Orissa High Court
Nityananda Panigrahi vs Basudeb Patra And Ors. on 13 February, 1970
Author: R Misra
Bench: S Ray, R Misra
JUDGMENT R.N. Misra, J.

1. These seven appeals have been directed at the instance of defendant No. 1 against a reversing judgment and separate decrees passed by the learned Additional Subordinate Judge of Berhampur in suits for a declaration that the order of the Assistant Commissioner of Hindu Religious Endowments was illegal and not binding on the plaintiff and for recovery of the disputed properties.

2. Seven separate suits were filed, but in view of the fact that the defendants were common and common questions of fact and law arose, the suits were made analogous in the original and the lower appellate courts. One common judgment was delivered in the appellate court and in this Court the Second Appeals have been made analogous also.

3. One Basudeb Patra purchased certain properties under a registered sale deed dated 11-8-26 (Ext. 1) from the original defendant No. 2 who happened to be the Mahant of Srichaitanya Math. In the family of Basudeb the properties acquired under Ext. 1 came to be partitioned subsequently and the members of his family along with him were allotted shares in such properties. Basudeb himself is the plaintiff in T. S. No. 148 of 1959 and the other members of his family who acquired absolute interest in portions of such properties are each the paintiff in the remaining suits. The case made out by the plaintiff in each suit was that the suit lands located in village Hatiotto being a part of what is locally known as "Dutia Chakada" or second block of the Inam lands of the village originally belonged to Gopabandhu Misra and others of Jamadevipur. Subsequently these lands which came to be later known as "Hanumantha Tangiri" were purchased by one Mahant Radhakrishna Das and out of his own personal funds and continued to be treated as his personal property separate from the assets of the math. After Radhakrishna Das, defendant No. 2 succeeded to the properties and in order to meet personal liabilities as also certain math expenses defendant No. 2 who had earlier borrowed money from one Dasarathi Patra, elder brother of Basudeb, by mortgaging the suit properties along with other lands sold the disputed lands for a sum of Rs. 8000/- on 11-8-26 and thereby obtained release of the remaining property and liquidated the mortgage debt. In partition different portions of the property came to be allotted to the different members of the family and each of the plaintiffs came to possess his specific portion shown in the schedule in each of the suits. In the recent record-of-rights the respective suit lands were shown in the Pattas issued to each of the respondents plaintiffs.

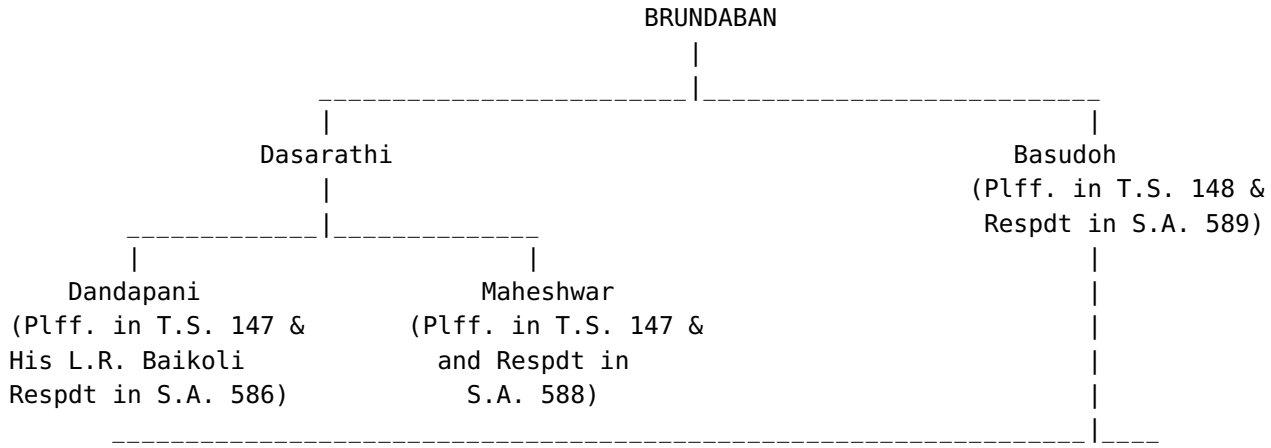
Defendant No. 1 came to be appointed as the President of the Board of Trustees of Srichaitanya Math some years before the suit and after his appointment he moved under Section 68 of the Orissa Hindu Religions Endowments Act (2 of 1952) and obtained an order from the Assistant Commissioner of Endowments for delivery of possession of the lands. Before the Assistant Commissioner the plaintiffs had resisted the application on various grounds including the one that they were in possession bona fide on their own account. Possession was, however, illegally ordered to be delivered and such delivery was effected. The plaintiffs filed a writ application before this

Court in O. J. C. No. 326 of 1956 which, however, was disposed of by indicating that it vas open to the plaintiffs to file a suit if they were so advised. Thereafter the present suits were filed.

