
(1998) 09 MAD CK 0032
In the Madras High Court

Swaminathan

APPELLANT

Vs

Sri Subramaniaswami Deity through the Executive Officer
holding his Office in Subramaniaswamy Temple Buildings

RESPONDENT

Date of Decision : 25-09-1998

Acts Referred:

Citation : (1999) 1 MLJ 553

Hon'ble Judges : V. Kanagaraj, J

Bench : Division Bench

Judgement

V. Kanagaraj, J.—The above appeal suit is directed against the judgment and decree dated 3.5.1980, made in O.S.No. 61 of 1976 by the

Court of Principal Subordinate Judge, Tuticorin, thereby declaring the title of the plaintiff to the plaint "A" schedule property and also ordering the

recovery of possession of the plaint "B" schedule property along with past and future damages.

2. The above suit has been filed by the respondent herein for declaration that the suit properties belong to the plaintiff and for recovery of

possession of the plaint "B" schedule property and for recovery of past and future damages.

3, The plaint averments, in short, are that the plaint "A" schedule property, part of which is the "B" schedule property was belonging to late

Lakshmi Ammal, wife of Sankara Narayana Pillai, Tiruchendur, as her self acquisition; that she was pious and intensely devoted to the plaintiff-

deity, that herself and her husband were doing religious services, not only the plaintiff-deity, but also for the Vinayakar Temple, located at

Sabapathipuram Street, Tiruchendur; that they are issueless; that even after the death of her husband, the said Lakshmi Ammal continued her

services to the plaintiff-deity; that her intention was to dedicate the plaintiff "A" schedule property to the temple, to do the services that she was already performing and further to do her own annual "shardha" after her death, so that the services might be performed in perpetuity; that with that intention, she executed a registered Will on 7.7.1943 enjoining inter alia the Executive Officer of the plaintiff-temple to enjoy the plaintiff "A" schedule property after her death and perform the services that she was already doing; that one Ponnusamy Pillai and his wife Mangaiarkarasi, who are related to the said Lakshmi Ammal, became her tenants in one of the portions of the plaintiff "A" schedule property and they took genuine interest in her welfare, further helping in her performance of the services; that then she executed a second and thereafter a third Will in supersession of the previous ones, first apportioning the performance of services and enjoyment of the plaintiff "A" schedule properties between the temple authorities on one hand and the said Ponnusamy Pillai and Mangaiarkarasi and herself on the other hand, by her second Will and then enjoining the said Ponnusamy Pillai and Mangaiarkarasi both to enjoy the "A" schedule property, by her third Will, and also to perform the services, after her death.

4. The further averments of the plaintiff are that the said Lakshmi Ammal also executed a Registered Settlement Deed dated 24.2.1959 in favour of the said Ponnusamy Pillai and Mangayarkarsi bequeathing the plaintiff "A" schedule property to them, to be enjoyed by them jointly with her, till her lifetime and after her death, by them absolutely, subject to the performance of the services to the Deity and the annual "shradha" for her and accordingly, the said Lakshmi Ammal, Ponnusamy Pillai and Mangaiarkarasi were enjoying the suit properties; that thereafter, the said Lakshmi Ammal, again wanted to give effect to her original intention of dedicating the plaintiff "A" schedule property absolutely to the plaintiff-deity and put the Deity in possession and enjoyment of them enjoining on the Deity performance of the services including the "shardha" of her husband and herself, after her death and expressed her desire to the said Ponnusamy Pillai and his wife Mangaiarkarasi and wanted them to execute a deed of cancellation of the earlier Settlement Deed, dated 24.2.1959, for which, they readily agreed and executed the Registered Deed of cancellation on

2.11.1972, releasing all their rights under the Settlement Deed dated 24.2.1959 and further making the said Lakshmi Ammal as the sole owner and possessor of the plaint "A" schedule property.

5. The further averments of the plaint are that thereafter, the said Lakshmi Ammal executed a registered deed of irrevocable settlement of the plaint

"A" schedule property on 6.11.1972, bequeathing and dedicating the same to the plaintiff-Deity absolutely and putting the property in the

enjoyment of the plaintiff-deity, through its then Executive Officer Thiru V.K. Velusami and his successors-in-office, subject to the terms like

performance of the services styled as ""Lakshmi Ammal Dharmam"", providing monthly allowance of Rs. 100 from the plaintiff-temple's funds, for

her maintenance, her right of residence in the plaint "B" schedule property till her lifetime and after her death, her body to be buried and a

"Samadhi" be raised by the temple authorities; that the settlement was acted upon and the plaintiff entered into possession of the plaint "A"

schedule property on 6.11.1972 and was also performing the services and complying with all other conditions, imposed in the Settlement Deed,

dated 6.11.1972.

6. The further averments of the plaint are that, the plaintiff-temple received a letter dated 24.12.1973, purported to be from the said Lakshmi

Ammal, seeking permission to cancel the settlement in favour of the plaintiff, for which the plaintiff replied in the negative and then the plaintiff

received another letter dated 10.2.1974, alleging thereby that the said Lakshmi Ammal had cancelled the settlement, effected in favour of the

plaintiff and had executed a Will in favour of the defendant, enclosing a copy of the cancellation deed. The plaintiff would state that the defendant,

being a man without any means or occupation, has manipulated the cancellation deed and the execution of the Will in his favour, by sending such

letters in the name of Lakshmi Ammal and would further state that even if the said cancellation deed and the Will are taken as true, they are invalid

in Law.

7. The further averments of the plaint are that the said Lakshmi Ammal died on 2.7.1975 and on her death, the defendant had taken forcible

possession of the plaint "B" schedule property; that by a lawyer's notice dated 22.9.1975, the plaintiff demanded the defendant to pay a rent of

Rs. 75 per mensem for being in occupation of the plaint "B" schedule property, which is a house and on fear of eviction, of late, on 20.12.1975,

the defendant sent a reply denying the plaintiff's right to the plaint "A" schedule property and setting up the Registered Will dated 30.1.1974,

claiming ownership of the entire "A" schedule property along with his male heirs and to perform the services of the Deity as hereditary huqdars.

