registrar of Madras-Chingleput, transferred these properties under Document No.1623 of 1931 dated 9-4-1931, registered in the office of the Registrar of Madras-Chingleput on 9-8-1931 to Defendant No.30, "The Evangelical Missionary Society in Basel (Basel Mission), a Society incorporated in Switzerland and carrying on Mission work in India, West Africa, China and Borneo and represented in India in its secular affairs by its General Secular Agent and Treasurer".

91. In 1933. the Defendant No.30 Basel Mission relinquished its control over all the Basel Mission Churches in the three ecclesiastical district units of South Kanara with Coorg, Bombay-Karnataka and Malabar, and these Churches came to be constituted on 17-10-1933, in the autonomous body of "The United Basel Mission Church in India", each of the three district units being an independent entity, vested with the control of the affairs of the Churches within its limits, under the revised constitution and Church Rules. The preamble to this constitution declares that "The Basel Mission Churches in South Kanara, in Bombay Karnataka and in Malabar (which is also affiliated to the S.I.U.C.) i.e.. the South India United Church)", hereby constitute themselves for purposes of worship. Christian life and the propagation of the Gospel into a body, which shall be called the "United Basel Mission Church in India". Thus, with effect from 17-10-1933. each of these three ecclesiastical district units became an

autonomous unit, independent of all control by the Basel Mission. The 30th defendant, who acquired all the properties under the registered deed of conveyance dated 9-4-1931, became the absolute owner of the same. However, the 30th defendant was desirous of holding the said properties in trust for the benefit of the work of the church founded by it. in the Districts of South Canara, Bombay Karnataka and Malabar, known as the United Basel Mission Church in India, as well as works of the Mission carried on in India by it, mainly in the District South Canara, Bombay Karnataka and Malabar. Therefore, the 30th defendant executed and registered two documents, to effectuate the said purposes. They are:

(i) Document No. 142 of 1935 dated 18-9-1934 in respect of properties "for the benefit of the works of the Church founded by the Society" - Ex P35, and

(ii) Document No.2388 of 1939 dated 1-8-1939 in respect of properties for the benefit of the works of the Mission carried on by the Society in India" -Ex.P37,

registered in the office of the Registrar of Madras Chingleput, on 27-1-1935 and 29-11-1939 respectively.

92. Both these declarations of trust make it clear that all the properties referred to in them are expressly designated for identical and common purposes, inseparably connected with the U.B.M. Churches and expressly declare that the Basel Mission "as trustee is seized of or entitled to the lands and premises" described in the schedules in these documents and that "the Society is desirous of holding the said premises upon and for the intents and purposes" detailed therein, in the interest and for the benefit of the U.B.M.C. in India. Both these declarations also stipulates that, "ordinarily the rents and profits" of the trust properties "stipulated within the area of any District Church Council shall be used for the benefit of that District Church Council". These two declarations of trust, which, in fact and effect, are gift/ settlement deeds, confirming/ creating a trust, refer to the exclusive and absolute ownership and beneficiary rights in these trust properties, which have subsisted continuously in the U.B.M.C. in India, a distinct autonomous religious society governed by its own constitution, independent of any control by the Basel Mission. The trust properties pertaining to this case are fully described in the Schedules annexed thereto.

PURPOSE OF THE TRUST

93. A trust can be created inter vivos or by operation of law. After trust is created by a deed of trust, then in order to find out, whether it is a public trust or a private trust, it is the intention of the author of the trust which has to be gathered from his intention expressed in terms of the trust deed, which is to be primarily looked into. In this context, the first deed of trust which deals with B-schedule properties is marked in the case as Ex.P-35. In Ex.P-35, clause (1) expressly speaks about the purpose of the trust.

94. The author of the trust, in his unequivocal terms expressed the intention of

the trust as under:

1. To use and permit the use of the same or any part thereof for the benefit of the work of the Church founded by the Society in the Districts of South Kanara Bombay Karnataka and Malabar now known as the "United Basel Mission Church in India" or of that Church which shall be lawfully affiliated to it or declared to be its such or and in particular for the following purposes:-

(a) as a site or sites for a Church, Chapel Prayer House, Sheds, Class Room Meeting Room or Lecture Room or a Hospital, Dispensary, Refuge, Hostel or Boarding House, Orphanages, Sick Houses Poor and Converts Homes and Asylums or objects of a like nature

(b) the celebration of Divine Service in accordance with the usages of the United Basel Mission Church in India.

(c) Salaries of pastors, church Evangelists, Church Teachers and other servants of the Church maintenance of Church Schools of Church orphanages Boarding Houses, Sick Houses, Poor Houses, Converts Homes and other similar institutions, and expenses connected with the administration of Church properties and other similar expenses.

XXX XXX

95. Similarly, Ex.P-37 which deals with A schedule property, reads as under:

1. To use and permit the user of the same or any part thereof for the benefit of the works of the Mission carried on in India by the Society mainly in the Districts of South Kanara Bombay Karnataka and Malabar and in particular for the following purposes: -

(a) As a site or sites for a Church, Chapel Prayer House. Sheds, Class Room, Meeting Room or Lecture Room or a Hospital Dispensary, Refuge, Hostel or Boarding House, Orphanages, Sick Houses Poor and Converts Homes and Asylums Bungalows Dwelling houses Farms and Gardens Printing Press and a Book Depot or objects of a like nature.

(b) The celebration of Divince Service in accordance with the usages of the United Basel Mission Church in India.

(c) Salaries of Pastors, Evangelists, Teachers and other agents of the Mission Hospitals and Dispensaries Maintenance of Schools and other similar institutions as mentioned in clause 1(a) hereof and expenses connected with the administration of properties and other similar expenses.

96. From the objects set out in both the trust deeds, it is amply clear that the trusts under Ex.P-35 is created for the benefit of the work of the Church, whereas, the trust created under Ex.P-37, is for the benefit of the works of the Mission. The trust created under Ex.P-35 is more in the nature of a religious trust. Whereas, the trust created under Ex.P-37 is more in the nature of a

charitable trust. However, it is the beneficiaries who ultimately decide, whether the trust in question is a public trust or a private trust.

BENEFICIARY OF THE TRUST

97. Under EX. P35 DATED 18.9.1934, the beneficiary is described as under : -

benefit of the work of the Church founded by the society in the Districts of South Kanara Bombay Karnataka and Malabar, now known as the United Basel Mission Church in India or of that Church which shall be lawfully affiliated to it or declared to be its successors.

98. Under Ex.P-37 dated 01.08.1939, the beneficiary is described as under:

...for the benefit of the works of the Mission carried on in India by the Society mainly in the Districts of South Kanara Bombay Karnataka and Malabar...

99. It was contended that the property is endowed for the use and admit use of the same for the benefit, of the Church founded by the society, since the beneficiaries are ascertainable and the members who attend the Church are also ascertainable and therefore, when once the beneficiaries are ascertainable, it is a private trust and not a public trust.

100. The word "Church" has two meanings. Firstly, Church is a building where the sacraments are administered as of right. A building consecrated to the honour of God and religion, and anciently dedicated to some Saint, whose name it assumed. The other meaning is, it is a body of communicants gathered into church order, body or community of Christians. It is a place where persons assemble for worship and congregation; organization for religious purposes. It is an assembly of persons united by the profession of the same Christian faith, meet together for religious worship. It is a voluntary association of Christians, united for discipline and worship, connected with and forming a part of some religious society, having a legal existence. A gathering or congregation of disciples of Jesus Christ. It does not mean building. But means, a religious society of some sort. No doubt, the persons who attend the church are ascertainable. But any person who believes or who has faith in the preachings of Jesus Christ, can attend these churches. The entry into the church is not restricted, in the sense it is not confined to a particular family or a private group of individuals. It is open to a particular religious denomination which formed part of the public. The beneficiaries are not specific individuals. The beneficial interest is vested in a uncertain and fluctuating body of persons. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust. That apart, after stating that the trust is created for the benefit of the work of the church, the particulars of the purposes has been elaborated. It clearly shows that the beneficiaries are unascertainable public at large. In English law, religious trusts of private character is not recognised as in

Hindu Law. The church is meant for religion, for charity. It is not meant for any private individuals. It is meant for a body of individuals or community of Christians. Therefore, the trust created for the benefit of a church is a public religious and charitable trust and not a private trust.

101. In fact, in the case of Ex.P-37, it is for the benefit of Mission carried on in India by the society mainly in the districts of South Kanara, Bombay Karnataka and Malabar. Here no church is involved. On the contrary, it is for the schools imparting education, hospitals, asylums, farms and gardens, printing press and book depot or objects of a like nature. The purpose is charity. Therefore, the purpose of the trust is for the benefit of the public. It is secular and not confined to any religious denomination. In English law, charitable trusts are synonym with public trusts. Therefore, the trust created under Ex.P37 is also a public charitable trust.

102. Therefore, the intention is amply clear. It is not meant for any private individuals. It is meant for public. It is meant for charity. It is meant for religion. In English Law. which is attracted to the case of a church, the private religious trust is unheard of and not recognized. Once, it is admittedly a religious trust, it is only a form of charitable trust, which synonymous with public trust. Therefore, both the trusts are in the nature of public, charitable and religious trusts.

103. The trial Court on the basis of the contents of these two documents has rightly held, that both the trusts are created for public, religious and charitable purpose and created in respect of A and B schedule properties. Therefore, the said finding is in conformity with Ex.P-35 and P-37 and also the legal evidence on record. The finding being neither perverse nor illegal, no case for interference is made out. Accordingly, the said finding is affirmed.

POINT NO.2 LEAVE OF THE COURT

104. The present suit was filed on 22.8.1977 and it was numbered as O.S. 22/1977. An application u/s 92 of CPC was filed, seeking permission of the Court to institute the suit. An order came to be passed granting the permission sought for. Revision Petition No. 44/1980 came to be filed challenging the said order. The CRP came to be allowed by an order dated 6.2.1980, setting aside the order granting leave and remanding the matter back to the District Court for fresh consideration. After remand, the application for grant of leave was registered. The defendants were given an opportunity to file the statement of objections. After considering the rival contentions, the learned District Judge By an order dated 5.7.1991, allowed the application and directed registration of the plaint as original suit. Accordingly, the suit was again registered and re-numbered as O.S No. 7/1991. Against the said order, the defendants preferred CRP 4377/1991. the said revision petition came to be dismissed by an order dated 19.8.1994. Thus, the said order granting leave has attained finality. Therefore, the contention that the present suit is filed without seeking leave of the Court is without any substance. After realising the futility of such a contention; it was

next urged that the persons who sought leave initially are not alive and persons who are subsequently added as parties in their plaint have admittedly not obtained such permission and therefore the suit is not maintainable. The suit u/s 92 of CPC is a representative suit. It is filed representing the public at large. Once leave is granted and it has attained finality, if persons who are parties initially were to die and in their place others are substituted, it is not necessary that all those persons who are substituted should again seek leave of the Court, to prosecute the suit. It is because, the permission is granted to the public at large and not to the individual plaintiffs. Therefore, if the original plaintiff dies and others are substituted in their place, as the permission is granted for the public, the permission granted earlier holds good even in respect of them. Therefore, we do not find any merit in the contention of the appellants, that the suit filed u/s 92 is not maintainable for want of permission to institute the suit under the said provision.

POINT NO.3: PRIVATE OR PUBLIC INTEREST

105. Sri. S. Vijayashankar, the learned senior counsel, relying on the judgment of the Apex Court in the case of Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another, , contended that, even if the ingredients of a suit u/s 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public, but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons, in whom they are interested and hence the suit would be outside the scope of Section 92. In this context, he pointed out that Ex.D2 which has come into existence one month after the judgment of the Apex Court on 18.2.1988, purports to be a trust deed under which plaintiff Nos. 4, 5, 10, 11, 13, with others, formed a trust by constituting themselves as trustees for the management of the properties which are the subject matter of the suit, either in anticipation of getting those properties or to manage the said properties. Learned counsel contended that in view of the aforesaid conduct, it is clear that the present suit is filed to vindicate plaintiffs personal rights and therefore, it goes outside the scope of Section 92. Learned counsel submitted that even otherwise, by forming such a trust, plaintiffs have ceded from the Church of India and the allegations in the plaint shows now the properties are vested with the CSI and therefore, plaintiffs lost their right to challenge any of the actions of the CSI. According to the learned counsel, seen from any angle, the suit is not maintainable and plaintiffs are not entitled to the relief, since they have no substantial right in the properties which are the subject matter of the suit. He also contended that these plaintiffs have not come to the Court with clean hands, that they are not vindicating any public lights and that they are vindicating their private rights.

106. In order to find out, whether the plaintiffs are vindicating their private rights or public rights, what is to be seen is the averments made in the plaint. Then, the prayer sought in the suit. It is not the case of the defendants, either in the

plaint or in the prayer column, there is anything to indicate that the plaintiffs are vindicating their private rights. Reliance is placed on Ex. D2, in support of their contention. Ex.D2 is a trust deed which came into existence on 18.2.1988, nearly 11 years after the filing of the suit. Though the Apex Court declared that the resolution dated 9.5.1961 is valid and legal and set aside the judgment under appeal, but when it observed that the said resolution for merger would not have the effect of diverting this Trust properties in the hands of UBMC Trust Association to CSI and that properties held in trust for UBMC will not be diverted to the use of CSI, but will continue to be held in trust by the CSI Trust Association for the benefit of the members of the UBMC of South Canara and Coorg, even if a merger takes place and as on that date the company which was acting as the trustee was wound up by the order of the High Court, the said Deed of Trust was brought into existence to manage the properties of the Trust. The recitals in the Trust deed do not indicate that the plaintiffs are claiming any title to the property, even if they had leased the properties belonging to the Trust and collected rents from the defendants. It is nobody's case that it was misappropriated. The money is completely accounted for. Therefore, the very fact of forming a Trust shows the intention was to manage the property for the benefit of the beneficiaries to whom it was meant for, in the light of the judgment of the Apex Court, on account of the fact that the company which was acting as a Trustee and managing the affairs was ordered to be wound up by the order of a Court. Therefore, it is not possible to hold that by creating such a Trust, the plaintiffs are attempting to vindicate their personal rights. The facts of this case and the evidence on record, amply demonstrates what the plaintiffs are trying to enforce in the suit is the right of the public and not their personal rights and therefore, the aforesaid judgment has no application to the facts of this case and rightly the trial Judge was justified in holding that the suit filed by the plaintiffs u/s 92 satisfies the requirement of Section 92 of CPC and is maintainable.