4. Defendant No. 2 did not enter appearance. Defendant No. 1 who alone contested the suit took the stand that the lands in question belonged to the math and the transfer was subsequent to the coming into force of the Madras Hindu Religious Endowments Act (Act 1 of 1925). As the alienation was without the sanction of the Board constituted under the Madras Act 1 of 1925 the alienation was invalid, The property belonged to the math and was, therefore, not transferable. It was also contended that there was no legal necessity to justify the transfer. Defendant No. 1 further took the stand that the proceeding under Section 68 of the Orissa Hindu Religious Endowments Act was maintainable and possession has been properly taken, Subsequent to the proceeding under the Endowments Act there was a dispute relating to possession under Section 145, Cr. P. C. in respect of the properties and the said dispute terminated during the pendency of the suit in favour of defendant No. 1. A stand was also taken that the suit in the civil court was not maintainable and the present dispute was only cognizable under Section 41 of the Endowments Act, (Orissa Act 2 of 1952) and as such the present suits were not maintainable in law in the civil court. With reference to 87 cents of land covered by survey No. 1575 it transpired that that was not an alienation under Ext. 1 and no claim thereto was made. Therefore, the determination in the present second Appeals would not be in relation to that property and the appellate decree in respect of that property is not challenged.

5. Originally the seven suits were dismissed on 28-4-62 after trial. In appeal the suits were remanded for a finding on the question of acquisition of title by adverse possession by the plaintiffs. The learned Munsif upon remand found that issue in favour of the plaintiffs. Ultimately the learned Additional Subordinate Judge who disposed of the appeals came to hold that each of the plaintiffs had proved his title and possession, and as such was entitled to a decree. On his aforesaid finding, the learned Appellate Judge allowed each of the appeals and gave a decree for declaration of title and recovery of possession. During the pendency of these Second Appeals, it appears, possession has already been taken by the plaintiffs and they are now in possession.

6. Before proceeding to notice the various contentions raised by the parties and discussing their merits it would be proper to indicate the relationship of the parties by extracting the genealogy appearing in the judgment of the lower appellate court.



Lingaraj (Plff. in T.S. 143 & Respdt in S.A. 589)	Nilakantha (Plff. in T.S. 145 & Respdt in S.A. 585)	Magiti (Plff. in T.S. 146 & Respdt in S.A. 587)	Narasingha (Plff. in T.S. 24 o Respdt in S.A. 590)

7. These appeals originally came up for hearing before a learned Single Judge of this Co
"As there is no direct decision of this Court under Section 41 of the Orissa Hindu Reli

That is how these appeals have now come before us for final hearing.

8. Mr. S. Mohanty, learned counsel for the appellant, contended that the alienation under Ext. 1 was subsequent to the enforcement of Madras Act 1 of 1925 under which alienation of endowment property without the sanction of the Endowment Board was illegal. He, therefore, contended that no title could be acquired by the vendee under the said alienation. The property in question belonged to the math and, therefore, the proceeding under Section 68 of Orissa Act 2 of 1952 was valid and the dispossession made by a lawful order under that Act was not open to question in the civil court. He contended that the present suits were not maintainable in the civil court on account of the provisions contained in Sections 41 and 73 of Orissa Act 2 of 1952. His next contention was that the plaintiff in each of the suits could not acquire title by adverse possession and the possession could not become adverse on account of the fact that the alien or defendant No. 2 was alive until the suits came to be filed and in the circumstances by necessary implication the right to recover possession would indeed accrue only upon his death to the succeeding Mahant or Manager.

9. On his submissions before us, according to him the following six points arose for determination:--

(1) Whether Madras Act 1 of 1925 was intra vires or not?

(2) Whether that Act had ever come into force?

(3) What was the effect of repeal of the said Act by Madras Act 2 of 1927?

(4) Whether the jurisdiction of the Civil Court to decide as to whether a particular property belongs to the religious endowment or not could be decided by the civil court in view of the provisions contained in Sections 41 and 73 of Orissa Act 2 of 1952?

(5) Whether the Assistant Commissioner had jurisdiction to deliver possession under Section 68 of the Act or his action was without jurisdiction; and (6) Whether the plaintiffs can be taken to have acquired title by adverse possession in the present case.