The plaintiff would state that the cancellation deed and the Will were not genuine and the defendant and his henchmen, exercising undue influence,

coercion and fraud on Lakshmi Ammal, have brought about those documents, when the said Lakshmi Ammal was not in a sound disposing state of

mind; that after executing an irrevocable Settlement Deed in favour of the plaintiff-deity on 6.11.1972, the said Lakshmi Ammal had no right either

to revoke the settlement deed or to execute another Will dated 30.1.1974; that the plaintiff, through its Executive Officer, accepted the settlement,

entered into possession of the suit property from 6.11.1972, paid house and other taxes and allowed Lakshmi Ammal to live in "B" schedule

property till her life at free of rent and doing all such things enjoined on the plaintiff under the said irrevocable settlement deed. The plaintiff also

arranged for the burial of the body of Lakshmi Ammal, after her death and hence the plaintiff would conclude saying that it is entitled to declaration,

for recovery of possession and for past and future damages respectively If Rs. 584.48 and Rs. 75 per mensem from the date of plaint till the date

of delivery of possession.

8. On the contrary, the defendant would resist the plaintiff's claim stating that Lakshmi Ammal's husband Sankara Narayana Pillai of Sankaran

Koil was employed as Vaccinator in the Public Health Department of the Government of Madras and in or about 1931, he purchased the site of

plaint "A" schedule property for a consideration of Rs. 700, out of his own funds and built a building at the cost of Rs. 5,000 in the year 1935 and

another building in the remaining portion of the site at a cost of Rs. 2,000 in 1936 with the money that he got as his share from his ancestral

property and he died on 14.4.1942, intestate and issueless, leaving his widow Lakshmi Ammal and she took the plaint "A" schedule properties for

a Hindu Widow's Limited Estate and continued in enjoyment of the same, as such, until the coming into force of the Hindu Succession Act, when

u/s 14(1) thereof, her estate came to be enlarged into an absolute title. While so, it is false to allege that the plaint "A" schedule properties were her

self-acquisitions, that herself and her husband wanted to endow the plaint "A" schedule property to the plaintiff-deity and that she executed the

Will and further denying all allegations of the execution of the cancellation deed dated 2.11.1972 by Ponnusamy Pillai and Mangaiarkarasi and

execution of the irrevocable settlement deed by Lakshmi Ammal in favour of the plaintiff-deity on 6.11.1972. This defendant would state that

Lakshmi Ammal, under the registered deed dated 23.12.1973, had validly cancelled the settlement deed dated 6.11.1972, for proper and valid

reasons and the same had been communicated to the plaintiff; that neither the Executive Officer nor any functionary acting under the Hindu

Religious and Charitable Endowments Act can validly agree to make monthly gifts of Rs. 100 to the settlor, out of the temple funds and seek to

bind the plaintiff temple by such agreement or undertaking; that even assuming that the settlement deed is true, it is invalid; that the settlement deed

had not been independently acted upon and the plaintiff has not entered into possession of the plaint "A" schedule properties and that the provision

for the burial of the settlor's mortal and the erection of the "samadhi" has vitiated the settlement deed and rendered it void, since such a provision is

totally void at Hindu Law; that no gift of property or office in favour of the Executive Officer and his successors-in-office is valid, since the Office

of the Executive Officer is not a Corporation sole and therefore not a jurisdic person at all and that there is no donee at all; that the endowment is

not made in favour of the plaintiff-deity; that neither the plaintiff is the donee nor the gift is accepted by it; that the cancellation deed dated

2.11.1972 in so far as it relates to the Huqdars is void.

9. The further case of the defendant is that he is the son of Sankaralingam Pillai, younger brother of Sankaranarayanan Pillai the deceased husband

of Lakshmi Ammal; that after the death of Sankaranarayanan Pillai in 1942, Lakshmi Ammal, harbouring imaginary grievances, kept herself away

from the members of her husband's family, resulting in the execution of the Will, Settlement etc., inspired by the designing persons; and that late in

her life, she discovered that her appointed benefactors were after all more interested in the properties than in the services and the charities of even

in herself and cancelled the Settlement Deed dated 6.11.1972, thereby stating that even during her lifetime, the services instituted by her were not performed and that her obsequies and "Shradha" have to be performed only by her near relative and not be by the temple authorities and that she had no intention of giving the properties absolutely to the temple and the defendant and his father being her near relatives, she executed the Registered Will dated 30.1.1974, in a sound disposing state of mind, bequeathing thereby the plaint schedule properties to the defendant, without any power of alienation and enjoined on him to perform the services mentioned in the Will and that himself and his male heirs should be the hagdars of the services thus enjoying the properties without alienation hereditarily.

10. The further case of the defendant is that the cancellation deed dated 23.1.1974 and the Registered Will dated 30.1.1974 are true and valid in Law; that the said Lakshmi Ammal died on 2.7.1975 and the Will dated 30.1.1974 took effect and he is in possession of the plaint "B" schedule property on the strength of the Will; that he is entitled to possession of the remaining suit properties and that the allegation that himself and his henchmen got the Will and the cancellation deed executed, exercising fraud, undue influence and coercion of the cancellation deed and the Will by the said Lakshmi Ammal was voluntary and in the exercise of her independent for the plaintiff-deity and therefore the plaintiff-deity has no right to sue nor is it properly represented before the court; that even assuming that the settlement deed executed by the said Lakshmi Ammal in favour of the plaintiff-deity is valid, the endowment is not absolute, but only partial and that only a charge is created over the properties; that neither the plaintiff nor its servants are entitled to possession of the suit properties and the plaintiff is not entitled to the reliefs sought for and thus prayed for dismissal of the suit with costs.

11. The plaintiff and the defendant, in their attempt to prove their cases, as aforementioned, with such standard of proof as expected by Law i.e., with preponderance of probability, the plaintiff would examine eight witnesses as P.Ws.1 to 8 and would mark 142 documents as Exs.A-1 to A-142 and on the other hand, the defendant would examine three witnesses as D.Ws. 1 to 3 and would mark seven documents as Exs.B-1 to B-7.

12. The court below, in consideration of the above evidence placed on record and

appreciating the same in its own way, would ultimately decide

the case in favour of the plaintiff, thereby passing the decree declaring the title of the plaintiff to the plaint "A" schedule properties and granting

recovery of possession of the plaint "B" schedule property along with past and future damages at the rate of Rs. 584.48 and Rs. 75 per mensem

respectively from the date of plaint till delivery of possession. It is only challenging the said judgment and decree passed by the trial court, the

defendant therein has come forward to file the above appeal suit, offering certain grounds, as found in the memorandum of appeal.