POINT NO.4: RES JUDICATA

107. Before the trial Court, the plaintiffs contended that the judgment referred in G.S.NO.221/61, RSA 741/71 and C.A.84/75 operate as res judicata or otherwise binding on the parties. Strangely, in this appeal, it is the defendants who contend that it operates as res judicata. However, the trial Court held that the findings to be recorded on Issue No.4 which dealt with the question of res judicata will have a direct bearing on the findings to be recorded on other issues and therefore it took the said issue for discussion and decision at the first instance.

108. O.S.No.221/61 was filed on the file of the Munsiff at Mangalore, for a declaration that the resolution dated 09.05.1961. proposing merger is void, illegal and ultra vires and for a decree of permanent injunction to restrain the implementation of the said resolution. It was contended that the impugned resolution is ultra vires Rule 14 of the constitution of UBMC. It is also bad since it is beyond the power of the District Church Council to dissolve the constitution. It was alleged that the funds and properties of UBMC are held in trust for

propagation and advancement of the faith and doctrine of UBMC and as such, it cannot be divested to public purpose. The said suit after contest came to be dismissed on 27.05.1968. Aggrieved by the said judgment and decree, the plaintiffs preferred RA.No. 189/68, on the file of the Civil Judge at Mangalore. The appeal was dismissed on 12.04.1971. Thereafter, RSA 741/71 was tiled before this Court. On 19.04.1974. this Court allowed the appeal and set aside the judgment and decree passed by the Courts below and declared that the impugned resolution dated 09.05.1961 was void and permanent injunction to prevent implementation of the resolution was granted. During the pendency of RA 189/68 and RSA 741/71. there was an order of temporary injunction restraining the defendants in the suit from implementing the merger resolution and also making over the UBMC trust properties to the Church of South India. Interim injunction granted by this Court in RSA 741/71 at. the time its admission, was made absolute on 14.10.1971, which continued to hold till 19.04.1974, when judgment and decree of the Courts below were set aside and the suit of the plaintiff for declaration and permanent injunction was decreed. Aggrieved by the said judgment, and decree, the defendants in the suit preferred an appeal to the Supreme Court. However, the Supreme Court declined to grant stay of the operation of the judgment and decree of this Court in RSA 741/71. In the appeal, the Supreme Court set aside the judgment and decree passed in Second Appeal and restored the judgment and decree passed by the Courts below. In effect, it dismissed the suit of the plaintiffs. The Supreme Court held as under:

Both the Churches are Protestant Churches. The fundamental doctrines, faith and belief appear to be the same. Both UBMC and CSI believe in Jesus Christ, the Incarnate Son of God and Redeemer of the World. Both also believe that man is saved from sin through Grace in Jesus Christ, the Son of God. Both the Churches believe in The Holy Spirit and in the Supreme Power of the Holy Spirit and that there should be free access of man to God.

It is true UBMC is opposed to Episcopacy, but Episcopacy which has been adopted by the CSI, is not that historic Episcopacy, but historic Episcopacy in a constitutional form. In other words, the Bishop will be one of the of the officials of the Church under its Constitution performing certain duties and functions. The Bishops are appointed by election and there are provisions for the. retirement of Bishops at the age of 65 years, and also for their removal. It is significant to notice that CSI believes that in all ordinations and consecrations the true Ordainer and Consecrator is God. From all this, the irresistible conclusion is that there is neither apostolic succession nor historical Episcopacy in CSI as contended on behalf of respondents.

The universal priesthood, which is said to be prevalent in UBMC, does not permit lay preachers and Evangelists to administer the sacraments. It is true that in the CSI the Presbyters are ordained persons, but in UBMC they are unordained. But nothing turns out on that distinction.....While a Presbyterian in the CSI is an

ordained minister, in UBMC the ordained Minister is a Pastor. In the CSI Presbyters have the authority to administer the sacraments and in UBMC the Pastors, who are ordained ministers, are authorised to administer the sacraments. There is, therefore, no distinction between a Pastor in UBMC and a Presbyter in the CSI. As the functions and duties of Presbyters and Pastors are the same and as both of them are ordained ministers, no exception can be taken if the sacraments are administered by Pastors instead of by the Presbyters. No objection can also be taken to the Bishops administering the sacraments, for they do not emerge from the apostolic succession which is the main characteristic of historical Episcopacy.....The CSI has already accepted the form of worship which the members of UBMC used to follow before the union of UBMC with CSI. In view of this specific provision in Rule 12 of Character II of the Constitution of CSI, it is difficult to accept the contention that in case of merger or the implementation of the impugned Resolution, the right of worship of the members of the UBMC will be affected.. In UBMC the method of consecration and ordination is also the same as in CSI.....After a person is appointed a Bishop or a Presbyter in the CSI or a Pastor in UBMC, he has to be ordained in almost the same manner.....The mode or manner of ordination or the underlying object of such ordination has nothing to do with the right of worship.....Both UBMC and the CSI believe in Apostle's Creed and Nicene Creed. This has nothing to do with the right of worship.....Even if Apocrypha is followed in the CSI that would not interfere with the right of worship. In view of Rule 12, Chapter II of the Constitution of the CSI, there is no cause for apprehension that in the case of merger, the Apocrypha will be imposed which is repugnant to religious faith. Moreover, in the liturgy of the CSI, the prayer from Apocrypha has been made optional which shows that there is no scope for imposition of Apocrypha in case of union of UBMC and CSI.

Even though there is merger, the properties or the income thereof will be utilised only for the benefit of the members of the UBMC of South Kanara and Coorg.....There is no material to show that the UBMC Trust Association has agreed to transfer the properties to the CSI in case of merger. In the circumstances, it is difficult to accept the contention that in the case of merger there will be diversion of the properties in the hands of the UBMC Trust Association to the CSI in breach of trust

109. Therefore, from the aforesaid judgment, the following three points of dispute are finally decided by the Apex Court and would operate as *res judicata*.

(1) The resolution dated 09.05.1961 is legal and valid.

(2) There are no fundamental differences between UBMC and CSI in the matters of doctrine, faith, worship and religious practices.

(3) In case of merger, there cannot be any diversion of the properties held in trust by the Society (defendant No.30) and managed by UBMCITA (defendant No.32). The properties would remain as the properties of the Society which holds

them for the purposes as mentioned in the registered document dated 18.09.1934, Ex.P-35 in this case. In other words, though there is merger, the properties or the income thereof will be utilized only for the benefit of the members of UBMC of South Canara and Coorg. These three questions cannot be re-agitated in this proceeding and the said findings would operate as res judicata as rightly held by the learned trial Judge in this case. Therefore, we affirm the said finding.

POINT NO.5: WHETHER THE RESOLUTION OF MERGER IS IMPLEMENTED

110. The resolution dated 09.05.1961, which is the subject matter of the earlier proceedings, reads as under:

Resolved that the suggestion appearing in Minute No.60-16 of the District Church Council held on 12-5-1960 that our South Kanara and Coorg district Church should join the Church of South India is adopted, confirmed and finally passed.

Therefore, this District Church Council besides resolving to accept the constitution of the Church of South India, authorises the District Church Board to proceed to correspond in connection with this matter with the authorities of the Church of South India after obtaining permission of the Synod of the United Basel Mission Church

111. A perusal of the aforesaid resolution makes it clear that the suggestion of District Church Council of South Canara and Coorg District Church, that they should join the Church of South India, is adopted, confirmed and finally passed. After accepting the said suggestion, the District Board was authorised to proceed to correspond in connection with this matter with the authorities of Church of South India, after obtaining permission of the Synod of the United Basel Mission Church. The resolution of Synod. UBMC dated 24.06.1968, is marked as Ex.D-58, It is the Minutes of the Extraordinary Meeting of United Basel Mission Church Synod, held on 24.06.1968 at 10 a.m. in the Karnataka Theological College Hall, Balmatta, Mangalore-1. Item No.4 pertains to the aforesaid resolution passed by the District Church Council of South Canara and Coorg, which reads as under:

4. After a brief discussion Mr. P.M. Airan proposed and Rev, I.A. Soans seconded the proposal that permission be given by the Synod to the District Church Council to join the C.S.I., The following resolution was unanimously adopted by the Synod:

Resolution I

Resolved unanimously that this Synod of the United Basel Mission Church permit the District Church Council of South Kanara and Coorg to join the Church of South India and that with effect from the date of affiliation this Synod cease to exit.

112. Though there is controversy that what is produced before the Court is only a copy and not the original, the aforesaid resolution makes it clear that the

merger would come into effect from the date of affiliation and consequently the Synod cease to exist.

113. As is clear from the resolution dated 09.05.1961, after obtaining the permission of the Synod, the District Church Board has to approach the authorities of the Church of South India for implementing the said resolution. In the written statement of Defendant-1 and 2, it is stated that on 24.06.1968, the representative appointed by the executive committee of the CSI Synod and the District Church Board members of UBMC, held a joint meeting and declared by joint resolution that the UBMC of South Canara and Coorg has become part of CSI. Thus, the merger resolution of 09.05.1961 was implemented on 24.06.1968, when there was no injunction of any Court against the implementation of the merger resolution. The Minutes of the Union of two Churches dated 24.06.1968 also provided that in accordance with the initial arrangement provision of Articles 8, Chapter VII of the CSI Constitution, existing arrangements will continue until new order is taken. The aforesaid resolutions are not produced before the Court to substantiate the completion of the merger courses.

114. A Contempt Petition in CCC (Crl) 6/88 came to be initiated against Rev.D.P. Shettian, Moderator's Commissary, Karnataka Southern Diocese, CSI the Defendant No.7, for publication in Udayavani, Kannada Daily, published from Mangalore. In the said publications, the accused interpreted the decision of the Hon'ble Supreme Court and tried to convey to the members of the public, that the question of merger of UBMC with the Church of South India and implementation of the merger had received the approval of the highest Court of Law in the country. Therefore, the proceedings questioning the implementation of the merger resolution in the present proceedings was a futile exercise. After hearing the accused, the Division Bench of this Court held that, in their opinion, the publications admittedly authored by the respondent defendant No.7, prima facie were and are calculated to interfere with the administration of justice. Evidently, the first publication was made when the Miscellaneous First Appeal was pending in this Court and the second publication was made when the CRP was pending in this Court. The matters referred to in the publications, there is no dispute, were and are the subject matter of the suit between the complainants and others and the respondents and others. The respondent has abused the complainants who were the parties to the pending proceedings in one capacity or the other. The result of the abuses may lead to consequences that may hold them up to public ridicule. The comments in the publications was and have the tendency to prejudice the issues that were and are pending before the Courts. In coming to the said conclusion, this is what has been said at paragraph 48 of the judgment:

It was urged by Sri. V. Krishna Murthy, the learned Senior Counsel for the respondent, that the "UBMC did not exist consequent on the merger resolution and on its implementation That contention stands effectively answered by the

observations made by the Supreme Court in C.A. No.84/75 to which we have made a detailed reference in one of the earlier paragraphs.

Further they also observed as under:

18. Dealing with the point as to whether the question raised was of merger of "UBMC with the "CSI" or its dissolution, the Supreme Court observed:

We are afraid, this decision has no manner of application to the facts of the instant case. Here we are not concerned with the question of dissolution of UBMC of South Kanara and Coorg, but with the question of merger. Dissolution contemplates liquidation of the Club and distribution of all assets among the members, but in the case of merger, there is no question of liquidation or distribution of assets. Moreover, we have already discussed above that the properties held in trust for UBMC will not be diverted to the use of the CSI, but will continue to be held in trust by the UBMC Trust Association for the benefit of the members of UBMC of South Kanara and Coorg, even if merger takes place.

22. Though the Supreme Court upheld the validity of the merger resolution, as can be seen from the Judgment it did not go into the question as to whether the resolution had been implemented.

36. The publication dated 4-2-1988 after quoting certain observations of the Supreme Court, verbatim, asserted that the properties of "UBMC were not the subject-matter of dispute in the suit. that after the transfer of the properties by registered deed in favour of "SIC Trust Association and after the liquidation of UBMC Trust Association, no one had challenged the arrangements by instituting Court proceedings and that OS No.22/77 instituted by the opponents (complainant No.1 and others) which had been filed in 1977 on the basis of the decision of the High Court in 1974 had lost its ground in view of the reversal of the decision by the Supreme Court. According to it, in view of the reversal of the decision of the High Court by the Supreme Court, there was no support to the contentions raised (in the suit).

39. The publication dated 5-7-1988 stated that though the merger dispute had been concluded by the decision of the Supreme Court Y.V. Hanumantha Rao Vs. K.R. Pattabhiram and Another, a few people for their personal prestige and profit were giving very often publications, in newspapers in the name of unauthorised institutions and were making attempts to create false impression in the minds of the public. It stated that (to dispel the mischief] a publication had been given in the issue of Vdaya Vani dated 6-2-1988 about the merger matter and the details of the Supreme Court Judgment. The publication reminded about the earlier publication stating that it had been issued as a warning to the persons indulging in acts, calling them as destroyers of society, The said publication stated about a complaint having been lodged in the Police Station against complainant No.1 and another who were deceiving people by giving publications in the name of unauthorised institutions and about the Sub-Inspector, after having made investigation, having issued warning notice, it declared in unequivocal terms that

neither UBMC District Church Board nor "UBMC Trust Association existed.

Ultimately, when the case was set down for framing of charges, the accused in the Contempt Petition filed an unconditional apology. The Division Bench, while passing the order on 21st April, 1994, categorically observed as under:

We have studied the decisions cited at the Bar. Before we proceed further in the matter, it appears necessary for us to record a finding that the accused has committed the criminal contempt of this Court and the courts subordinate to the Court in which the judicial proceedings between the complainants and the others on the one hand and the accused and others on the other hand are pending. We may observe that in a contempt case apology takes the character of admission. Apology is accepted to purge the contemptner of the charge of contempt and exonerate him. It is also accepted in lieu of the punishments the contemptner is liable for having committed the offence of contempt.