10. The Madras Hindu Religious Endowments Act 1 of 1925 seems to have been brought into force sometime in course of that year. But soon after it was passed doubts were thrown on the validity of

the enactment mainly on the basis that the Governor of Madras had no authority under the Government of India Act, 1915 to remit the Bill to a Council other than the one that passed it. The validity of the Act passed by the subsequent Council on the remitting of the Bill by the Governor was directly raised in a number of cases before the Madras High Court.

11. In the meantime legal opinion was taken. The matter was agitated in different forms. Jurists opined that the Act was invalid. The main plank of the challenge was that with the dissolution of the previous Council which had passed the Bill there was an automatic cessation of every business before the House irrespective of the stage of that business. That principle, it was contended, was manifest from the provisions under Section 81A of the Government of India Act, 1915. The relevant portion of that section is as follows:--

"81A(1). Where a Bill has been passed by a local legislative council, the Governor, Lieutenant-Governor or Chief Commissioner may, instead of declaring that he assents to or withholds his assent from the Bill, return the Bill to the council for reconsideration, either in whole or in part, together with any amendments which he may recommend, or, in cases prescribed by rules under this Act, may, and if the rules so require, shall, reserve the Bill for the consideration of the Governor-General."

"The Council" occurring in Section 81A(1) has been interpreted to mean the council that passed the Bill. This principle of course has been well recognised in the Government of India Act, 1935 in Section 73 of that Act where it has been provided:--

"73. (1) Subject to the special provisions of this part of this Act with respect to financial Bills, a Bill may originate in either Chamber of the Legislature of a Province which has a Legislative Council.

(2) A Bill pending in the Legislature of a Province shall not lapse by reasons of the prorogation of the Chamber or Chambers thereof.

(3) A Bill pending in the Legislative Council of a Province which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(4) A Bill which is pending in the Legislative Assembly of a Province, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly."

A clear provision has also been made to that effect in Article 196 of the Constitution of India, 1950.

12. While the suits were pending before the Madras High Court and other suits similarly questioning the validity of the Act were also instituted in other courts, the Government of Madras stem to have thought that the constitutional issue raised in those suits was not altogether free from doubt; and in order to avoid the risk of taking an adverse decision and also actuated by a desire to avoid the long delay and the great expense to all parties concerned in allowing these suits to be fought out in courts, and being satisfied that there was force in the technical objection relating to procedure in the

passing of the Bill, applied to the Central Government for permission to introduce a Bill validating the provisions of Madras Act 1 of 1925.

13. The Government of India, however, took the view that a validating Statute as such could only be passed by the Imperial Parliament, and the local Legislative Council as then constituted did not have authority to validate a Statute purporting to have been passed by a local Council. Therefore, re-enacting the Bill in the nature of an introduction of a new measure into the new council was found more convenient. As such a Bill repealing Madras Act 1 of 1925 and re-enacting its provisions in another Code with a validating clause was introduced into the Council in 1926 and emerged out of anvils of the legislating process as what has ultimately been known as Madras Hindu Religious Endowments Act (Act 2 of 1927).

14. At this point it would be appropriate to find out and give a determination as to whether Madras Act 1 of 1925 was ultra vires. It is not disputed that if the legislative process indicated in the Government of India Act, 1915 was not satisfied the Act would not be a valid one. "The Council" occurring in Section 81A of the Government of India Act, 1915, seems to have no ambiguity and must have reference to the council that passed the Bill. The statute making process in countries like New Zealand, Australia and elsewhere the constitution whereof had been indicated almost in the self-same language had adopted the same process, and even subsequently in 1935 the Government of India Act made clear provisions to that effect. That also appears to be the spirit of the Act. A Bill which had been shaped, processed and was in some stage before it had really been finally passed by one particular council could not be imposed on the succeeding council. If it had become a Statute the position was different, but if it was somewhere half way it was considered befitting to have it dropped by allowing it to lapse and permit the new council to think of its own legislation unfettered by any measure undertaken by its preceding council and left in an incomplete stage. The succeeding Council which passed Madras Act 2 of 1927 seems also to have accepted the position. The preamble of that Act stated.

"An Act to provide for the better administration and governance of certain Hindu religious endowments and to remove certain doubts as to the legality of the action taken and things done under the Madras Hindu Religious Endowments Act 1923."

This Act was however, not a validating Act, but was absolutely a new measure of re-enacting the entire previous law.

15. In this background and on the aforesaid analysis of the provision in the Government of India Act and the defective process adopted for bringing Madras Act 1 of 1925 into the Statute Book, we think the only conclusion that can emerge is to hold Madras Act 1 of 1925 was ultra vires the Government of India Act, 1915.