[Paras. 13 to 24 omitted - Ed.]

25. During arguments, the learned Counsel appearing for the appellant would contend that it is a private endowment, which is different from public

endowment, since it is not meant for the benefit of the public; that in private endowment, the benefit goes to the endower i.e., to the temple or

institution, mentioning thereby that the income would be utilised for the services of the institution; that the future benefits or welfare after the life of a

person is superstitious belief; that it is not a specific or partial or absolute endowment, but a composite endowment as per Section 63(c) and (e) of

the Tamil Nadu Hindu Religious and Charitable Endowments Act (hereinafter referred to as the "Act"); that all that is important is that they were

entrusted only in the Sub Registrar's Office and not with D.I. Office; that Lakshmi Ammal created "Lakshmi Ammal Dharmam" and the objects of

the endowment are to do the religious services, the annual "Shradha" for her husband and after her death for her too, that Ex.A-6 settlement deed,

dated 6.11.1972 was executed in favour of the Executive Officer of the temple; that conditions 1 to 5 relate to "Dharmam" that the amount to be

spent per year is Rs. 3 80 that the said Lakshmi Ammal died on 2.7.1975; that even during her lifetime, the appellant was maintaining and looking

after her along with his father, since being related to her as father's brother's wife and he is the direct heir of the said Lakshmi Ammal and that

even during her lifetime, the said Lakshmi Ammal cancelled the settlement deed executed in favour of the plaintiff and executed a Will in favour of

the appellant.

26. The learned Counsel appearing for the appellant would further contend that being an endowment matter, the civil court has no jurisdiction to try

the suit as per Sections 63 and 108 of the "Act" and an application should have been filed before the Hindu Religious and Charitable Endowments

authorities. He would further contend that even if it is a partial endowment, the Commissioner, Hindu Religious and Charitable Endowments has

got jurisdiction to entertain the application and pass orders; that without going into the validity of the document, an application before the

Commissioner should have been filed and thereafter only a statutory suit u/s 70 of the Act should have been filed.

27. Resuming his argument, the learned Counsel for the appellant would further contend that in an absolute endowment, all the properties are given

to the temple and in a partial endowment that is being carried on were the properties and that portion is void and that endowment to erect

"samadhi" or to do "poojas" is not valid and would cite a judgment of the Supreme Court in Malayammal and others v. A. Malayalam Pillai and

others (1991) 1 L.W. 89, wherein it has been held that,

Hindu Law, trusts - Religious Endowments - Will - Construction - Religion and charity, no line of demarcation between the two, among Hindus -

Charity is regarded as part of religion.

Dedication of property in perpetuity for construction of a samadhi or a tomb over the mortal remains of an ordinary person, not recognised as

charitable or religious - Provision therefore, not valid - Not so, in the case of saints - Held, provision for construction of a Samadhi for the testator

and for its maintenance, not legal.

28. The learned Counsel for the respondent in his argument would contend that Ex.A-6 document dated 6.11.1972 executed in favour of the

plaintiff by Lakshmi Ammalis an irrevocable Settlement Deed and not a Will and would cite a judgment of this Court in Poongavanam v.

Poongavanam Vs. Perumal Pillai and Another, wherein a single Judge of this Court, citing earlier judgments rendered by different Honourable

Judges, would give a complete picture as to how the character of a document has to be determined as to whether a particular document in dispute

is a settlement deed or merely a Will The relevant portion of the Judgment runs as follows:

I have carefully considered the submissions made by learned Counsel for the appellant in the light of the materials referred to supra, to which my

attention was invited. The decision in Ramaswami Naidu and Another Vs. Gopalakrishna Naidu and Others, is that of V. Ramaswami, J. as the

learned Judge in analysing the principles governing the adjudication as to whether a particular deed was a Will or gift, held as follows:

The broad tests or characteristics as to what constitutes a Will and what constitutes a settlement have been noticed in a number of decisions. But the

main test to find out whether the document constitutes a Will or a gift is to see whether the disposition of the interest in the property is in praesenti

in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of

the executant, it would be a Will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the

document will be a settlement. The general principle also is that the document should be read as a whole and it is the substance of the document

that matters and not the form or the nomenclature the parties have adopted. The various clauses in the documents are only a guide to find out

whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the

executant.

In Ponnuchami Servai Vs. Balasubramanian and Others, , V. Sethuraman, J. also had an occasion to deal with a similar issue. The learned Judge

adverted to the earlier two Division Bench judgments and held as follows:

The question whether a particular document is a testamentary or a non-testamentary instrument has been gone into in several cases. It is enough to

mention two of the latest Bench decisions namely, (1) V. Rajammal Vs. P. Jesudhas and Others, and (2) Ramasami Naidu v. M.S. Velappan

(1979) 2 Mad. L.R 88 . Though the second decision does not refer to the first, to which I was a party, still the principles enunciated in both the

decisions are not materially different. Normally speaking, every document has to be construed with reference to the language it contained and

therefore, a decision construing one document cannot be an authority for construing another document except to the extent that the said decision

may lay down certain principles or guidelines. The principles enunciated in this class of cases is that a testamentary bequest is revocable as the

interest contemplated therein is intended to pass only after the lifetime of the

testator, while a settlement or a gift which comes into operation immediately is irrevocable. Even if a Will contains a clause that it is not revocable, the law makes it revocable whereas in a gift or settlement, if there is a clause that the settlor or donor can revoke it, still it will remain irrevocable under the law, because the donee obtains his interest in the property on the execution of the document itself. Consequently, whether a particular document contains a provision as to whether it is revocable or irrevocable is not decisive of the question whether it is a Will or a gift, similarly the caption or the nomenclature given by the parties to the transaction is again not decisive of the question as to whether it is a Will or a gift. If a particular document provides for immediate transfer of the interest from the original owner to somebody else, notwithstanding the fact that the parties called it a Will, it would operate only as a gift. Similarly, if a document contains provisions which showed that the disposition would come into existence only on the death of the executant of the document, even if the parties call it a settlement, it would be only a Will. The fact of registration alone would not render the document a settlement if it, in other respects, is a Will. Thus, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to examine the nature of the disposition under the document to see whether it had transferred any interest in praesenti in favour of the settlee or whether it intended transfer of interest in favour of the beneficiary only on the death of the executant.