(Underlining by us)

Then it held that the Contempt committed by the accused is purely technical in nature, accepted the apology and let him off. In the present suit, defendant No.7 was examined as DW-1 and his evidence on the merger is as under:

I know defendant No.28 the District Church Council and 29th defendant the District Church Board. Defendants 28 and 29 are not in existence now. The functions of the defendants 28 and 29 were to manage the schools, churches and hospitals in South Kanara and Coorg. Defendants 28 and 29 were so managing till 1968. Because of the merger that took place in 1968 defendants 28 and 29 ceased to exist. The 1st defendant took over the management consequent to merger. Area working Committee and area working council are the equivalent bodies of defendants 28 and 29 DCC and DCB of UBMCI were participating in the litigation throughout even after merger. After the Supreme Court Judgment defendants 28 and 29 ceased to exist. Protestant Christians are the members of UBMCI After the merger protestant Christians were called as members of 1st defendant I was also a member of UBMCI before merger.

I know the defendant No.30 EMS and its functions. Defendant No.30 is not existing in India. Defendant No.30 was functioning in India till 1972. Defendant No.30 in 1972 wound up its activities and went to Germany. The 1st defendant and the 3rd defendant took over the activities of defendant No.30 after 1972. The defendant No.30 had established UBMCI in South Kanara and Coorg Districts. I know defendant No.32 UBMCI and its functions and it was constituted by the defendant No.30. Defendant No.32 was revoked by defendant No.30 in 1972. The properties managed by defendant No.32 till 1972 were transferred to 3rd defendant The defendant No.32 was a trite formed under the Companies Act. It was dissolved by the High Court of Karnataka in 1978 in liquidation proceedings. Those proceedings were not challenged by anybody in any Court of Law. The Trust of the defendant No.32 did not exist after 1978.

At the time of filing of the suit in the year 1977 besides being the treasurer of 1st defendant I was also a treasurer for UBMCI for the purpose of court proceedings which is defendant No.29. UBMCI was functioning under the written constitution. The constitution was operating after 1968 to the extent of defending the court proceedings arising out of OS No.221/1961. UBMC higher churches and other institutions were governed by a written constitution prior to 1963. UBMCI constitution was not in force after the Supreme Court judgment in the year 1988.

Prior to 1968 our schools were called UBMC Schools. Even after 1968 the schools are called as UBMC Schools.

3rd defendant is the owner of the schools, churches, hospitals and other institutions after 1972. At the time of filing of the suit, I was not dealing with the properties of 3rd defendant and defendant No.32.

115. This evidence makes it clear that it is a categorical admission that D.C.C. and D.C.B of UBMCI were participating in the litigation through out, even after merger. It is only after the Supreme Court judgment in the year 1988. defendants 28 and 29 ceased to exist. At the time of filing of the suit in the year 1977, besides being the treasurer of the 1st defendant, he was also a treasurer of UBMCI for the purpose of court proceedings which is defendant No.29, UBMCI was functioning under written Constitution. The Constitution was operating after 1968 to the extent of defending the court proceedings arising out of O.S.No.281/1961. UBMCI Constitution was not in force after Supreme Court judgment in the year 1988. Prior to 1968 the schools were called UBMC schools. Even after 1968, the schools are called as UBMC schools. The 3rd defendant is the owner of the schools, churches, hospitals and other institutions after 1972.

116. Unfortunately, these undisputed facts were not noticed by the learned trial Judge. Therefore, he proceeded to hold as under:

Therefore, even if there were interim orders in restraint of the implementation of the resolutions, those interim orders cannot be given effect to in view of the fact that the plaintiffs in the previous litigations were not successful and the Hon'ble Supreme Court of India has declared that the resolution dated 9-5-1961 is valid. The, plaintiffs have failed to establish the existence of the functionaries (constituents of UBMC as per its constitution marked as Ex.P62). Defendants 5 to 10 have contended that after 24-6-1968 they are not functioning as the elected representatives or members of DCC or DCS. The contention of the defendants looks probable. Therefore, notwithstanding the fact that defendants have not-produced the primary evidence, that is the merger resolution dated 24-6-1968. I hold that after 24-6-1968, the UBMC as a constituent body according to its constitution (marked as Ex.P62) has ceased to exist The obvious inference is that the UBMC as a constituent body has merged with CSI

117. In coming to the conclusion, he has also taken into consideration the deed of declaration of trust dated 18.02.1988. marked as Ex.D-2, which was brought into existence to constitute the DCB and DCC. "Therefore he was of the view that

the plaintiff cannot contend that the UBMC and its functionaries as per its constitution existed after 24.06.1968, Further, he held that if there are procedural irregularities regarding the merger, the plaintiff had the remedy to challenge the merger by invoking the provisions of the constitution of UBMC, marked as Ex.P-61. The plaintiffs have not done so. Therefore, even if there are procedural irregularities, it is not possible to hold that there was no merger. Therefore, he concluded that the merger resolution dated 09.05.1961 was implemented and merger is not in violation of the injunction orders.

118. Therefore, the finding recorded by the learned trial Judge is contrary to the findings recorded by the Division Bench of this Court in the aforesaid Contempt Petition. The Supreme Court as set out above in its judgment, has clearly held that they are not going into the question of merger as it is not an issue before them. Even according to the resolution dated 24.06.1968, on which reliance is placed, further steps have to be taken to complete the merger. Neither the resolution dated 24.06.1968 nor the aforesaid proceedings in pursuant of that resolution, are produced before the Court. According to the defendant, the very resolution dated 24.06.1968 is the proof of implementation of merger. That contention was not accepted in the Contempt proceedings and it was held, prima facie, a case of contempt is made out. Apology was tendered. The said stand was withdrawn unconditionally. The evidence of Defendant No.7 in the suit set out above clearly shows that Defendant No.27-UBMCI, did not cease to exist from 24.06.1968 as contended and if it all, it ceased to exist from 1988, after the judgment in the Supreme Court. Under these circumstances, it is not possible to hold that the stand of the defendants that the merger resolution is taken to its logical end and is completely given effect to is correct. As pointed out earlier, the learned trial Judge has recorded his finding in complete ignorance about the aforesaid contempt proceedings, findings recorded therein and the apology tendered by the accused in the said proceedings, as well as the admitted oral evidence of Defendant-7. Therefore, the said finding cannot be sustained and it is hereby set aside.

119. In our opinion, in a proceedings initiated u/s 92 of the Code of Civil Procedure, for a direction for proper management of the trust properties, the said issue is of no relevance and it falls out side the scope of Section 92 of the Code. Therefore, it would be appropriate to relegate the parties to a suit where the said question can be gone into by a Court of competent jurisdiction and accordingly, the findings recorded by us herein, would not come in the way of the Court of competent jurisdiction, going into the said question. That would meet the ends of justice.

POINT NO.6 AND 7: REVOCATION OF TRUST

120. The argument on behalf of the plaintiff is that the trusts in question are public, religious and charitable trusts. Once the author of the trust creates a trust and transfers the trust properties to the trustees, the property vests with the trustee and the author of the trust, divest himself of the right, title and interest

in the property. In the case of charitable trust. the beneficial interest of the trust property vest with the beneficiary. Therefore, a public, charitable and religious trust once created, cannot be revoked. In the first place, in Ex.P-35 and Ex.P-37, a power of revocation of the trust is not reserved. Even, if Clause 13 in Ex.P-35 and Clause 9 in Ex.P-37 has to be construed as power of revocation, the said clause is void ab initio and non est in the eye of law. Therefore, the revocation of the said trust is void ab initio and as such, all the subsequent documents which have come into existence after the creation of the trust is a scrap of paper and would not have the effect of either revoking the earlier trust or creating a new trust.

121. The contention of the defendants is, that the trusts are not public trusts. In view of the power of revocation reserved with the author of the trust, i.e. the 30th defendant-society, the trust declarations dated 18.09.1934 and 01.08.1939 were duly revoked and new trusts were created on 03.12.1957. By virtue of the power of revocation specified in the deed of trust dated 03.12.1957, the said trusts were revoked and fresh trust was created by document No. 1163 and 1164/72. It is specifically pleaded in the written statement of the defendant, that the plaint C schedule property were acquisitions of the 32nd defendant, after it was appointed trustee by the 30th defendant -Society in respect of the 2 trusts for the benefit of the work of the church and the work of the Mission. The acquisitions were from the profits of the trust properties and became accretions to the parent trust. When the parent trusts were revoked by the 30th defendant society in lawful exercise of the power of revocation reserved to it as author of the trust, the accretion to the trust in respect of the plaint C schedule property also stood revoked. Since the properties covered by the revoked parent trust were transferred by the 30th defendant for the CSITA. the properties covered by the revoked accretion trust were also transferred by the ostensible owner, the 30th defendant, to the third defendant in trust of the CSI, under registered document No. 1107/1972-73, as directed by the 30th defendant.

122. It was specifically contended, that even if it is held that it is not a private trust, the principles underlying Section 78 of the Trust Act is applicable. Clauses (13) and (9) of the trust deeds reserves In the author of the trust, a power to revoke the trust, which power has been legitimately exercised. Therefore, the contention that a public trust cannot be revoked is without any substance. Not only the trust created under Ex.P-35, Ex.P-36 as well as Ex.P-37 and Ex.P-38 are revoked, a new trust is created as per Ex.D-74 and Ex.D-75 and subsequently, the same is also revoked under Ex.D-71 and Ex. D-73 and a new trust is created under Ex.D-72 by registered documents. Therefore, the plaintiffs not having challenged the subsequent documents in a manner known to law, they are estopped from contending to the contrary.

123. In the light of these rival contentions, two questions do arise for consideration. They are:

(a) Whether a public, religious and charitable trust can be revoked by reserving

the power of revocation?

(b) Whether clause 13 in Ex.P-35 and Clause 9 in Ex.P-37, can be construed as clause reserving the power of revocation in the author of the trust and, revocation of the said trust by virtue of the said power of revocation is valid and legal?

POINT No.6 : REVOCATION OF PUBLIC TRUST

124. This is purely a legal issue. In order to answer this issue, it is necessary for us. to look into the law, as contained in the statutory provisions.

Sections 5, 6 and 78 of the Indian Trust Act. 1882 reads as under:

5, Trust of immovable property.- No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of movable property.- No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud,

6. Creation of trust - Subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself" to be the trustee) transfers the trust property to the trustee.

125. Section 78 of the Indian Trust Act, provides for revocation of the trust at the pleasure of the testator. It reads as under:

78. Revocation of trust- A trust created by will may be revoked at the pleasure of the testator,

A trust otherwise created can be revoked only-

(a) where all the beneficiaries are competent to contract - by their consent;

(b) where the trust has been declared by a non-testamentary instrument or by word of mouth - in exercise of a power of revocation expressly reserved to the author of the trust; or

(c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors -at all pleasure of the author of the trust

126. The word "transfer" has been defined in the Transfer of Property Act. at Section 5, which reads as under:-

5. ""Transfer of property" defined.- In the following section "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [or to himself] and one or more other living persons; and "to transfer property" is to perform such act

[In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any laws for the time being on force relating to transfer of property to or by companies, associations or bodies of individuals.

127. Section 126 of the Transfer of Property Act. reads as under;

126. When gift may be suspended or revoked.- The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

In the background of these statutory provisions, it is useful to refer to the opinion of teamed authors on the subject,

TUDOR on trusts

When a charity has been founded and trusts have been declared the founder has no power to revoke, vary or add to the trusts. This is so irrespective of whether the trusts have been declared by an individual, or by a body of subscribers or by the trustees.

128. In HALSBURY'S LAW OF ENGLAND, 4TH EDITION at page 308, para 565, it is stated as hereunder:

565. Revocation and Variation: Where an express trust is completely constituted, it is generally binding and irrevocable whether it was or was not constituted or declared for valid consideration, unless a power of revocation is expressly reserved. In order to effect a valid revocation, such a power must be exercised in the manner specifically directed.

However, in certain circumstances a disposition of property in trust may be set aside under the provisions relating to the avoidance of voluntary statements in bankruptcy or under the general statutory provisions relating to dispositions in fraud of creditors, or on the ground of the disposition was induced by fraud, duress or undue influence. Moreover, the Court has wide discretionary power conferred on it by statute to vary the terms of trust, besides its limited inherent

jurisdiction in this respect

129. In the Hindu Law of Religious and Charitable Trust by B.K.MUKHERJEA, FIFTH EDITION, in page 213, paragraph 5,14 reads as under: -

5.14 Founder cannot alter or revoke the appointment after it is made, unless such powers are reserved by him.- Once the appointment is made and the line of devolution laid down, is it competent for the founder to alter or revoke it afterwards? On the authorities as they stand, the answer has to be in the negative, unless the right of revocation or alteration has been reserved at the time when the grant was made. This is so even if the provision in the deed of dedication as to succession to Shebaitship is invalid in law and the Shebait reverts to the founder.

130. Now, let us see the law enunciated by the various

Courts in the contrary, including the Hon"ble Supreme Court of India.

The Supreme Court in the case of Sri Agasthyar Trust v. C.I.T. (S.C.J reported in Income Tax Reports [Vol.236 1999], explaining the power of the trustee to amend, alter, vary or change in any manner, the object of the trust, has held as under:-

It will be useful at this juncture to refer to the following passage from Tudor on Charities (6th edn.) at page 131, it is stated as follows:

When a charity has been founded and trusts have been declared, the founder has no power to revoke, vary or add to the trusts. This is so irrespective of whether the trusts have been declared by an individual, or by a body of subscribers, or by the trustees.

When the founders of the trust have no power to alter or vary the terms of the trust, a trustee appointed to manage the properties of the trust for securing its object can under no circumstances be regarded as having such a power specially when the original deed dated November 28, 1941, does not bestow such power on him. Such a question also came up for consideration before the Madras High Court in Thanthi Trust Vs. Income Tax Officer, . Dealing with the question whether the founder of a trust had power to revoke the same, the court observed as follows (pages 284-85):

It is well established that the subsequent acts and conduct of the founder of the trust cannot affect the trust if there has been already a complete dedication. (vide Krishnasami Pillai Vs. Kothandarama Naicken and Others, ; Sunder Singh Malloh Singh Santhan Dharam High School Trust v. Managing Committee, Sunder Singh Mallah Singh Rajput High School [1938] 1 MLJ 359; AIR 1938 PC 75 , and Gokuldoss Jamnadoss and Co. Vs. M. Lakshminarasimhalu Chetti and Others, . If a valid complete dedication had taken place, there would be no power left in the founder to revoke and no assertion on his part or the subsequent, conduct of himself or his descendants contrary to such dedication would have the effect of

nullifying it. If the trust had been really and validly created, any deviation by the founder of the trust or the trustees from the declared purposes would amount only to a breach of trust and would not detract from the declaration of trust. Therefore, the subsequent conduct of the founder in dealing with the funds of the trust long after the creation of the trust may not put an end to the trust itself.