16. Mr. Mohanty, however, placed some decisions of the Madras High Court where the legality or otherwise of that Act came for consideration. According to him the case directly on the point is in AIR 1936 Mad 223, Kuttikrishna Menon v. Purushothaman Nambudiri. The facts of the case which came up for consideration before Pandrang Row, J. were as follows: Two suits by a melcharthdar for

redemption were filed before the Court of the District Munsif, Pattanibi. Those melcharths were granted by the first plaintiff whose name was subsequently struck off to his Anandravan the second plaintiff on 1-3-1925. A conditional decree had been passed by the trial court condition being that the decree for redemption would stand only if a certain order of the Board of Commissioners for Hindu Religious Endowments dated 21-4-26 was set aside by the District Court. An application to set aside the order was actually pending in the District Court of South Malabar, but that application was not prosecuted. It was, therefore, contended in Second Appeal that the condition imposed by the trial Court in the decree was wiped out. The condition was imposed by the trial Court as it was of the view that the melcharths offended against the provisions of Section 72 of Madras Act 1 of 1925 and the melcharths which were a type of alienation without the sanction of the Board were not valid. The lower appellate Court did not maintain the condition as it was of the opinion that Madras Act 1 of 1925 was ultra vires the Madras Legislature and also on the ground that by the time those alienations were made the Board of Commissioners had not been constituted. In this background the learned Judge came to hold, "The objection to the validity of this Act (Act 1 of 1925) is thus an objection to the procedure followed by His Excellency the Governor in the course of the Legislation. In my opinion no objections to the procedure followed by the Legislature or any part of it in the course of any legislation can be entertained by Courts, and even if well founded such objections do not render the subsequent legislation ultra vires. What the Court has to do, when it is contended that a particular Act of the legislature is ultra vires is to look at the subject-matter of the Act and to see whether that subject-matter is included within the provisions which define the powers granted to that legislature by the Government of India Act."

It is already laid down by good authority that if a particular procedure is prescribed by the Statute for a particular act, it is mandatory that that particular procedure must be followed for the performance of the particular act and an act not in conformity with the procedure laid down cannot stand the protection of law as being a statutory act. This is more so in the case of law making. Therefore if in the making of the law a particular procedure is prescribed in the Constitution Act, there could be no second opinion that that particular procedure must be followed so that an Act made would be a valid one. In the present case the reasoning of the learned Judge, therefore, does not seem to be quite appealing.

In another case reported in (1928) 55 Mad LJ 605 = (AIR 1928 Mad 1272), Vythilinga Pandara Sannadhi v. T. S. Aiyar some reference has been made to Act 1 of 1925. The point that had arisen for consideration before Kumaraswami Sastri J. on this occasion was as to whether Section 7 of Madras Act 2 of 1927 was ultra vires. When we come to discuss that section it will clearly appear to be a section to validate certain actions under the earlier Madras Act (Act 1 of 1925). The learned Judge, however, did not decide as to whether Madras Act 1 of 1925 was an invalid piece of legislation. He noticed the contention and proceeded to assume that conclusion. In his own language the matter is expressed thus:--

"It is argued by Mr. Rangachari for the plaintiffs that Madras Act 1 of 1925 is not a valid Act as it was not passed in accordance with the provisions of the Government of India Act of 1919 and that it was not competent for the local Legislature to validate the act or acts done under that Act by any subsequent enactment as it would virtually be doing indirectly what the law prohibits to be done

directly. For the purpose of this argument I shall assume that Madras Act 1 of 1925 was invalid and it is, therefore, not necessary for me to discuss the various reasons given in the plaints and the question is, where an Act of subordinate Legislature is invalid owing to the non-compliance of certain conditions required by an Act of Parliament which constitutes the subordinate Legislature, whether the passing of a fresh enactment which complies with the requirements of the Imperial Act and which is validly passed and which validates acts done or Boards appointed under the provisions of the Act would be ultra vires of the Legislature and invalid."

The three other decisions which have been cited at the Bar are: AIR 1933 Mad 57, Chengayya v. Kottayya; AIR 1928 Mad 905, Gangadhara v. Ramanuja Pedda Jeeyangar Tirumalai and AIR 1926 Mad 162, Arumuga Thambiran v. Namasivaya Pandara Sannadhi. These decisions, however, in our opinion, do not throw any direct light on the point for determination. We do not, therefore, find any precedent properly taking one or the other view. On the aforesaid analysis we would, therefore, conclude that Madras Act 1 of 1925 was ultra vires the provisions of the Government of India Act 1915 and was not a valid piece of legislation.