29. Further, in dissecting a document of such nature, the learned Judge held that, The recitals extracted above only indicate that the property given under the settlement could be enjoyed by him without any rights of alienation and it is only after the lifetime of the executant viz., the 1st defendant, he (2nd defendant) shall acquire absolute rights in respect of the property with rights to sell and encumber the property by assuming absolute control and enjoyment of the property. The above recitals would go to show that not only the document was a crisp one and that there is no specific or clear and absolute instant disposition and transfer of interest in praesenti in favour of the beneficiary under the document but equally, there is absolutely no complete divestment of the right, title or interest of the executant on the date of the execution of the deed, such conferment of rights are postponed

till the lifetime of the 1st defendant. The recitals themselves, in my view, are sufficient in law to show that it is only in the nature of a Will and at any rate not a settlement absolute, the document thus being tested in the light of well-settled principles and often reiterated by the courts.

30. The learned Counsel for the respondent would further argue that Exs.A-26, 27, 35 to 40, 46, 50, 61, 62 and 64 to 88 would prove the

plaintiff's expenditure and that Ex. A-6 had been acted upon. Similar entries are also found in Exs.A-68 to 72, 77 and 88, which are the relevant

entries of the General Accounts Ledger maintained by the temple authorities, thereby indicating the expenditure for "Lakshmi Ammal Dharmam";

that Exs.A-96 to A-124 are the cash books maintained by the temple authorities for a certain period and Exs.A-126 to A-142 are the cash books

maintained for various other periods, spanning from 1.9.1972 to 30.11.1978 and they indicate the expenditure incurred by the temple authorities in

fulfilling the object of settlement in creating the endowment. The learned Counsel for the respondent would further contend that Ex.A-6 is admitted

by the appellant, but the point that is to be determined is whether (Ex.A-6) is in the nature of a settlement or Will and the judgment cited supra,

reported in Poongavanam Vs. Perumal Pillai and Another, , would make it clear that Ex.A-6 is only a settlement and not a Will, a valid settlement

that had been acted upon.

31. Coming to the scope of Section 63 (c) read with Section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, the learned

Counsel for the respondent would cite a passage at page No. 286 of the Commentaries on the Tamil Nadu Hindu Religious and Charitable

Endowments Act, 1959 by Justice R. Sengottuvelan, which reads as follows:

The relief prayed for in the suit is for a declaration of title to the temple and its properties and for delivery of possession of the properties. The

substantial issue is whether the defendant's possession was lawful. It was found that the question for determination was whether the defendant has

got a hereditary right or not, but whether the plaintiffs had a superior right, and it might be while considering the matter, the further question about

the second defendant being a hereditary trustee might incidentally arise. But a question which arises incidentally cannot oust the jurisdiction of the

civil court to decide the suit particularly when the substantive relief of declaration

of title and possession can be only granted by the court.

32. The learned Counsel for the respondent would cite yet another unreported judgment of this Court in *Agasthiappa Mudaliar v. Manikka*

Gounder and 30 others, Second Appeal No. 117 of 1959 and would contend that in the above judgment, Ramachandra Iyer, C.J. (as he then

was) clearly held that the declaration of title and delivery of possession could be granted only by the civil court.

33. The learned Counsel for the respondent would cite yet another judgment of this Court reported in *T.R. Krishnamoorthy and Others Vs. T.S.*

Krishnamachary and Others, , wherein in a suit filed by the trustees for recovery of possession, this Court held that:

There was nothing in the provisions of the Act, which places an embargo upon the trustees of a public trust filing a suit against a trespasser for

recovery of possession of the trust properties and the suit therefore, was not barred.

34. The learned Counsel for the respondent, for the same proposition of Law that whether Section 63 of the "Act" operates as a bar for a suit to

establish a hereditary right and not for a suit enforcing it, would cite another judgment of this Court in *Mookka Velar v. Baluchami and others*

(1977) 2 M.L.J. 5, wherein it has been held that:

Where the plaintiffs had already established their rights to be in management of a private temple as hereditary trustees under the earlier decree their

later suit for a permanent injunction restraining the defendant from interfering with their right to be in joint management as joint hereditary trustees

was not barred u/s 63 read with Section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. The bar u/s 63 operates

against a suit for establishing a hereditary right and not against a suit for enforcing it.

35. The learned Counsel for the respondent would cite yet another judgment of this Court reported in *Sri Venkataramanaswamy Deity at Kothur*

Village Vs. Vadugammal, , wherein it has been held that:

The preponderance of judicial authority in the Madras High Court is that a civil suit is not barred in respect of a relief which cannot be granted by

the Deputy Commissioner for Endowments and that in such a suit, the civil court has jurisdiction to decide incidental issues which are within the

jurisdiction of the Deputy Commissioner.

36. The last judgment cited by the learned Counsel for the respondent is the one reported in *The Nagercoil, Asarimar Samudayam, Muthuraman*

and *Natesa Trust and Others Vs. Natarajan Asari and Others*, , wherein dealing with Section 63(a) of the "Act" and the applicability of the same

to the jurisdiction of the civil court, this Court held that:

It is only when a declaration is sought for or a dispute is raised that the temples are not religious institutions as defined in the Act, the matter has to

go before the Deputy Commissioner u/s 63(a). But Whereas in the instant case, no dispute was raised that the suit temples were not religious

institutions as defined in the Act, the matter could not be agitated before the Deputy Commissioner. In the face of the pleadings and the dispute

between the parties in the instant case, the suit could not be treated as one coming under clause (a) or (b) of Section 63 of the Act.