We are in full agreement with the principle stated in the aforesaid passage and we hold that the trustee had no authority or jurisdiction to execute a fresh trust deed and the document dated July 1, 1944, is of no consequence and is no more than a scrap of paper. The trust as originally established by the deed dated November 28, 1941, remained unchanged or unaffected by the later document dated July 1, 1944.

131. In *Thanthi Trust v. Income Tax Officer*, 1973 (71) ITR 261 (MAD), it has been held as under:-

It is well established that, the subsequent acts and conduct of the founder of the trust cannot affect the trust if there has been already a complete dedication. If a valid and complete dedication had taken place, there would be no power left in the founder to revoke and no assertion on his part or the subsequent conduct of himself or his descendants contrary to such dedication would have the effect of nullifying it. If the trust had been really and validly created, any deviation by the founder of the trust or the trustees from the declared purposes would amount only to a breach of trust and would not detract from the declaration of trust. Therefore, the subsequent conduct of the founder in dealing with the funds of the trust long after the creation of the trust may not put an end to the trust itself. There can, therefore, be no reason for doubting the genuineness of the trust.

132. A Division Bench of this Court in the case of *K.M. Ramachandra Setty and Others vs K. Ramakrishnappa and Others*, in RFA No. 6/1969, held that, once a settlor creates a trust, unless he makes necessary reservation for modifying or altering the terms of the Trust in the deed itself, he ceases to have any power or authority to alter the terms of the deed, even though he may himself be the Chief Trustee or one of the Trustees.

133. Therefore, the principle that can be deduced from the aforesaid provisions of law, passages of the learned authors and the law laid down by the Courts could be broadly stated as under:-

Transfer of property means, an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons and to transfer property is to perform such act. For the purpose of Section 5 of the Transfer of Property Act, living person includes a company or association or body of individuals, whether incorporated or not, but nothing contained therein shall affect any law for the time being in force, relating to transfer of property to or by companies, associations or bodies of individuals. Therefore, once an immovable property is transferred, the title to the property vests in the transferee. By a contract

between the parties, the said right which is conveyed cannot be reclaimed. The only mode which the law recognizes for re-transfer is by execution of a registered deed of conveyance, re-transferring the property. A public trust once created by way of non-testamentary instrument, which is duly registered, under which the trust property is conveyed by the author of the trust to the trustee cannot be revoked and reclaimed by the author of the trust. Subsequent acts and conduct of the author of the trust, cannot effect the trusts, if there is already a complete dedication. He has no power left in him, to revoke nor put an end to the trust itself. The trust, or the author of the trust have no authority or jurisdiction to execute a fresh trust deed, after revoking the earlier trust deed. Any document, such as a deed of revocation or a fresh trust deed, which would purport to revoke the earlier trust deed and create a new trust, in the place of the earlier trust, are all of no consequence and is no more than a scrap of paper. It has no value. It is void ab initio and non est in the eye of law.

134. If the statute provides for such revocation, the power to revoke flows from the provisions of the statute and not by terms stipulated in the contract. But, if the statute says that it is only in case where the right of revocation is reserved in a contract, that power of revocation could be exercised, subject to condition that such a power is vested in the contract and the statute provides for exercising the power of revocation. As is clear from clause (b) of Section 78 of the Trust Act, where the trust has been declared by a non-testamentary instrument, power of revocation has to be expressly reserved to the author of the trust in the instrument. Then, a trust created by such non-testamentary instrument could be revoked. Therefore, the power of revocation flows from the statutory provision. But for the statutory provision, which confers such a right on the author of the trust, once the transfer takes place, the transferor can not re-claim the property which is transferred.

135. Similarly, u/s 123 of the Transfer of Property Act, 1882. a gift of immovable property which also involves transfer of immovable property has to be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Section 126 of the Transfer of Property Act also provides for suspension or revocation of such gift. As is clear from the said provision, the donor and the donee may agree, that on the happening of any specified event, which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable, wholly or in part, at the mere will of the donor, is void, wholly or in part, as the case may be. A gift also can be revoked in any of the cases, in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked.

136. Thus, in the absence of statutory provision conferring such right on the transferor to revoke the transfer, the transferor has no right in law, to exercise the power of revocation. Once the transfer of title in the immovable property passes on to the trustees and beneficiary, the author of the trust loses his right, title and interest to the said property. In other words, he ceases to have any

right in the trust property, which is transferred and which is the subject matter of the trust. Therefore, the preponderance of opinion is that, once a public, religious, and charitable trust is created by a non-testamentary instrument and the author of the trust transfers or vests the property in trustees, for the benefit of unascertainable fluctuating body of beneficiary and such an instrument is duly registered in accordance with the law that is being in force, the author of the trust cannot revoke the trust. The author has no power to revoke, vary, or add to the trusts. The subsequent acts and conduct of the founder of the trust, cannot affect the trust, if there has already been a complete dedication. If the trust had been really and validly created, any deviation by the founder of the trust or trustee from the declared purposes would amount only to breach of trust and would not detract from the declaration of trust. The subsequent conduct of the author of the trust, in dealing with the trust property, long after the creation of trust, would not put an end to the trust, itself. Therefore, once a valid trust is created, it is irrevocable,

137. However, one exception recognised to this absolute rule is, where the author of the trust is induced to create the trust by fraud, duress, undue influence or mistake, the trust could be revoked. But the question, whether such a trust could be revoked by executing a revocation deed or getting rid of the document by a decree of cancellation is a moot point.

138. However, where a private trust is created inter vivos, the settlor has power to revoke the trust or to modify it, only if he has reserved such a power. In the case of a private trust created inter vivos, the settlor can revoke or modify the trust, if all of the beneficiaries are ascertainable and are under no legal incapacity and consent. If the conditions stipulated in Section 78 of the Trusts Act, 1882 is complied with, the trust can be revoked and not otherwise. Though the Indian Trust Act applies only to private trusts, the Apex Court has held that the principles underlying the trust can be applied to public trust also. But that does not mean, that in respect of public trust, these statutory provisions are made applicable *mutatis mutandis*. When the power of revocation is specifically conferred under the Act, which is applicable only to private trust, the said power is to be confined only for revocation of private trust. The said provision or the principle underlying the provision, cannot be extended to a public trust. Therefore, the power of revocation contained in Section 78 of the Trust Act cannot be invoked to revoke a public trust. By the very nature of the trusts, in the case of public, charitable and religious trust, Section 78 of the Act, has no application. Even the principles underlying the said provisions cannot be adopted to public trusts, because, number of concessions, exemptions are granted in law, to such public trusts, keeping in mind the public interest involved in the working of such trusts. The main object behind extending such benefits is. that the beneficiaries are the general public or a section of public. After creating a public trust, extending the benefit to the public, then in law, the trust property vests in trustees for the benefit of the public. In effect, the trust property is meant for the beneficiary. The settlors control over the property ceases as soon as the trust

is created. After a lapse of time, the settlor cannot be permitted to reclaim the property on any pretext. If such a thing is permitted, it amounts to fraud on public.

POINT No.7; RESERVATION OF POWER OF REVOCATION

139. Clause (13) of Ex. P35 and Clause (9) of Ex.P-37, refers to revocation. The question is, whether the power of revocation is reserved under the said deed. In order to find the said power, it is necessary to look at the entire paragraph, which reads as under:

13. The Home Committee of the Society if at any time it should appear to them in the interest and for the benefit of the United Basel Mission Church in India shall have power on the recommendation of a Committee to be called the Enquiry Committee and constituted. as hereinafter provided and notwithstanding "the appointment of new trustees" in place and stead of the Society to "revoke" or alter or add to or diminish, amend, explain or modify all or any of the trusts powers provisos agreements and declaration herein contained and to declare nor and additional or other trusts powers provisoes agreements and declarations without reference or regard to the original trusts powers provisoes agreements and declarations herein contained and such altered revoked and new or additional or other trusts powers provisoes and declarations in like manner as these presents shall from time to time and at all times be and remain subject to this present clause and to the power therein contained. The Committee of Enquiry referred to above shall consist of three members one to be appointed by the Home Committee of the Basel Evangelical Mission one by the Committee of Management of the Trust Association and the third who is to be the Chairman to be chosen by such members. In case they fail to agree in the choice of the third members such member shall be appointed by the President for the time being of the Basel Evangelical Mission in India.

140. Before we interpret this clause, it is necessary to keep in mind, what is the effect of creation of trust. As is clear from the recitals, the 30th defendant claimed that it is seized of or entitled to lands and premises more particularly set out in the schedule thereto, which is B schedule property. The 30th defendant claimed the said property, as set out earlier under a registered document dated 09.08.1931. Under the said document, they became absolute owners. In Ex.P-35 and Ex.P37, they have expressed a desire to hold the said property as trust property. In other words, the intention was to convert the schedule property from exclusive ownership to trust property and appointed themselves as trustees. Though the intention was to convert the status from owner to a trust, the property as such was not vested with them as trustees.

141. Section 5 of the Indian Trust Act provides for "Trust of immovable property". It provides that no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing, signed by the author of the trust or the trustee and registered or by the will of the author of the trust or

the trustee. Section 6 deals with Creation of Trust. subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts; (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property and unless the trust is declared by the author of the trust is himself to be the trustee, transfers the trust-property to the trustee. Therefore, when the author of the trust who is the owner of the trust property declares that he will be the trustee, then transferring the property to the trustee is not required. However, the trust is not complete until the trust property is vested in trustees for the benefit of the cestui que trust. This can be done by the settlor, where he is himself the trustee, by a declaration of trust, using language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it and to exercise dominion and control over it, exclusively in the character of a trustee. Section 6 of the Trust Act, makes the position clear beyond all doubt.

142. In Ex.P-35 and Ex.P-37, in law, no trust as such has been constituted, because there was no transfer of A and B schedule properties, in favour of the trust. There was no vesting declaration as such.

143. In this regard, it is useful to refer to SNELL's PRINCIPLES OF EQUITY, 28th Edition, which explains what is vesting of trust property. It reads thus:

VESTING DECLARATIONS: The mere appointment of a person as trustee does not by itself vest the trust property in him: the office of trustee is one thing, the trust property another. On every appointment of a trustee it is accordingly necessary to provide for the vesting of the trust property in the new trustee, either alone (if he is the sole trustee) or jointly with his cotrustee. By virtue of the Trustee Act 1925, s.40, this can often be done without any express conveyance or assignment. The Section applies to all trusts, whenever created, unless negated by the trust instrument in any; but it does not apply to property held by personal representatives in the course of administration. If the appointment is made by deed, a mere vesting declaration in it suffices to vest the property in those who have become the trustees; and where the deed is made after 1925, then, subject to any express provision to the contrary, it operates as if it contained such a declaration even if none is actually inserted. The section applies to registered land, though the legal estate will not pass until the register gives effect to the vesting declaration on the register.

144. Therefore, in the registered deed, there is no vesting declaration vesting the property in the trust or the trustee. In other words, the trust did not come into effect in law. If the trust has not come into effect in law, the question of reserving the power of revoking the trust which has not come into existence would not arise. Therefore, in the aforesaid clause, no such power of revocation of the trust as such was reserved.

What is reserved is only power to amend, alter or diminish, modify the powers of

the trust, it is because, in law, no trust was created under Ex.P-35 and Ex.P-37. This is clear from the subsequent conduct of the 30th defendant. The 30th defendant, after executing Ex.P35 and Ex.P37, executed Ex.P-36 and P-38. The recital in the said documents makes it very clear, that those documents are executed as supplemental to the declaration of trust Ex.P35 and Ex.P37 made earlier by the 30th defendant, which is duly registered. Under the said documents, the recital manifests the intention of the author of the trust as under:

WHEREAS the society is desirous of vesting the said pieces or parcels of land and premises in the Trust Association as trustees.

145. Therefore, in the earlier documents Ex.P-35 and Ex.P-37, there was no intention to vest the schedule property in the trustee. It is for that reason, these two documents came to be executed. That apart, in these two documents, namely Ex.P36 and Ex.P38. as is clear from clause (1). the society, the 30" defendant, as trustee, appointed the Trust Association, the 32nd defendant, to be the trustee of the Principal Indenture for all the purposes for which the society was appointed trustee thereof to the intent that all the trust powers and authorities vested in the society by the Principal Indenture as if the trust association had been originally appointed trustee of the Principal Indenture. Having appointed the 32nd defendant as the trustee under this document, in substitution of 32nd defendant as manger, appointed under the earlier document, clause (2) was inserted, to transfer the property in the trustee. Clauses (1) and (2) read as under:

1. The society as Trustee hereby appoints the Trust Association to be the Trustee of the Principal Indenture for all of the purposes for which the Society was appointed trustee thereof to the end and intent that the Trust Association shall and may exercise all the trusts powers and authorities vested in the Society by the Principal Indenture or such of them as are now subsisting and capable of taking effect in the same manner as if the Trust Association had been originally appointed Trustee of the Principal Indenture",

2. The Society hereby conveys and transfers to the Trust Association the pieces or parcels of land and premises now vested in the Society on the trusts of the principal indenture to hold the same unto the Trust. Association upon the trusts and with and subject to the powers and provisions applicable to the same and declared by and in the principal indenture.

The said relinquishment was absolute, unconditional and complete and the defendant No.32 Trust Association, accepted and acted upon it.

146. Therefore, from this document, four things emerge, (1) Vesting declaration, (2) Appointment of 32nd defendant as a full fledge trustee in place of its status as manager (3) transfer of the property in favour of the trustee and (4) the document is not executed in substitution of the earlier document. It is executed as a supplementary document.