37. Commenting on the judgment cited by the appellant in *Malayammal v. Malayalam Pillai* (1991)1 L. W 89, the learned Counsel for the

respondent would argue that it is the contention of the appellant herein that any endowment created for the purpose of "samadhi" is not valid and

null and void, but so far as the judgment cited is concerned, it is based on earlier judgment reported in *Ravanna Koovanna Karuppannan Ambalam*

and *Others Vs. Vana Pana Tirumalai Ambalam, Managing Trustee of the Poolampatti Nallamuthu Samadhi, Nandavanam, etc., trust and Others*, ,

wherein it has been held that an endowment for property, for the erection of a dome and maintaining "samadhi" over the grave of the testator or

maintaining a "Nandhavanam" around it or the services connected with the "samadhi" like lighting, "Naivedhyam" etc. is not valid under Hindu

Law. But, according to Ex.A-6, the property in question is not mentioned therein and hence the proposition of Law as laid down in the said

judgment reported in (1991)1 L.W. 89 would not apply. He would further contend that Ex.A-6 being a valid settlement deed, there is no question

of acting upon; that Exs.A-7 to A-142 would reveal that the settlement deed had been acted upon; that "Lakshmi Ammal Dharmam" has been

scrupulously and validly executed and there is no question of a subsequent Will to be executed by Lakshmi Ammal under Ex.B-2 and that the

provisions of Sections 63(c) and 108 of the "Act" will not apply and that the

appeal fails and the same is liable for dismissal.

38. Resuming his argument, for clarity the learned Counsel for the appellant would contend that in any Will, if there is any mention of Pooja" or

"samadhi", only that portion is not valid and would cite a judgment reported in Karuppannan Ambalam v. Tirumalai Ambalam (1992)2 L. W. 379

and would contend that Ex.A-6 is a void document; that the plaintiff wants to recover possession of "B" schedule property only and not the "A"

schedule properties, which are already in the custody of the plaintiff-deity and that the defendant is in possession of the "B" schedule property; that

Ex.A-6 is not a settlement deed, but a Will, since Lakshmi Ammal reserved rights for her lifetime; that only a partial religious service and partial

endowment was created and would emphasise that the subsequent Will has been proved and would cite para 11 of the judgment of the lower

court, wherein the merit of the case of the appellant has been discussed. The learned Counsel for the appellant would ultimately contend that under

the void settlement deed, the respondent has no right; that the Executive Officer is not having the absolute right over the properties and would cite

a judgment in Veluswami Goundan Vs. Dandapani by next friend and mother Govindammal and Others, , wherein it has been held that,

Hindu Law - Charitable Object - Deed of charity in connection with samadhi of an ancestor - Performance of guruopooja - Not a charitable

object - Reference in deed to temple - Temple not being independent object of bounty - Deed void-....

39. Lastly, the learned Counsel for the appellant relied on a judgment of the Honourable Supreme Court in Menakuru Dasaratharami Reddi Vs.

Duddukuru Subba Rao, , wherein it has been held that,

Dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of

public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is

attached to, and follows the property which retains its original private and secular character.

40. Based on the above evidence and the arguments, the following points are framed for determination:

1. Whether the suit is barred u/s 63(c) read with Section 108 of the Tamil Nadu

Hindu Religious and Charitable Endowments Act?

2. Whether Exs.A-4, A-5 and A-6 deeds are valid and binding documents and whether Ex.A-6 has been acted upon?

3. Whether the cancellation deed in Ex.B-1 and the Will in Ex.B-2 are true, valid and binding or have been obtained by the defendant in exercise

of undue influence, fraud and whether these exhibits have been obtained when the executrix was not in a sound disposing state of mind?

4. Whether the lower court is correct in granting the relief, as prayed for by the plaintiff?

41. Adhering the above points, if the above appeal suit is to be dissected and weighed in evidence placed on record as mentioned supra and in the

context of the proposition of law as brought forth by the learned Counsel appearing for the plaintiff and the defendant and if the sum and substance

of the entire case, as registered by the respondent herein, is to be assessed, it is Lakshmi Ammal, who, as the absolute owner of the suit properties

wrote three Wills covered under Exs.A-1 to A-3, the first Will dated 7.7.1943 in favour of the plaintiff-temple, the second Will dated 3.1.1951

and the third Will dated 18.5.1952 both executed in favour of the Ponnusamy Pillai and his Mangaiarkarasi. Then under Ex.A-4, the said Lakshmi

Ammal, executed a settlement deed in favour of Ponnusamy Pillai and Mangaiarkarasi placing them in charge of the suit properties and to do such

things as per the recitals therein, but after 13 years, of Ex.A-4, the said Lakshmi Ammal obtained a cancellation deed from Ponnusamy Pillai in

Ex.A-5 on 2.11.1972 and on the fourth day i.e., on 6.11.1972 itself she executed an irrevocable settlement deed in favour of the plaintiff-temple in

Ex.A-6, which is the strong case advocated on the part of the plaintiff. Thus, Ex.A-6 document is the land mark, so far as the present case in hand

is concerned. The other documents in Exhibit "A" series are only proof of the contents and recitals of Ex.A-6, in their perpetuity, by the plaintiff

and to have been in enjoyment of the suit "A" schedule property and issuing of certain notices and receiving of reply notices. Most of the other

documents in Exhibit "A" series are the account books, and such other entries effected in the necessary registers from the year 1973 to the year

1978 and almost all the witnesses examined on behalf of the plaintiff would speak to the fact of effecting the said entries, every now and then,

working in different capacities, at different points of time under the plaintiff-temple in the said Devastanam.

42. It is the firm case of the respondent/plaintiff that the said Lakshmi Ammal had no issues and her husband pre-deceased her on 14.4.1942 itself

and they did not have any issues and as a helpless widow, she evinced great interest in the plaintiff-temple and got herself attached to the religious

ceremonies, functions and rituals to the plaintiff-deity and thereafter her life became intermingled, interconnected and interwoven together as to

become inseparable from the affairs of the temple and dedicating in its services the rest of her life she created the endowment in favour of the

plaintiff-temple and deity and in the very next year of losing her husband, she executed Ex.A-1 Will in favour of the plaintiff-temple and thereafter,

even though she executed other two Wills in favour of third parties in Exs.A-2 and A-3, they were only placed in charge of discharging her

intentions and ultimately she executed the Ex.A-6 irrevocable settlement deed done in Ex.A-4 under Ex.A-5 by cancelling the earlier settlement. It

is the firm case of the plaintiff that they have only been appointed to continue the service in favour of the plaintiff-temple and deity as the guardians

and to fulfil the religious services, ceremonies and other such obligations, of Lakshmi Ammal towards plaintiff deity and in conducting the annual

"shradha" to her husband and on her death to herself and not for in any manner appropriating any portion of the suit properties or the income from

the suit properties to their personal benefits, thereby making it very clear that the said Lakshmi Ammal created an endowment called "Lakshmi

Ammal Dharmam" and inclined to continue the services to the plaintiff-temple and to do the annual ceremonies for her husband and after her death

to herself and to do some charitable acts, as indicated thereon, most of which are concerned with the plaintiff-temple and its affairs.

43. It is at this juncture, Ponnusamy Pillai and his wife Mangaiarkarasi executed a cancellation deed in Ex.A-5 for the earlier settlement deed in

Ex.A-4 and on the fourth day of the cancellation of Ex.A-4 settlement i.e., on 6.11.1972, the said Lakshmi Ammal executed an irrevocable

settlement deed in favour of the plaintiff-temple in Ex.A-6. It is the firm case of the plaintiff that thereafter all the performances as per the recitals of

Ex.A-6 started taking place as revealed under many of the documents, ranging from Exs.A-7 to A-125. It is also the case of the plaintiff that after

the death of Lakshmi Ammal, it was the temple authorities who conducted the ceremonies and performed everything regarding her "samadhi" and started observing all such rituals indicated under Ex.A-6. While so, they became alert on receipt of a letter on 24.12.1973, even during the life time of the said Lakshmi Ammal, purported to be from the said Lakshmi Ammal, seeking permission from the plaintiff to cancel the settlement deed under Ex.A-6 and the plaintiff replied in the negative and thereafter yet another letter dated 10.2.1974 had been received by the plaintiff, stating thereby that Lakshmi Ammal had cancelled the settlement dated in Ex.A-6 and executed a Will in favour of the defendant further enclosing a copy of the cancellation deed. On the death of Lakshmi Ammal on 2.7.1975, the defendant took forcible possession of the "B" schedule property and the plaintiff issued a lawyer's notice on 22.5.1975, treating the defendant as a tenant and demanding the monthly rent of Rs 75 from him, for which the defendant replied under Ex.A-15 on 20.12.1975 denying the plaintiff's right and revealing the registered Will dated 30.1.1974, claiming ownership of the plaint "A" schedule properties also and declaring his right and his male heirs to perform services as hereditary huqdars. It is the case of the plaintiff that Ex.A-6 is an irrevocable settlement and it had been acted upon and Lakshmi Ammal had no right either to revoke it or to write the Will as seen in Exs.B-1 and B-2 and therefore they are null and void documents and they Would file the above suit for declaration, possession and for past and future damages, as seen in the prayer column of the plaint.

44. The defendant's case is something different and he Would plead that the suit properties had been purchased by the husband of Lakshmi

Ammal, from out of the income of his ancestral properties, the land at a cost of Rs. 700 and that the buildings were also constructed by him from

out of his own funds, each at a cost of Rs. 5,000 and Rs. 2,000 respectively during the years 1935 and 1936 and thus they have all been done by

the husband of Lakshmi Ammal, with the money that he had obtained towards his share from his father's ancestral estate. The defendant would

deny the execution of Exs.A-1 to A-3 by the said Lakshmi Ammal and would comment them as false and bogus. This defendant would ultimately

attack the validity of the settlement deed dated 6.1 1.1972 under Ex.A-6, alleged to have been executed by the said Lakshmi Ammal in favour of

the plaintiff-temple. He would not admit any other recitals of the settlement deed in Ex.A-6 and further would state that by Ex.B-1, dated

23.1.1974, Ex.A-6 settlement deed had been cancelled and on 30.1.1974, the said Lakshmi Ammal executed a Will in his favour and the said Will

being the last Will and testament of the said Lakshmi Ammal, the same has been acted upon by himself taking possession of the suit properties and

that Ex.B-2 Will is a true, valid and binding document, which came to force on the death of Lakshmi Ammal on 2.7.1975 and he is doing all such

things as contemplated under Ex.B-2 and hence there is no property available for the plaintiff under the already revoked settlement deed in Ex.A-

6. It is also the further contention of the appellant that he is observing the obligations insisted under Ex.B-2 by feeding three persons on the date of

death of Lakshmi Ammal and performing Poojas, Naivedhyam etc. for the plaintiff-deity on the "Yekadasi" day and in the month of "Margali"

paying the flowering tributes to Sri Natarajan Manicka Vasaka and in the month of "Vaikasi" during "Thirukkalyanam" erecting pandals in front of

Door No. 4 and in "Karthikai" month, during "Sivarathri" performing the fourth pooja and annually during "Vinayaka Chaturdhi" to the said deity

besides paying flowering tributes to Lord Vinayaka in the morning and evening and further performing such rituals and would also mark Ex.B-3

Power of Attorney executed in his favour by Lakshmi Ammal. The defendant would also further state that on the death of Lakshmi Ammal, it was

his father, himself and his relatives, who conducted the last ceremonies and buried the body and would ultimately deny any right for the plaintiff in

the properties of the late Lakshmi Amma.

45. With these the case and counter case, documents filed for and against each other, and arguments and reply arguments, it has become the duty

of the court to weigh the evidence projected in proof of the case put up, applying the legal dictum and norms of Law, as legislated and pronounced

in the context of the legalities involved in the case.

46. Point No. 1: Answering this point, whether the suit is barred u/s 63(c) read with Section 108 of the Tamil Nadu Hindu Religious and

Charitable Endowments Act, many authorities have been cited by the learned Counsel for the appellant, time and again held by the upper forms of

Law. At Page No. 286 of Commentaries on the Tamil Nadu Hindu Religious and

Charitable Endowments Act, 1959, Justice R. Sengottuvelan has held that,

...a question, which arises incidentally cannot oust the jurisdiction of the civil court to decide the suit, particularly when the substantive relief of declaration of, title and possession can be only granted by the court.

It has been reiterated in the judgment of this Court in Agasthiappa Mudaliar v. Manikka Goundar and 30 others, S.A.No. 117 of 1959, wherein

Ramachandra Iyer, C.J. (as he then was) clearly held that the declaration of title and delivery of possession could be granted only, by the civil

court. Again, in the judgment reported in T.R. Krishnamoorthy and Others Vs. T.S. Krishnamachary and Others, , which is a case arisen when the

trustees filed by a suit for recovery of possession, this Court has held that,

There was nothing in the provisions of the Act, which places an embargo upon the trustees of a public trust filing a suit against a trespasser for

recovery of possession of the trust properties and the suit therefore, was not barred.