147. Therefore, in order to understand the creation of a trust, both these documents have to be read together. If so read together, it is obvious that these properties originally belong to the 30th defendant. The 30th defendant expressly desired to hold these properties in trust, as set out in the earlier documents, namely Ex.P35 and P37, for the benefit of the beneficiaries, appointing the 32nd defendant as a manager. At that point of time, there was no intention to vest these properties in the trustee and the 32nd defendant was also not appointed as trustee in the said documents. Similarly, the property was not transferred to the trustee. It is by subsequent documents, Ex.P.36 and Ex.P.38. the properties were vested in the trustee, the 32nd defendant, who is appointed as a trustee and the properties are transferred to the trustee, the beneficiaries remaining the same, as stipulated in the earlier document. There is no inconsistency in any of the terms of these two documents. Therefore, both the documents read together, do constitute a public, religious and charitable trust. In so far as Ex.P-35 and Ex.P-36 in respect of B schedule property is concerned, it creates a public religious trust and Ex.P-37 and Ex.P-38, in respect of A schedule property is concerned, it creates a public charitable trust. 30th defendant is the author of the trust. 32nd defendant is the trustee. A and B schedule properties are the trust properties. It is created for lawful purpose. The 32nd defendant having accepted the confidence reposed in them is called the trustee. The church founded by the society in the districts of South Kanara, Bombay Karnataka and Malabar, known as United Basel Mission Church in India, and mission work carried in the aforesaid districts and the beneficiaries of the said work are the beneficiaries, In other words, the beneficiaries are the members of the Basel Mission Church in India and also the General Public, in so far as the mission trust as per Ex.P37 read with Ex.P38. The deeds under which the trust was created, Ex.P-35 and Ex.P-36. on the one hand and Ex.P-37 and Ex.P-38, on the other hand, are the instruments of trusts and the said trusts are created for the public, religious and charitable purpose.

148. Learned Senior Counsel Sri Vijayashankar submitted that, in clause (13), no comma, is there between the word, trust and powers. It has to be read "as trusts, powers," by inserting comma in between the words "trusts" and "power". If it is so read, as is clear from the subsequent documents, the power to revoke the trust is reserved by the settlor in Ex.P35 and Ex.P137. It is in pursuance of such power reserved, the trust is revoked and a new trust is created.

149. In order to understand the intention of the author of the trust as expressed in clause (13), it is necessary to read the entire clause and also read the preceding and subsequent clauses in the deed of trust, The preceding clause, clause (12), has no connection to clause (13), as it is dealing with payment made to the power of attorney holder. However, clause (14) has a nexus with clause (13). Clause (14) provides that, if the society i.e., the 30th defendant, should at any time be desires of retiring from the office of the trustee, it shall have the power to appoint new trustees of these presents. In other words, the said clause was providing for retirement of the trustee and substitution of a new

trustee, in place of the old trustee. Clause (13) also provides for appointment of new trustees by the Home Committee of the 30th defendant, on the recommendation of the Enquiry Committee. It provides for such power on the Home Committee. Further, it declares that, notwithstanding the conferment of such power on the Home Committee to appoint new trustees, in place and instead of the 30th defendant, the Home Committee also has power to revoke, or alter, or add to or diminish, amend, explain, or modify all or any of the "trusts powers", provisos, agreements, and declarations contained in the deed of trust. Further, they are conferred power to declare additional or other "trusts powers", provisos, agreements, and declarations, without reference or regard to the original trusts powers, provisos, agreements and declarations contained and such altered, revoked, and new or additional or other "trusts powers", provisos and declarations. In like manner as these presents shall from time to time and at all times be and remain subject to this present clause and to the power therein contained,

150. The words, "trusts powers", is used in this clause at 3 places. At all the three places, there is no comma, between the said two words. At the first place, it is used to convey the meaning, that the Home Committee has the power to revoke, or alter, etc., of the trusts powers, as contained in the document. Second time, it is used to convey the meaning, that the Home Committee has the power to revoke, or alter, etc., the trusts powers, without reference or regard to the original trusts powers etc., as contained in the document. Third time, it is used to express, that such altered, revoked and new or additional powers etc., shall from time to time and at all times be and remain subject to this present clause and to the power therein contained. Therefore, the Intention is clear. There is no ambiguity. The meaning is plain. The said clause only deals with trusts powers" and do not deal with "trusts".

151. What is reserved is not the power to revoke the trust. But to revoke trusts powers and declare new or additional trusts powers. One cannot read into a document and expand the power of revocation of the trusts powers, into revocation of the trust deed. If words cannot be read into a document, similarly, coma or colon, full stop, which would materially affect the meaning of a sentence or a composite word, also cannot be read into the document, so as to defeat the intention of the author, as expressed by him in the document.

152. The Supreme Court in the case of Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others, , has held as under;

13. The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before, the Courts have evolved the

principle on the theory that what once had been granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by a later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of the grantee.

153. Therefore, the documents being grantor's documents, has to be interpreted strictly against the grantor and in favour of the grantee. The intention is to be gathered from the words used by the parties themselves and in doing so, parties must be presumed to have used the words in their strict grammatical sense. If the entire document is read as whole, there is no indication of the intention to revoke the trust. The reason is obvious. Under the Ex.P35 and Ex.P37. no trust has come into existence in law. There was no vesting of the property in the trustee. The property continued with the 30th defendant. The said documents only expressed a desire on the part of the 30th defendant, to hold the property in trust, and appointment of the 32nd defendant as a manager to look after the trust property. The property was not vested in the trust or trustee. Therefore, the properties were not transferred from the author to the trustee. No trust was created in law. The word "revoke" means, to officially cancel, so that it is no longer valid. The act of cancelling, is to annul, by taking back, to withdraw-Therefore, revoke presupposes the existence of some thing which is valid. Some thing which is given away, which is to be taken back. Unless some thing is created validly or given away, the question of revoking the same would not arise. Revocation of trust, implies that a valid trust is created, transferring immovable property to the trust and trustees, and the said trust is revoked, taking back the property given to the trust or trustee. In the instant case, under Ex.P35 and Ex.P37, no trust is created, no properties were transferred, the question of revoking such non existent trust did not arise. The author was conscious of this fact. It was conscious under Ex.P35 and Ex.P37, it was declaring its intention to create a trust, and what are the powers of such trust to be created. It also made provision for the revocation, alteration, and amendment of such powers. As it was not creating trust and vesting or transferring the properties in the trust, trustees or beneficiaries, it did not make any provision for the revocation of the same, as it would have looked ridiculous and meaningless. Therefore, clause (13) cannot be construed as a clause conferring power of revocation on the author of the trust, to revoke the trust. No such power is conferred nor ever intended to be conferred on the author of the trust. Clause (13) and Clause (9) do not constitute power of revocation reserved by the author of the trust.

154. In the year 1918. the Churches founded by the 30th defendant, in Malabar were allowed to join the South India United Church, The UBM Church of Bombay Karnataka were allowed to join the Church of South India in 1958. To facilitate such mergers, the 30th defendant society, in the year 1957, revoked both the earlier declarations of trust dated 18.09.1934 and 01.08.1939 and

declared two new trusts. By a registered document No.2504/1957 dated 03.12.1957, the previous trust relating to the Church trust was revoked and a fresh declaration of trust was made for the benefit of the work of the Church founded by the Society known as the UBMC Church in South Kanara and Coorg and in Bombay Karnataka and the Church of South India in Malabar or for the benefit of any other church, which shall be declared by the society to be the successor thereof. Clause 1(b) in the previous trust declaring the celebrations of divine service according to the usage of the UBMC to be one of the objects of trust was deleted in the new declaration.

155. By a registered document No.2503/1957 dated 03.12.1957, the previous declaration relating to the Mission Trust was revoked and a fresh declaration of trust was made for the benefit of the works of the Mission, started or carried on by the society and the UBMC in the ecclesiastical districts of South Kanara and Coorg and Bombay Karnataka and by the Church of South India in Malabar. The clause in the previous declaration relating to the Mission Trust, declaring the celebration of divine service according to the usages of the UBMC to be one of the objects of the Trust was deleted in the new declaration. Both these documents were challenged as incompetent and void in the court of the subordinate Judge of Palaghat in O.S.No.7/68, in which the CSI. the 1st defendant herein, the CSI Trust Association, the 3rd defendant herein, were parties. The Basel Mission, the 30th defendant and the United Basel Mission Church in India Trust Association-32nd defendant, were also the defendants. The subordinate Judge of Palghat, by his judgment dated 07.04.1971 passed in O.S.NO.7/68, held that both these declarations of trust were incompetent. This finding has been confirmed in appeal by the Kerala High Court, by its judgment dated 01.08.1975, in appeal suit No. 410/71. The relevant findings on this aspect, appearing in the said judgment is as under:

It appears to us that the court below was right in its finding that Exhibits A-8 and A-9 (i.e., documents Nos.2503 and 2504 of 1957 above referred to) were incompetent.....As we have already indicated. Exhibit A-3 (i.e., document No. 142 of 1935 above referred to) in clause 14 reserved a power in the trustee to nominate new trustees and that power was evidently exercised by executing Exhibit A-4 (i.e., document No.828 of 1936 above referred to), which specifically provided that the trustees so constituted under the document should be deemed as trustees under the deed of principal Indenture, namely Exhibit A-3. Having executed Exhibit A-4 it is not possible to find how the Basel Evangelical Missionary Society or its Home Board could exercise any power to revoke Exhibit A-4 trust deed and substitute in its place another trust with new terms. We do not find any provision in Exhibit A-3 or for that matter in the subsequent document Exhibit A-4 which would enable the Home Board or the Society to invoke any such power to justify Exhibit A-8 (i.e., document No.2503 of 1957 aforesaid) in regard to the Mission properties and Exhibit A-9 (i.e.. document No.2504 of 1957 aforesaid) in regard to Church Properties.

However, the suit came to be dismissed on other grounds. Thus, it is clear that clause 13 fell for consideration before competent Courts of law. Both the District Court of Palghat and High Court of Kerala, on interpretation of the said clause, categorically held that the said clause do not confer on the 30th defendant, any power to revoke the trust created by it and documents executed by the 30th defendant, subsequently on the assumption such a power vest in them are incompetent.

156. During the pendency of RA 189/68 and RSA 741/71, there was an order of temporary injunction restraining the defendants in the suit from implementing the merger resolution and also making over the UBMC trust properties to the Church of South India. Interim injunction granted by this Court in RSA 741/71 at the time its admission, was made absolute on 14.10.1971, which continued to hold till 19.04.1974, when the judgments and decrees of the Courts below were set aside and the suit, of the plaintiff for declaration and permanent injunction was decreed. Aggrieved by the said judgment and decree, the defendants in the suit preferred an appeal to the Supreme Court. However, the Supreme Court declined to grant stay of the operation of the judgment and decree of this Court in RSA 741/71. The judgment of the Supreme Court was rendered on 20th January 1988. During the pendency of RSA 741/71 before this Court, in spite of interim order granted, the declaration of trust relating to church trust made by the 30th defendant society in 2504/57 was revoked by the society by registered document 1164/72 and the properties were transferred by the society by document No. 1166/72 to the Church of South India Trust Association defendant. Declaration of the trust relating to the Mission Trust made by the 30th defendant society under document No.2503/57 was revoked by the society by registered document No. 1163/72 and the properties were transferred by the society in three portions under three transfer deeds. A major portion was transferred by the society under registered document No. 1165/72, to the third defendant in trust for the church of South India. Another portion was transferred by the 30th defendant society under registered document No. 1620/72 to the 40th defendant, in trust for the Karnataka Theological College. The third portion was transferred by the 30th defendant society under registered document No. 1621/72 to the 40th defendant, in trust for Hebich Technical Training Institute. All these documents have come into existence during the pendency of the Regular Second Appeal before this Court and the Appeal before the Supreme Court. The defendant No. 1 and 3rd defendant who are parties to these proceedings did not bring it to the notice of the Court. In other words, they kept back these documents from the Court. The plaintiff in the said suit specifically contended that in pursuance of the resolution of the merger, there would be transfer of the properties in favour of the 1st defendant. Repelling the said contention, the Hon"ble Supreme Court held as under:-

Even though there is merger, the properties or the income thereof will be utilised only for the benefit of the members of the UBMC of South Kanara and Coorg.....There is no material to show that the UBMC Trust Association has

agreed to transfer the properties to the CSI in case of merger. In the circumstances it is difficult to accept the contention that in the case of merger there will be diversion of the properties in the hands of the UBMC Trust Association to the CSI in breach of trust.

157. The Hon"ble Supreme Court proceeded on the assumption that there is no material to show that the UBMC Trust Association has agreed to transfer the properties to the CSI in case of merger. Now, it cannot be disputed in 1972, registered documents came into existence, transferring the properties to the CSI, the 3rd and 40th defendant. Even in 1988, the Supreme Court proceeded on the assumption, the 32nd defendant, the trustee under Exs.P35, P36. P37. P38 is the absolute owner of the property and the resolution of merger which it was upholding would not have the effect of divesting the properties in the hands of the 32nd defendant to the 1st or 3rd defendant in breach of trust, i.e., in 1988 the trust created under Exs. P35, P36, P37, P38 still exists and valid.

158. The revocation deeds, Ex.D-73, Ex.D-74 and Ex.D-75, are all executed by Reverend Albert Veigel. the power of attorney holder of the 30th defendant. The power of attorney so executed by the 30th defendant is marked in the case as Ex.D-82. The relevant clause dealing with the immovable property belonging to 30th defendant is concerned is found at paragraph 6, 7, 8 and 10, which read as follows:-

6. To hold use increase alienate dispose of and sell all and each of such properties and buildings in possession of the Mission and to purchase take on lease or otherwise properties and buildings as shall in the opinion of the Attorney be necessary or expedient for the purpose of conducting and carrying on Mission work in India,

7. To demise and let for such period as the Attorney shall think fit any property belonging to the Mission in India or in which the Mission may be interested at such rent as he in his discretion may think proper and to let any lessee thereof into possession thereof and also to sign and give lawful notices to quit to any tenant of the said hereditaments or any of them or to accept surrenders of leases.

8. To execute sign and deliver enter into acknowledge perfect and do all such deeds agreements instruments acts and things as shall be requisite or may be deemed proper for or in relation to all or any of the purposes or matters herein mentioned.