In yet another suit filed, to establish the right of hereditary trustee, as reported in Mookka Velar v. Baluchami (1977)2 M.L.J. 5, this Court held

that,

The bar u/s 63 operates against a suit for establishing a hereditary right and not against a suit for enforcing it.

From all the above judgments, it has become very clear that the suit as instituted by the respondent herein for declaration and possession and for

past and future damages is quite on the right line and as per the expectations of Law and it could be well maintained before a civil court and the suit

is not barred u/s 63(c) read with Section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act and this point is answered

accordingly in favour of the respondent and against the appellant herein.

47. Point No. 2: So far as the second point that whether Exs.A-4 to A-6 are valid and binding documents and whether Ex.A-6 has been acted

upon has been concerned the case of the plaintiff is that Exs.A-1 to A-6 are very important to his case, as already discussed. The suit properties

were the self-acquisitions of the husband of the said Lakshmi Ammal and no one could object her to write Exs.A-1 to A-3 Wills, since she was

free to execute such Wills, which would have come to force only on her death. But, at the same time revoking those Wills one by one, ultimately,

the said Lakshmi Ammal settled the suit properties in favour of Ponnusamy Pillai and his wife Mangaiarkarasi appointing them as Managers to

conduct the obligations contemplated thereby to do certain things, according the recitals of the document. But, 13 years later, the said settlement

got cancelled under Ex.A-5 and in four days of such cancellation of Ex.A-4 settlement, yet another settlement under Ex.A-6, dated 6.11.1972 had

been executed, as the irrevocable settlement deed by Lakshmi Ammal in favour of the plaintiff-deity.

48. So far as Exs.A-4 to A-6 are concerned, Ex.A-4 is the settlement deed, executed by Lakshmi Ammal in favour of Ponnusamy Pillai and

Mangaiarkarasi and Ex.A-5 is the cancellation deed of Exs.A-4 and A-6 is the settlement deed executed by Lakshmi Ammal in favour of the

plaintiff-deity. So far as the settlement regarding the settlement in concerned, is "once settled, always settled", it is not acted upon. Hence, the

expectation of Law is that the settlement deed must be fully acted upon according to the recitals of the document. So far as Ex.A-4 settlement is

concerned, it is settled in favour of both the husband and wife-Ponnusamy Pillai and his wife Mangaiarkarasi and in spite of they both enjoying the

said settlement for 13 years, till it is cancelled on 2.11.1972 under Ex.A-5, the reason for such cancellation adduced on the part of the plaintiff is

that Lakshmi Ammal on coming to know that the said Ponnusamy Pillai and his wife were also issueless and there was no scope for continuity of

the services to the endowment created under Ex.A-4, had thought of creating an endowment in favour of the plaintiff-deity and suggested to the

said Ponnusamy Pillai and his wife to write a cancellation deed and they too readily agreed for her proposal and they themselves came forward to

cancel the deed of settlement executed by Lakshmi Ammal Ex.A-4. When the beneficiaries in the settlement deed, themselves came forward to

cancel the deed of settlement, technically there is no question of testing the validity of such a cancellation and on the said circumstances, since the

possession of the suit properties, ownership etc., reverts back to the original owner, namely, Lakshmi Ammal, she was free to execute any other

document and under such circumstances, Lakshmi Ammal executed Ex.A-6 in favour of the plaintiff-deity. This is the argument that is put forth on

the part of the plaintiff.

49. But on the contrary, on the part of the defendant, his contentions are that the properties themselves were not belonging to Lakshmi Ammal, but

to her husband, who inherited from the ancestral, nucleus and he purchased the land for Rs. 700 in the year 1935 from out of the ancestral nucleus

and constructed two houses from out of his own funds at a cost of Rs. 5,000 and Rs. 2,000 respectively in the year 1935 and 1936 and that on his

death, Lakshmi Ammal inherited the same and that since she had an aversion towards her husband's relatives, she created Exs.A-1 to A-3 in

different names to suit the then prevailing circumstances and after long time, she realised her fault and started taking into confidence her husband's

relatives and the defendant being her husband's brother's son, himself and his father came to her rescue and taking up their residence in plaint "B"

schedule house, they not only attended on her during her last days but also would advocate that for eight years prior to her death, the said Lakshmi

Ammal did not attend to any of the ceremonies of the plaintiff-temple since she was confined indoors an account of the advanced age and failing

health and it was himself and his father, who entirely took care of her including the providing of medical assistance and that on her death on

2.7.1975, they conducted the last ceremonies. The defendant would further contend that even during the life time of Lakshmi Ammal, Ex.A-6 had

not been acted upon and hence she revoked Ex.A-6 as per Ex.B-1 and executed Will under Ex.B-2 in his favour, appointing him as the Manager

to perform the "poojas", ceremonies etc. to the temple and to conduct "shardha" to her husband and to herself after her death and to feed three

poor persons on those days and to do certain other things as per the recitals of the document in Ex.B-2.

50. In testing the validity of Ex.A-6, the learned Counsel appearing for the appellant would brand the said document not as a settlement deed, but

as a Will. His contention is that the general principle is that the document should be read as a whole and it is the substance of the document that

matters and not the format or the nomenclature the parties have adopted; that the various clauses in the document in Ex.A-6 indicate that it is the

Will and not a settlement deed much less an irrevocable settlement deed. The other contention that is advanced on the part of the learned Counsel

for the appellant is that it was a partial endowment and that any endowment created for the purpose of "samadhi" is not valid, but only null and void. So far as the contentions of the learned Counsel for the appellant regarding Ex.A-6 are that certain things are reserved, conditions are imposed in Will only and no such reservations or conditions will be imposed in the settlement deed and would also comment that Ex.A-6, had not been acted upon.