10. To appear before any Registrar of Deeds Government Official or other person appointed or to be appointed under any Ordinance for the time being in force in India or otherwise for the registration of deeds assurances contracts or other instruments and then and there or at any time thereafter to present and register or cause to be registered any deeds assurances contracts or other instruments in which the Mission may be or by the Attorney be deemed to be interested and also this Power of Attorney and to pay such fees as shall be necessary for the registration thereof.

159. The said power of attorney is duly registered and is dated 23.01.1959. It is on the basis of the said power of attorney, the power of attorney holder has executed the aforesaid revocation deeds. A perusal of the aforesaid clause discloses, that no power is conferred upon the attorney, to revoke the trusts or to execute documents for revocation or transfer of trusts. The Supreme Court in the case of Syed Abdul Khader Vs. Rami Reddy and Others, , at paragraph 11A, has held as under:

11A. It was urged that the Court should bear in mind the first principle that a Power of Attorney has to be strictly construed. Undoubtedly, where someone other than the person who has a right to act in respect of certain things has, under a contract of agency, the right to act on behalf of principal, the authority conferred by the written instrument has to be strictly construed. Ordinarily a Power of Attorney is construed strictly by Courts.

160. Therefore, the power of attorney, has to be construed strictly. When a power of attorney sets out expressly the powers conferred on the agent, the power of such attorney holder is to be restricted to what is expressly stated in the deed of power of attorney. Powers which are not conferred but which are exercised, should not be read into such attorney. If it is done, it amounts to re-writing the deed of power of attorney. It is not open to the Court, to interpret it so widely, so as to include powers which are not specifically mentioned. Viewed from this background, when no power is conferred on the power of attorney holder, to revoke the trust, create the trust, the revocation deeds executed by such attorney, who had no power to execute such documents, do not have any value in the eye of law. It is a mere piece of paper. The said documents have no legal effect. They are not valid and consequentially all the documents so executed by such power of attorney holder is void ob Initio. Therefore, the deed of revocation is void ab initio. Therefore, the documents executed by the 30th defendant viz.. Document No.2503 and 2504 of 1957 and Document No. 1164 of 1972 and 1166 of 1972, revoking the aforesaid documents and Document No. 1163 of 1972 and 1165 of 1972; Document No. 1620 of 1972 and 1621 of 1972, are all incompetent, void abinitio, non est, and without the authority of law. As the Hon"ble Supreme Court has held, in Sri Agasthyar Trust case, the aforesaid documents are no more than a scrap of paper. The execution and registration of those documents, in no way revoked or put an end to the existence of the trust created under Ex.P35 and Ex.P37 read with Ex.P36 and P38.

161. The learned trial Judge has misconstrued this clause (13), though he held that the trust created under Ex.P-35 is a trust in perpetuity; it is not a trust which would come to an end after the fulfillment of its objectives and the objectives set forth in the trust are intended to be in existence for all the time to come, he proceeded to hold that the aforesaid clause conferred the power of revocation on the author of the trust, the author of the trust has revoked the trust by making fresh declaration of trust, has not destroyed the object of the trust. Further, he held that the 30th defendant has not committed any acts which

has resulted in diminution of corpus of the trust, it has not raised funds from the public for its benefit and therefore the 30th defendant by executing Ex.D-71 and Ex.D-72 has revoked the earlier trust and has declared a fresh trust deed, which are valid and legal. Therefore, the learned trial Judge has proceeded on the assumption that the aforesaid clauses conferred power of revocation on the author of the trust and that the said power has been exercised without in any way affecting the beneficiaries of the earlier trust, as under the new trust also, the beneficiaries continue to enjoy the benefits of the trust. In the light of what we have stated above, the said finding is not sustainable and accordingly it is hereby set aside.

POINT NO.8: LIMITATION

162. Section 10 of the Limitation Act, 1963 deals with suits against trustees and representatives. It reads as under:

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.

This Section is an exception to the Limitation Act itself. This Section grants total exemption from the bar of limitation in regard to the suits against trustees and their representatives. In other words, it provides no period of limitation for a suit against a person in whom the trust property has become vested, for no specific purpose or against his legal representatives or assigns for the purpose of following in his or their hands, such property. The reason behind the Section is, that an express trust ought not to suffer by misfeasance or nonfeasance of the trustee. Section 10 of the Limitation Act applies only to a case of property which has become vested in trust for a specific purpose. It applies only to express trust, where trust has been created by a direct and positive act of the parties, namely, by the execution of the document evincing an unequivocal intention to create a trust. This Section contemplates action by a beneficiary under a trust to which Section 10 applies and provides that in such an action, the beneficiary may follow the property and ask for a proper order, as to the delivery of the said property to the new trustee. Vesting in the context means, that the trustee has absolute control over the trust property. The main part of Section 10 states, that no period of limitation applies for recovery of property from a trustee in whom the property is vested for a specific purpose, unless such a person is an assignee

for valuable consideration. A suit by the beneficiary against a trust for the enforcement of the beneficial right is not barred by limitation. The expression "following" necessarily implies, that in order to bring a suit within the expression, the object of the suit must be to restore the trust property which rightfully belongs to it, but it has been improperly removed from it.

163. In the instant case, after revocation of the trust, a new trust came to be created, vesting the property belonging to the trust in them. The trust property is alienated. Even accretions made to the trust property are the subject matter of vesting and alienation. The new trust which is created is void ab initio. In law, the property did not vest in the new trustees, but vesting in the context means, the trustee has absolute control over the trust property. Neither the author of the trust nor the trustees who are constituted by such author of the trust subsequent to revocation acquired, no right, title or interest in the trust property. Therefore, all alienation made by them are void ab initio and non est, in the eye of law. It is nothing but a scrap of paper. Admittedly, the property belonging to the trust, is in the hands of those persons. The suit is filed to restore the trust property, which rightfully belongs to it, but it has been improperly removed from it. This section is attracted, only when it is shown that originally the property belongs to the trustee. Thereafter, it has been improperly removed from the trustees and has been put in the hands of persons who are not entitled to possession, control and management of the properties. Then, a suit lies, for the purpose of following the property in hands of such persons who are unauthorisedly in absolute control of the property i.e.. for restoring the property which rightfully belongs to the trust. In respect of filing of such suit, no period of limitation is prescribed under the Act. Such a suit is not barred by any length of time. In other words, the suit can be filed at "any time", and the provisions of Limitation Act, 1963, in particular, Section 3 is not attracted.

164. In this background, it is necessary to look into the evidence on record. The 7th defendant, the Bishop of Karnataka Southern Diocese was examined as D.W-1. He has stated that in 1961, he was a pastor of Puttur Church and Warden of Puttur Boarding Home. He was working under District Church Board of South Kanara and Coorg of the United Basel Mission Churches in India. He became Bishop in the year 1989. He was appointed as Bishop by Synod of Church of South India. Defendant No.30 acquired properties for the purpose of work of the mission and work of the church, and not for the benefit of the members of UBMCI. The purpose for which properties were held are incorporated in the transfer deed in favour of the 3rd defendant by defendant No.30 in the year 1972. As power of attorney of third defendant, he says that after 1972, the properties of the church are held for the use of work of mission and work of church. There is no office for defendant No.32 at Balmata, Mangalore after 1972. The office which was there of defendant No. 32 prior to 1972 is now being used by defendants-1 and 3. He was aware that in 1957 there were further declaration of trust by defendant No,30 under documents 2503/57 and 2504/57. The trust deed executed in 1957 by defendant No.30 are not in force after 1972,

Defendant 32 never transferred any church properties in favour of 3rd defendant. The properties of Bombay Karnataka area were transferred in favour of the 3rd defendant in the year 1972 after revocation. It was transferred by the 30th defendant to a trust and not the transfer by the trust to a trust. Since 1972, the suit Schedule A properties belong to CSI. After 1972, defendant No.32 has no kind of right in the suit schedule properties. The 3rd defendant is the owner of the suit schedule properties. The 3rd defendant has got power to sell the suit schedule properties and purchase new properties. Except the third defendant, no other trust, body or society has got any right over the suit schedule properties. After some of the suit schedule properties were transferred in the name of the third defendant, the 3rd defendant sold them. The sale consideration of those properties was utilized for the purchase of new properties and for construction of new churches. The third defendant purchased the properties at Panambur, Shaktinagar, Thokkottu, Mudoor and Korangarapady and constructed churches there. The third defendant also constructed school buildings wherever necessary. After 1980, Sushanthi Church was constructed in Mercera Hill, Mangalore. The suit schedule D properties belong to defendant No.40. Defendant No.40 got D and E schedule properties from defendant No.30. Third defendant has no rights over D and E schedule properties. The income of the suit schedule A, B, C properties is being utilized for the work of church and mission of first defendant. They have got surplus income from the suit schedule A, B and C properties. As per the direction of Defendant No.3, they were depositing the surplus amount in the institutions indicated by it. C schedule properties were purchased by Defendant-32 from its own assets. Before purchase, the defendant No.30 had no right over suit schedule C properties. C schedule properties were purchased with the surplus amount of schedule A and B properties, with the permission of Defendant No.30.

165. After 1972, and at the time of filing of the present suit, defendant No.32 was not in the management of suit schedule properties. Defendant No.3 is in management of suit schedule properties after 1972. Income of the properties is being used for the purpose it was dedicated under the transfer deed in favour of the third defendant.

166. In cross examination, he admitted that the transfer of property has been taken place in the year 1972 under a registered document, in favour of defendant No.40 as per the certified copies of the original registered deed Ex.D-63 and Ex.D-64. 40th defendant is running a religious institutions, which impart religious teaching. The institutions are run by the Karnataka Christian Education Society which was founded in 1969. He admits that High Court came to the conclusion that he has committed criminal contempt of High Court as well as the subordinate Courts. He also admits that High Court was pleased to frame charges against him. He admits that he pleaded not guilty. He also admits that thereafter he tendered apology. He was instructing his Advocate on behalf of defendants-2, 3, 6, 8, 9, 10,11,12,13, 14, 15, 17, 21, 22, 24, 25 and 27. He gave evidence as 7th defendant and also on behalf of aforesaid defendants.

167. In 1972 he started representing 3rd defendant in court proceedings as well as in respect of the properties. In 1972. he was the treasurer of Karnataka Southern Diocese. As a treasurer he was representing the 3rd defendant in 1972. It is not true to suggest that after 1972 as representative of 3rd defendant he sold certain items of A to C suit schedule properties as he had become Bishop and was holding General Power of Attorney of 3rd defendant. It is true that as a General Power of Attorney Holder for defendant No.3, he sold the properties. Unless he see the records, he cannot say as to whether he executed about 50 sale deeds in respect of A to C suit schedule properties after 1990. It is true that as shown in IA XII, he has executed 27 sale deeds. It is true that the said sale deeds were executed by him representing the CSI Trust Association which is defendant No.3 In this suit.

168. The 37 churches were owned by UBMCIITA as on 24-6-1968. The 37 churches were managed by the representatives of UBMCIITA. These 37 churches were under the control of DCC of UBMC only to the extent of worshiping. DCB was collecting the offerings and other income from these 37 churches. DCB was appointing pastors to these 37 churches at that time. UBMCIITA was managing suit schedule A and B properties at that time. UBMCIITA was collecting income till 24-6-68. As on 24-6-68. DCC and DCB were having UBMC members. The same office bearers of DCC and DCB continued to control the properties as members of CSI after 24-6-1968. On account of UBMC joining CSI, the same persons were having the control as members of CSI, The representatives of UBMCIITA were collecting the income of A and B schedule properties from 24-6-1968 to 1972. The same set of persons of UBMCIITA who were collecting the income prior on 24-6-1968 continued to collect after 24-6-1968 till 1972. Those members owed allegiance to CSI after 24-6-1968. These 27 churches mentioned were known as UBMC churches. There was a change in the name and after 24-6-1968. The names of the Schools have not been changed but they are not schools belonging to the U.B.M.C., The management of the Schools vested in the 3rd defendant in trust for the C.S.I. Now, admittedly the schedule properties which belong to the trust, is in the hands of defendants 1, 3 and 40.

169. The Secretary of 40th defendant J.S. Sadananda, was examined as D.W-2. He has stated that in 1847, the Karnataka Theological College was founded as Basel Evangelical Mission Theological Seminary. Hebich Technical Training Institute was started by Basel Missionary with the same concern. The admissions were open to the people belonging to all faiths and not restricted to Christians. The employment was also opened to everybody irrespective of other social concern. The K.T.C. and H.T.I, are situated in D and E schedule properties. They do not belong to UBMC. They belong to defendant No.30. Now they belong to defendant No.40. They were transferred in the year 1972. Ex.D-63 and Ex.D-64 are the documents evidencing such transfer. Neither the plaintiffs nor UBMC has any right over the said properties. Defendant No.40 is a registered society under the Karnataka Societies Registration Act. In year 1969, defendant No.40 has not alienated D and E suit schedule properties in any manner. The suit schedule D

and E properties came to be acquired by defendant No.40 through two transfer deeds. Those transfer deeds were for no consideration. After the suit was filed in 1977, one old building situated in D and E suit schedule properties were demolished. The plinth area of the building which was demolished was around 300 sq.ft. It did not have upstairs. That building was demolished in 1973. No other buildings were demolished after 1973. D and E Schedule properties had valuable tree growth. Recently, they have sold those valuable trees. They have sold 25 Teak trees and two Nearale trees for a sum of Rs.3,25,000-00. They sold the standing trees.

170. From the aforesaid evidence, it is clear that "C" schedule properties were purchased with the surplus amount derived from "A" and "B" property. After some of the schedule properties were transferred in the name of the third defendant, the third defendant sold them. The sale consideration of those properties was utilised for the purchase of new properties and construction of new churches. The third defendant purchased the properties at Panambur, Shakthinagar, Thokkotu, Mudoor and Korangarapady. The 3rd defendant constructed the churches and schools in those properties purchased. The suit schedule "D" and "E" properties belong to the 40th defendant, who acquired the same from 30th defendant, under two registered sale deeds Ex.D63 and D64 in the year 1972. "D" and "E" schedule properties were part of "A" and "B" schedule properties. The properties of Bombay Karnataka area were transferred in favour of third defendant in the year 1972. after revocation. Since 1992, the plaintiff "A" schedule properties belong to C.S.I, the first defendant. The 3rd defendant claims to be the owner of the suit schedule properties. After some of the schedule properties were transferred, the third defendant sold them. D.W-1, the 7th defendant, as General Power of Attorney holder of the 3rd defendant, sold the properties. He admits that he has executed 27 sale deeds. The 30th defendant has transferred "D" and "E" schedule properties to the 40th defendant under Ex.D-63 and D-64 in the year 1972.