51. From the documents ranging from Exs.A-7 to A-125 covering the period from 1973 to 1978, it is more than sufficiently established on the plaintiff's part that Ex.A-6 settlement deed had been fully and entirely acted upon and contra to such overwhelming evidence, nothing has been produced on the part of the appellant before the lower court, thereby making it very clear that immediately after coming into existence of Ex.A-6, the temple authorities have taken possession of the suit properties and from these exhibits, it comes to be known that even from the year 1973 onwards, the temple authorities have started functioning as the trustees of the suit properties, doing all such things, as contemplated therein and effecting entries into the relevant registers, further maintaining proper accounts and there is no denial of the fact that these entries have been effected then and there genuinely at the relevant time. If Ex.A-6 is to be treated as a Will, only on the death of Lakshmi Ammal, on 2.7.1975, it should have come to effect, but from the manner in which the possession of the suit properties have been transferred to the hands of the plaintiff and the plaintiff started managing the same and further performing the poojas, ceremonies and rituals as per the directions of Ex.A-6, thus, the plaintiff has fully proved that Ex.A-6 settlement deed had been acted upon and all such activities having been carried on by the plaintiff with regard to the suit properties, even during the lifetime of the said Lakshmi Ammal, would only indicate that Ex.A-6 is a settlement deed and not a Will. The reservations and conditions imposed cannot under any circumstance will go to prove that Ex.A-6 is a Will, since they are all of minor importance and negligible. Hence, adhering the norms held in the case reported in Poongavanam Vs. Perumal Pillai and Another, , it is hereby decided that Ex.A-6 is only a settlement and not a Will, since it had been acted upon, even during the lifetime of the executrix, thus deciding this point in favour

of the respondent.

52. Points 3 and 4: Coming to the other point whether on account of the mentioning of pooja or samadhi, the document in Ex.A-6 would become

invalid, since they are not charitable objects, the learned Counsel for the appellant would place reliance on the decision of the Honourable

Supreme Court in *Malayammal v. Malayalam Pillai* (1991)1 L.W. 89, stating thereby that the endowment to erect "samadhi" or to do "pooja" is

not valid, for which on the part of the respondent it would be argued that any endowment created for other performances, if it also includes the

creation of a "samadhi" and conduct of "poojas", cannot be said to be an invalid endowment and would contend that the judgment cited by the

other side is based on earlier judgment reported in *Ravanna Koovanna Karuppannan Ambalam and Others Vs. Vana Pana Tirumalai Ambalam*,

Managing Trustee of the Poolampatti Nallamuthu Samadhi, Nandavanam, etc., trust and Others, , wherein it has been held that an endowment for

property, for the erection of a dome and maintaining "samadhi" over the grave of the testator or maintaining a "Nandhanavanam" around it or the

services connected with the "samadhi" like lighting, "Naivedhyam" etc. is not valid under Hindu Law. The learned Counsel for the respondent

would clarify that according to Ex.A-6, the property in question is not mentioned therein and hence the proposition of Law as laid down in the said

judgment reported in (1991)1 L.W. 89 would not apply to the case in hand and would continue to argue that the settlement deed under Ex.A-6

had been acted upon as revealed by Exs.A-7 to A-42 and the said Lakshmi Ammal Dharmam has been scrupulously and validly executed and

there is no question of denying the endowment created under Ex.A-6 nor coming into being of the subsequent Will under Ex.B-2 much less under

the pretext of the cancellation deed, the validity of Ex.A-6 could be denied since it is an irrevocable settlement which came to be acted upon even

during the life time of Lakshmi Ammal and in such event even she herself was not competent to do anything regarding the settled properties.

53. Coming to the last phase of the case regarding Exs.B-1 to B-3, the revocation deed, the Will in favour of the defendant and the power of

attorney, said to have been created by Lakshmi Ammal in favour of the defendant, they have to be strictly proved on the part of the defendant. It is

contended on behalf of the plaintiff that those documents were never executed by Lakshmi Ammal nor had there been any legal necessity or

compelling circumstances requiring the said Lakshmi Ammal to execute these documents in favour of the defendant and even if it is admitted that

Lakshmi Ammal executed these documents, she had no locus standi to execute them since regarding the suit properties, she had already made the

irrevocable settlement deed under Ex.A-6 in favour of the temple, appointing the Executive Officer of the temple and his successors-in-office as

permanent trustees to the suit properties and when once the right is settled, the second right cannot accrue to Lakshmi Ammal so as to create the

exhibit "B" series documents.

54. Even in the evidence, the averments of the defendant for these documents have not proved. It is only the defendant, who chose himself to be

examined. D.W.2 is none other than his own father and D.W.3, who is said to be the attestor for Ex.B-2 is his close relative and there is no

sufficient evidence to prove the said documents, having been validly executed, much less in view of the contention of the plaintiff that Lakshmi

Ammal at the time of execution of these documents was not in a sound disposing state of mind. Moreover, it is the admitted case on the part of the

appellant that for a long eight years prior to her death, the said Lakshmi Ammal had been confined indoors since her movements were restricted

and she was not even attending to any temple ceremonies. So, unless in the above circumstance, the defendant proves validly to show that she was

in a sound disposing state of mind at the time of execution of Exs.B-1 to B-3, the contention of the plaintiff that at that time, she was not in a sound

disposing state of mind, cannot easily be dismissed or ignored.

55. Moreover, the moment Ex.A-6 settlement deed comes to be admitted to be true, valid and binding, the said Lakshmi Ammal has no locus

standi to either to cancel the same or to execute any other Will or settlement deed regarding the suit properties and those items which have been

contemplated under Ex.A-6 and hence even in the event of Lakshmi Ammal having executed Exs.B-1 to B-3, in a sound disposing state of mind,

since she had legal locus standi to execute them, they cannot be considered to be valid documents, in view of the legal dictum that no one could

convey a better title than what he has". At the time of execution of Exs.B-1 to

B-3, Lakshmi Ammal did not have either title or possession or any other right or interest regarding the suit properties, over and above those rights contemplated under Ex.A-6 and hence even under this score, Exs.B-1 to B-3 have to be declared as null and void and unenforceable instruments. Hence, point No. 3 is decided against the appellant and in favour of the respondent.

56. Ultimately, the appellant does not become entitled to any relief as sought for in the appeal and the lower court is fully justified in arriving at the conclusion to grant relief as prayed for by the plaintiff. Hence, point No. 4, is also answered in the affirmative in favour of the judgment and decree of the lower court.

57. Hence, for the discussion held above, this Court does not find any patent error or perversity in approach or any other infirmities or inconsistencies in the conclusions arrived at by the court below in decreeing the suit as prayed for and hence the interference of this Court is not at all called for.

58. In result, the above appeal suit fails and the same is hereby dismissed. The judgment and decree dated 3.5.1980 made in O.S.No. 61 of 1976 by the Court of Principal Subordinate Judge, Tuticorin, is hereby confirmed on the same terms as held by the lower court.