171. Therefore, Section 10 of the Act empowers the beneficiary to file suit for the purpose of placing in his or their hands, such property or the proceeds thereof, or for an account, such property or proceeds. Therefore, the contention that the suit filed by the plaintiffs is barred by time, has no substance. In view of Section 10 of the Act. the suit is not barred by time and is in time, as rightly held by the trial Court.

POINT NO.9

172. The question is, what is the effect of several registered documents which have come into existence, such as, trust deeds, revocation deed, sale deeds etc.. When the plaintiff has not challenged the same, either by seeking cancellation of those documents nor a declaration that those documents are not binding on them? The answer lies in the legal consequences which flow from the execution of those documents.

173. After the execution of Ex.D-35 and Ex.D-36, as well as Ex.D-37 and Ex.D-38. transferring the property in favour of 32nd defendant and creating public religious and charitable trusts, the 30th defendant was divested of all its rights over "A" and "B" schedule property. It did not retain any right in the said property. The trust was irrevocable. Clause (13) and (9) of Ex.P35 and Ex.P37, did not confer any power of revocation of the trust on the 30th defendant. Therefore, the purported revocation of the said trust is void ab initio. Therefore, all the documents executed by the 30th defendant in the year 1951 or 1972 are without the authority of law and void. Similarly, all the documents executed by the 3rd defendant on behalf of the 1st defendant are also non est in the eye of law, as the 1st and 3rd defendants, acquired no interest in the "A" and "B" schedule property, to any extent. As all the documents executed by the 30th defendant as well as defendants 1 and 3 are void ab initio, nullity in the eye of law, the question of cancellation or setting aside such documents is not necessary.

174. The Apex Court in the case of Prem Singh and Others Vs. Birbal and Others, , has held that. Section 31 of the Specific Relief Act refers to both void and voidable documents. It provides for a discretionary relief. When the document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of law, as it would be a nullity. It is only in respect of voidable transaction, unless a suit is filed for cancellation of the instrument, which is vitiated on the ground of coercion, undue influence, misappropriation or fraud, plaintiff cannot get the said documents cancelled nor he can ignore the existence of said documents. Such suits have to be filed within period prescribed under Article 59 of the Limitation Act.

175. Therefore, the contention that as the plaintiffs have not sought for the cancellation of the said documents and accordingly the plaintiffs are not entitled to any of the relief sought is without any substance.

176. That apart, all the alienations made by the third defendant are during the period when there was an interim order prohibiting such alienations. In RA 189/68 and RSA 741/71, there was an interim order of temporary injunction, restraining the defendants in the said proceedings from implementing the merger resolution and also making over the UBMC trust properties to the church of South India. In fact, this Court in RSA 741/71, granted interim order of injunction at the time of admission, which was made absolute on 14.10.1971, which continued to be in operation till 19.4.1974, the day on which the appeal was allowed and the judgments and decrees of the Courts below was set aside. Though the appeal came to be filed against the said order, the Supreme Court declined to grant an order of stay of operation of the impugned judgment and decree. It is during the operation of these interim orders, the alienations were made. Though the Supreme Court allowed the appeal, the question is, what is the effect of these interim orders on those alienations? There are two ways of

looking at it. One is, applying doctrine of lis pendens and another is, looking at the defiance on the part of a defendant, party to the proceedings, who has disobeyed the Court order. The doctrine of lis pendens was intended to strike at attempts by parties to a litigation, to circumvent the jurisdiction of a Court. The Apex Court in the case of *Rajender Singh and Others Vs. Santa Singh and Others*, , has explained the principle of doctrine of lis pendens and the same reads as follows:-

The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a Court, in which a dispute on rights or interest in immovable property was pending by private dealings which might remove the subject matter of litigation from the ambit of the Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable properties during a litigation over it were held to be bound, by an application of the doctrine, by the decree passed in the suit even though they might not have been impleaded in it. The act of taking illegal possession of immovable property or continuance of wrongful possession, even if the wrong doer be a party to the pending suit, was not a "dealing with" the property otherwise than by its transfer so as to be covered by section 52 of the Transfer of Property Act. The prohibition which prevents the immovable property being "transferred or otherwise dealt with" by a party is apparently directed against some action which would have an immediate effect, similar to or comparable with that of transfer, but for the principle of lis pendens. Taking of illegal possession or its continuance are one sided wrongful acts and not bilateral transactions of a kind which ordinarily constitute "deals" or dealings with property. They cannot confer immediate rights on the possessor. Continued illegal possession ripens into a legally enforceable right only after the prescribed period of time has elapsed. It matures into a right due to inaction and not due to the action of the injured party which can. approach a Court of appropriate jurisdiction for redress by suit to regain possession. Section 52 of the Transfer of Property Act was not meant to serve indirectly as a provision or a substitute for a provision of the Limitation Act to exclude time.

177. The said doctrine has no application to the facts of this case, because, the person who effected the alienation ultimately succeeded in the Apex Court. But the fact remains, that all the aforesaid alienations were made in disobedience of the order of injunction granted by the Court, which was in operation, on the date of alienations. In this context, it is necessary to notice, what is the legal position in so far as the validity of the alienations which are made in disobedience of the order of injunction. In *Clarke v. Chadburn* [(1985) 1 All ER 211], it has been observed as under:

I need not cite authority for the proposition that it is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience

the persons enjoined claim that they have validly effected some charge in the rights and liabilities of others. I cannot: see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them.

178. The Apex Court in the case of Surjit and others Vs. Harbans Singh and others etc. etc., , held as under:-

4. As said before, the assignment is by means of a registered deed. The assignment had taken place after the passing of the preliminary decree in which Pritam Singh has been allowed 1/3rd share. His right to property to that extent stood established. A decree relating to immovable property worth more than hundred rupees, if being assigned, was required to be registered. That has instantly been done. It is per se property, for it relates to the immovable property involved in the suit. It clearly and squarely fell within the ambit of the restraint order. In sum, it did not make any appreciable difference whether property per se had been alienated or a decree pertaining to that property. In defiance of the restraint order, the alienation/assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes. Once that is so, Pritam Singh and his assignees, respondents herein, cannot claim to be impleaded as parties on the basis of assignment. Therefore, the assignees-respondents could not have been impleaded by the trial court as parties to the suit, in disobedience of its orders. The principles of lis pendens are altogether on a different footing. We do not propose to examine their involvement presently. All that is emphasised is that the assignees in the present facts and circumstances had no cause to be impleaded as parties to the suit. On that basis, there was no cause for going into the question of interpretation of paragraphs 13 and 14 of the settlement deed. The path treaded by the Courts below was, in our view, out of their bounds. Unhesitatingly, we upset all the three orders of the Courts below and reject the application of the assignees for impleadment under Order 22 Rule 10 CPC.

179. Again, the Apex Court in the case of Satyabrata Biswas v. Kalyan Kumar Kisku. reported in 1994 SC 1837, held as under:-

29. Apart from the fact whether A.K. Ghosh had a legal authority to sub-lease or

not it was not open to him to grant a sublease in violation of the order. It is no use contending as Mr. Chidambaram, learned counsel for the respondents does, that there was a bar to such a sub-lease under the terms of the status quo order. It has the effect of violating the preservation of status of the property. This will all the more be so when this was done without the leave of the Court to disturb the state of things as they then stood. It would amount to violation of the order. The principle contained in the maxim: "Actus Curiae Neminem Gravabit has no application at all to the facts of this case when in violation of status quo order a subtenancy has been created. Equally, the contention that even a trespasser cannot be evicted without recourse to law is without merit, because the state of affairs in relation to property as on 15-09-1988 is what the Court is concerned with. Such an order cannot be circumvented by parties with impunity and expect the Court to confer its blessings. It does not matter that to the contempt proceedings Somany Builders was not a party. It cannot gain an advantage in derogation of the rights of the parties, who were litigating originally. If the right of sub-tenancy is recognised, how is status quo as of 15-09-1988 maintained? Hence, the grant of sub-lease is contrary to the order of status quo. Any act done on the teeth of the order of status quo is clearly illegal. All actions including the grant of sub-lease are clearly illegal.

180. The Apex Court in the case of Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, , held as under:-

19. To the same effect are the decisions of the Madras and Calcutta High Courts in Century Flour Mills Ltd. Vs. S. Suppiah and Others, and Sujit Pal Vs. Prabir Kumar Sun and Others, . In Century Flour Mills Ltd., it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the Court as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. The inherent power of the court, it was held, is not only available in such a case, but it is bound to exercise it to undo the wrong in the interest of justice. That, was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.

20. In Sujit Pal a Division Bench of the Calcutta High Court has taken the same view. There, the defendant forcibly dispossessed the plaintiff" in violation of the order of injunction and took possession of the property. The Court directed the restoration of possession to the plaintiff with the aid of police. The Court observed that no technicality can prevent the Court from doing justice in exercise of its inherent powers. It held that the object of Rule 2-A of Order 39 will be fulfilled only where such mandatory direction is given for restoration of possession to the aggrieved party. This was necessary, it observed, to prevent the abuse of process of law.

181. In fact. Supreme Court in the aforesaid decision was affirming the law laid down by the Calcutta High Court in the case of Sujit Pal Vs. Prabir Kumar Sun

and Others, wherein it was held as under:-

8.....In this connection, we may refer to an observation from Kerr on Injunctions, 6th Edition Page 41:

But where the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case, or the defendant has been guilty of sharp practices or unfair conduct, or has shown a desire to steal a march upon the plaintiff or to evade the jurisdiction of the Court, the injunction will issue, notwithstanding the amount of inconvenience to the other party, and though the expense thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it.

11. Thus it is apparent from the said observation of the Supreme Court that no technicality can prevent the Court from doing justice in exercise of its inherent power. 0.39. R.2A lays down a punitive measure for the purpose of compelling a party to comply with the order of injunction. The process as contemplated by the said provision may or may not be ultimately effective but, in any event, the procedure laid down in 0.39 R.2A is incapable of granting an immediate relief to a party who has been forcibly dispossessed in violation of an order of injunction. We do not think that in such a case the Court is powerless to grant relief to the aggrieved party in exercise of its inherent power. The very object for which 0.39 R.2A has been enacted will be fulfilled by the grant of a temporary mandatory injunction and restoration of possession of the aggrieved party. The inherent power of the Court as recognised in S.151 of the Code is in addition to the power conferred on the Court under the provisions of the Code. All that the Court is concerned is to prevent abuse of the process of Court and to do justice by immediately intervening under circumstances which require such intervention by the Court.

182. From the aforesaid judgments, it is clear that, where an act is done in violation of an order of stay or Injunction, it is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing. In defiance of the restraint order, the alienation/assignment made, if we were to let it go as such, it would defeat the ends of justice and the prevalent, public policy. When the Court intends a particular state of affairs to exist, while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist, till the Court orders otherwise. This will all the more be so, when this was done without the leave of the Court, to disturb the state of things as they then stood. It would amount to violation of the order. Any act done in the teeth of the order of status quo is clearly illegal. It has the effect of violating the preservation of status of the property. Such an order cannot be circumvented by parties with impunity and expect the Court to confer its blessings. Those who defy a prohibition, ought not to be able to claim, that the fruits of their defiance are good and not tainted by the illegality that produced them. The Courts would and should not recognize any alienation made in disobedience of order of

injunction or an order of stay or status quo, and confer any benefit of such alienation. The Court, in such circumstances, has the duty, as also the right, to treat the alienation/assignment, as having not taken place at all for its purposes and then proceed to decide the rights of the parties, as if the alienations as having not taken place at all, thus, upholding the rule of law and majesty of the Courts and the Judicial system.

183. Therefore, this Court does not recognize the aforesaid alienations made in disobedience of the order of temporary injunction and recognise any right in defendants 3 and 40, in respect of A, B, C, D and E properties. As stated earlier, it is not a question of application of doctrine of *lis pendens*. In this case, as the alienations, as set out in earlier paras have been made in disobedience of the Court order, we refuse to recognize those alienations and proceed on the basis that whatever rights the parties had in the schedule properties prior to the date of the interim order passed, exists as on today and grant relief to the aggrieved person. In those circumstances, notwithstanding the execution of registered documents, revoking the trust, creation of new trust by a deed. alienation of the property belonging to trust, in the eye of law, it has no sanctity and they are mere scrap of paper. All those documents will in no way affect the rights of the parties In whom the property vested prior to the said revocation and alienations. As admittedly, those properties now are in the possession of defendants-1, 3 and 40 and as all those alienations have to be held as void ab initio, the plaintiffs would be entitled to relief of declaration, that all those alienations would not be binding on the plaintiffs, nor would it in any way affect the trust created under Ex.P-35. P-36, P-37 and P-38 and, all the suit schedule properties continue to be the properties of trusts created under the aforesaid documents.

POINT NO. 10: RECOVERY OF POSSESSION

184. From the recitals in Exs. P36 and P38, it is clear. after vesting the schedule properties in the trustee, i.e. the 32nd defendant, the schedule properties were conveyed and transferred to the 32nd defendant and was put in possession of the said property. 32nd defendant is a company registered under the provisions of the Companies Act and as such a legal person. Now, it is not in dispute, after the execution of the deeds of revocation by the third defendant and conveying the schedule property in favour of defendants 3 and 40 by way of trust deeds and sale deeds, the 32nd defendant at a special general meeting held on 27.12.1972, resolved that the same is wound up voluntarily by members. Thereafter, proceedings were initiated in the High Court, in Company Petition No.C.R. 20/1978 c/w 1 to 19 & 21-37/1978 and an order of winding up, came to be passed on 31.3.1978. Thus, 32nd defendant ceased to exist. The possession of the schedule property is with defendants 1, 3 and 40. Other defendants, who are working with them in various capacities are in possession of or in control of or in management of the plaint schedule property. Now, as aforesaid, we have declared the deeds executed in 1957 and in 1972, namely, trust deeds, revocation deeds, sale deeds, etc., are all null and void ab initio. They are non-

est in the eye of law. They cannot be recognized in law. Consequently, the possession of the plaint schedule property with all these defendants becomes unauthorised and illegal. However, they are in possession of the property for over a period of 40 years. They have no right to continue in possession of the said property. The said possession is to be restored to the original trustees and the beneficiaries. The original trustee does not exist. Therefore, the properties have to be restored to the trustees to be appointed by the Court, on framing a scheme for management of the trust properties. As the defendants absolutely have no manner of right, title or interest over the plaint schedule property, they are bound to hand over possession of the property to the persons who are lawfully going to be appointed as trustees by the Court. As set out above, in view of Section 10 of the Limitation Act, which excludes the application of the Limitation Act to a suit filed u/s 92 of the CPC, when the suit is not barred by law of limitation, the plaintiffs as beneficiaries are entitled to restoration of possession of the plaint schedule property.

POINT NO. 11: BREACH OF TRUST

185. The evidence of 7th defendant, i.e., D.W-1 makes it abundantly clear that defendant No.32 never transferred any church properties in favour of the 3rd defendant. The properties of Bombay Karnataka area was transferred by the 30th defendant to the 3rd defendant in the year 1972. Since, from 1972, plaint schedule "A" properties belong to CSI. After 1972, defendant-32 has no kind of right in the suit schedule properties. The 3rd defendant claims it is the owner of the suit schedule properties, it has got power to sell suit schedule properties and purchase new properties and except 3rd defendant, no other trust, body or society has got any right over the suit schedule properties. After some of the suit schedule properties were transferred, the 3rd defendant sold them. The suit schedule D properties belongs to defendant No.40, Defendant No.40 got D and E schedule property from 30th defendant, under registered conveyance deed. "C" schedule property was purchased by defendant 32 from its own assets. After 1972 and at the time of the filing of the present suit, defendant 32 was not in the management of the suit schedule properties. Defendant No.3 claims to be the owner in management of the suit schedule properties after 1972. D.W-1 admits that transfer of property has taken place in the year 1972 under a registered document in favour of defendant No.40. as per the certified copies of the original registered deeds Ex,D-63 and Ex.D-64. Unless he sees the record, he cannot say as to whether he executed about 50 sale deeds in respect of A to C schedule properties after 1990. He admits that as shown in IA-XII, he has executed 27 sale deeds. He admits that he executed sale deed representing the third defendant. He also admits that the building in D and E schedule properties were demolished in the year 12.9.73. They have sold 25 teak trees and 2 nerale trees which were in D and E schedule properties for a sum of Rs.3.25,000-00. Therefore, it is abundantly clear that suit schedule properties have been alienated and 3rd defendant is asserting title to the suit schedule properties. The 3rd defendant has sold A and B schedule properties and as many as 50 sale

deeds have been executed. These acts clearly demonstrates the breach of trust committed by defendant Nos. 1, 3 and 40, without any more.

186. It is not only necessary that a trust should be properly administered, but it is equally necessary that it should be administered by a person entitled to administer. If a person having no title as trustee takes possession of the trust property, he does so in contravention of the provisions of the deed of trust and commits a breach of it. It is as much a breach of trust for a person not entitled to act as a trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. In other words, anyone who had some how obtained possession of the trust property and was managing efficiently could always continue in possession in spite of the specific provisions of the deed of trust.

187. In the case of Radha Krishna and Others vs. Lachhmi Narain and Others, reported in AIR 1948 Oudh 203, it is held as unden-

41. The appellants learned advocate next urged that a suit under S.92, Civil P.C. can only be brought if a breach of trust is alleged or a direction of a Court is necessary. He contends that in the present case no breach of trust is alleged -- much less proved -- and no occasion arose for any directions. It is quite true that even the plaintiffs' witnesses state the property of the trust is well managed and that the trustees are responsible persons but the plaint does allege breach of trust in that it alleges that defendant 1 is utilising the profits for his purposes and that the remaining defendants have conspired to allow him to do this. It is no doubt true that no evidence has been given of this but, in accordance with the principle that it is allegations contained in the plaint that determine jurisdiction, the Patna High court has held in Ramdas Bhagat Vs. Krishna Prasad Tewari and Others, that if a breach of trust is alleged in the plaint that is sufficient to confer jurisdiction under S.92, Civil P.C- see also 46 Bom 101 = 10 AIR 1923 Bom 67 : 64 IC 353 (Neelkanth Devrao vs. Ramkrishna Vittal). In that view of the matter the plaint in this case sufficiently complies with the provisions of the law to give the court jurisdiction under S.92, Civil P.C. It is, however, not necessary for us to go further into the matter because, a suit which seems to get fresh trustees appointed on the ground that there are no validly appointed trustees in existence clearly comes within the second category of suit contemplated by S.92, Civil P.C, namely, "where the direction of the Court is deemed necessary for the administration of any such trust": vide 18 O.C.38 - AIR 1914 OUDH 408 : 27 IC 389 (Mohammed Nasim Vs Mohammed Ahmad) in which the matter is fully discussed with reference to authorities and AIR 1938 Rang. 339 : 1938 RANG LR 276 = 177 IC 851 [Me Mitchala vs. A.M. Mitchala].

42. In Chhaganlal Uderam Gour Vs. Sobharam Harishankar Gour, the learned Judges say at page 27:

The lower appellant Court took the view that S.92, Civil P.C., could be held to apply only where the suit alleged a breach of any express or constructive trust

and asked for a direction of the Court for the administration of such a trust It was of opinion that in this case no direction of the Court could be said to have been asked for, Section 92, Civil P.C., does not say that the direction of the Court can be asked for only where there has been a breach of any express or constructive trust It contemplates cases where the direction of the Court may be necessary even though there has been no such breach of trust.

43. Thus this objection also fails. We must however, notice another argument advanced by the appellants' learned advocate in this connexion. He contended that even though the Court may have jurisdiction to deal with the case under S.92, Civil P.C. the defendants have committed no breach of trust and cannot be removed. He referred to the statements of the plaintiffs' witnesses who themselves clearly stated that there was no mismanagement and that the defendants were all responsible and respectable persons. The answer to this is furnished firstly by the passage in Chhaganlal Uderam Gour Vs. Sobharam Harishankar Gour, which we have just quoted and which makes it clear that if once a Court has jurisdiction, it is not necessary that a breach of trust should be proved before the reliefs contemplated by S.92. Civil P.C or any of them is granted.

44. Secondly, it must be remembered that not only is it necessary that a trust should be properly administered but it is equally necessary that it should be administered by a person entitled to administer. If a person having no title as trustee takes possession of the trust property, he does so in contravention of the provisions of the deed of trust and commits a breach of it. It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. Were this not so, any one who had somehow obtained possession of the trust property and was managing it efficiently could always continue in possession in spite of the specific provisions of the deed of trust.

188. It is therefore clear, that all the suit schedule properties are in possession of defendant No.1, 3, 40, who are not entitled to the same. They got into possession of the property under registered documents which are void ab initio. Having got into possession, the third defendant is acting as a trustee of all the suit schedule properties and the third defendant has alienated properties. In the first place, because of the assertion of title by the third defendant in respect of the scheduled properties and alienating the properties belonging to the trust, it has committed breach of trust. Secondly, it has no authority to manage the suit schedule properties. They are not persons who are duly authorised to manage and administer the schedule properties. They are managing the property in contravention of the trust deeds Exs.P-35. P-36, P-37 and P-38. As such, it amounts to breach of trust. Therefore, the case of breach of trust, pleaded by the plaintiffs is clearly established from the evidence on record.

POINT NO. 12: DIRECTION FOR THE ADMINISTRATION OF TRUST

189. The defendant-32, the Trust Association, at a Special General Meeting held on 27.12.1972, resolved that the same is wound up voluntarily by members. Therefore, the original trustee is not in existence. As such, no question of removal of such trustee would arise. The transfer of properties by defendant No. 30 to defendant No. 3 is void. The transfer of the properties from 30th defendant to 40th defendant is void, incompetent and also in contravention of the injunction orders. The properties belonging to the UBMC, which is the sole beneficiary have been diverted for the use of CSI, a wholly alien body.

190. Defendants-5 to 10 have committed breach of trust and it is highly prejudicial to allow them to be the office-bearers of defendant Nos.28 and 29. Defendants-5 to 10 and defendant-29. must also be directed to render accounts of UBMC property, funds and income, ever since 1966. Defendants-1, 3, 4, 30, 32 and 40 or such of them, as may be found liable as Trustees de son tort, are also liable to be divested of the properties of the UBMC, as may be found in their possession and control. They are also bound to render accounts. Accordingly, the defendants-1, 3 and 40 or any other person, in possession of these trust properties, are not entitled to continue in possession of the property and that they have to deliver the property to the trustees for the benefit of the beneficiaries. Defendant-3 and 40 are ineligible to be Trustees and to manage these properties, though they have been managing these properties in question as de facto trustees or trustees de son tort.

191. The Apex Court, in the case of A.A. Gopalakrishnan Vs. Cochin Devaswom Board and Others, , dealing with the power of the Court, in the matters of public and religious charities and public religious trust, has observed as under:-

The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees /archakas/ shebaita/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.

192. Therefore, in the instant case, both the conditions, namely, breach of trust and circumstances justifying issue of direction of the Court, for the administration of trust and its properties exist and are satisfied.

193. The District Court would under the CPC be the original Court in regard to the framing of Schemes, The Court has discretion u/s 92 of the CPC to frame a scheme in such a manner as commends itself to the Court so long as the scheme

fulfills the objects sought to be achieved by the Constitution. The Court framing the Scheme which admittedly acts as a Court of law at the time of framing the Scheme - may instead of making a provision for appointment or removal of trustees for all time to come, may reserve to itself the power to appoint or remove trustees, as and when occasion may arise. When pursuant to such a power, the Court is approached for the purpose of appointing or removing trustees, the Court certainly acts as a Court of Law and not as a persona designata. Same would be the position in case of other matters relating to the administration of the charity. The Court framing the Scheme reserves to itself any power in regard to matters arising in the course of the administration of the charity or for the purpose of effectively administering the charity and, there is no enlargement of its judicial power by the provision reserving such power. If the District Court frames a Scheme, the District Court can on this reasoning, reserve to itself the power to appoint or remove trustees or to do any other act in relation to the administration of the charity as a part of the Scheme. The High Court in the exercise of its appellate jurisdiction may affirm the Scheme or reject the Scheme or make modifications in the Scheme. Just as the District Court could reserve to itself powers in relation to various matters arising in the administration of the charity, the High Court also can reserve such powers either to itself or to the District Court, from whose decree the appeal is brought before it. When the High Court reserves such powers to itself, it is clear that there is no enlargement of the jurisdiction of the High Court as a result of the decree passed by it. Equally, there is no enlargement of the jurisdiction of the District Court when the High Court reserves such powers to the District Court. The District Court which is the original Court, framing the Scheme is empowered to implement the Scheme or to work out the Scheme as and when occasion arises. The question, whether a decree framing a scheme for a charitable trust is executable or not, must depend on the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. From the nature of the case, such a decree may in part, be declaratory and in part, be directory. It may provide for specific procedure for carrying out particular provisions of the scheme and yet leave other provisions of the scheme enforceable by execution. Therefore, we proceed to pass the following:

ORDER

(A) Appeal is allowed.

(B) Cross Objection is dismissed.

(C) Suit of the plaintiffs is decreed in terms as set out hereunder :-

1. The District Court is directed to settle a scheme for the proper and due administration and management of the properties of United Basel Mission Church in India, South Canara and Coorg, i.e., plaint A, B, C, D and E schedule properties which are also covered under Exs.P35, P-36, P37 and P-38 and for the proper and due administration of the affairs of United Basel Mission Church in

India, South Canara and Coorg, its properties, institution, assets and activities in accordance with its constitution as it is or by making necessary changes therein or in the alternative, by making necessary provisions for the same in the scheme to be settled.

2. The District Court is directed to appoint 9 (nine) trustees for the due administration and management of the trust and its properties and as well as the affairs of United Basel Mission Church in India, South Canara and Coorg. The trustees shall be selected by ordering elections to be held in accordance with the constitution of United Basel Mission Church in India or in accordance with the terms of the scheme to be settled.

3. The District Court shall direct vesting of the schedule properties and all accretions to the said properties in the trustees to be appointed.

4. Defendant No.3 and such other defendants, such as defendants-5 to 10, who are acting under the instructions of the 1st and the 3rd defendant and. who are in possession and control or management of the schedule properties and all accretions to the said properties, are hereby removed from the office which they hold/ trusteeship of the trust

5. Defendant Nos. 1, 3, 40 and other defendants, who are in possession, control and management of the schedule properties and all accretions to the same, shall deliver possession of all the trust properties to the trustees to be appointed by the District Court.

6. Defendants-1, 3, 5 to 10 and 29, who are in possession, control and management of the trust and its properties, shall render accounts of the income and expenditure of the District Church of United Basel Mission Church in India, South Canara and Coorg and its properties, institutions effects, from the day they assumed office of the trustee or other officer under the trustee, 3rd defendant till they hand over possession of the trust properties to the trustees to be appointed by the District Court.

7. The defendants shall not alienate or encumber or change the character of the plaint schedule properties.

8. If the trust properties are alienated and are in possession of third parties, who are not parties to these proceedings, then the District Court shall, after settling the scheme for the administration of trust, shall issue notice to them and pass appropriate orders in respect of such alienations, as either all these alienations are made in disobedience to the interim orders passed by the Court in the earlier proceedings, or without any right in those properties or made during the pendency of the legal proceedings and restore the property to the trust,

9. The District Court is at liberty to institute inquiries, in respect of the trust and its properties, for the purpose of following in his or their hands such property, or the proceeds thereof or for an account such property and to restore such property to the trust

10. The District Court is also at liberty to issue such directions as deemed fit either for conducting elections and for appointment of such elected persons as trustees or for management of United Basel Mission Church in India, South Canara and Coorg and its properties and for such other purposes in implementing the scheme to be formulated by it and make it a part of the scheme.

(D). Parties to bear their own costs.