17. There does not appear to be any dispute that Madras Act 1 of 1925 had already come into force. References to some of the contemporaneous decisions cited at the Bar clearly go to show that the provisions of Madras Act 1 of 1925 had been brought into force. Therefore, the second question which Mr. Mohanty raised has to be disposed of in an affirmative way saying that Madras Act 1 of 1925 had come into force.

18. That, however, does not appear to be at all material for the present litigation. Once it is found that Madras Act 1 of 1925 was not a valid piece of legislation and adopting the principle of ex abundant cautela that Act was repealed by Section 6 of Madras Act 2 of 1927, it has to be found out whether any penalty under that invalid Act has been saved under the new Act.

19. It may be necessary to indicate the relevancy of this point. Under Section 72 of Madras Act 1 of 1925 an embargo was put on alienation of math property unless that alienation was necessary or beneficial to the math and was sanctioned by the Board. Madras Act 2 of 1927 admittedly received the assent of the Governor only in January 1927. The alienation in question under Ext. 1, as has already been stated, is dated 11-8-26. Once it is held that Madras Act 1 of 1925 was not an operative Statute it must necessarily follow that there was no inhibition against alienation of math property by the time of Ext. 1. Mr. Mohanty, however, contends that under the provisions of the Madras General Clauses Act and Section 7 of Madras Act 2 of 1927 the embargo or the inhibition under Section 72 of Madras Act 1 of 1925 must be taken to have been saved.

20. We would, therefore, proceed to examine the provisions of Section 7 of Madras Act 2 of 1927. The section may now be extracted:--

"7. (i) All action taken and all things done including, the constitution of the Board of Commissioners for the Hindu Religious Endowments, the notifications issued and orders made under and in pursuance of the said Act shall be deemed to have been validly taken, done, issued or made.

(ii) All proceedings taken under the said Act may be continued under this Act in so far as they are not inconsistent with the provisions of this Act.

(iii) Any remedy by way of application, suit or appeal which is provided by this Act shall be available in respect of proceedings under the said Act pending at the time of the commencement of this Act as if the proceedings in respect of which the remedy is sought had been instituted under this Act."

Under Section 76(1) of Madras Act 2 of 1927 it has been provided:--

"No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math, temple or specific endowment shall be valid or operative unless it is necessary or beneficial to the math, temple or specific endowment and is sanctioned by the Board."

Mr. Mohanty contends that the embargo put under Section 72 of Madras Act 1 of 1925 must be taken to have been saved not only by application, of Section 7 of Madras Act 2 of 1927, but also by force of the provisions contained in Section 8 of the Madras General Clauses Act (1 of 1891). He also asks us to import into the provisions of Sub-section (1) of Section 7 the words "under the corresponding provisions of this Act". This he seeks to contend to meet the objection raised at the hearing that if Section 7 was validating actions taken under Madras Act 1 of 1925 or was also making the embargo under Section 72 of Madras Act 1 of 1925 enforceable the Board must be taken to have jurisdiction to give sanction in respect of alienations made earlier to Madras Act 2 of 1927. Admittedly Sub-section (3) of Section 7 cannot confer jurisdiction on the Board to entertain an application afresh in respect of such an alienation as the proceeding was not pending at the time of commencement of that Act. Sub-section (2) of that section would not cover that case. He, therefore, contends that we should incorporate those words into Sub-section (1) and thereby come to hold that the Board constituted under that Act was entitled under the appropriate section of this Act to deal with the question of sanction in respect of an alienation made after the enforcement of Madras Act 1 of 1925, and before the enforcement of Madras Act 2 of 1927. We do not think, we would be justified to read anything into the Statute in the manner suggested by Mr. Mohanty. The Legislature must be imputed the necessary wisdom and in its own wisdom the legislature has made reference to the provisions of this Act in Sub-sections (2) and (3) of that Section while in Sub-section (1) it has been omitted.

21. Under Madras Act 1 of 1925 an embargo alone was put and the invalidity arose in a case where there was no sanction. Its effect is definitely penal and it had brought a restriction on the authority of a person who hitherto was exercising that authority. In the circumstances unless we are called upon to hold that by necessary implication that the embargo under Section 72(1) of Madras Act 1 of 1925 was saved by the subsequent legislation we would be slow to do it

22. It is true that Section 8 of the Madras General Clauses Act does not make any provision like its sister Acts or the Central Act by mentioning "unless a different intention appears". Section 8 of the Madras General Clauses Act provides:--

"Where any Act to which this Chapter applies, repeals any other enactment, then the repeal shall not ....."

But one of the cardinal rules of interpretation is generalia specialibus non derogant. On that principle even in the absence of the normal words "unless a different intention appears" where a special Statute makes special provision about the effect of repeal the provisions in the General Clauses Act must stand excluded from application. We would, therefore, conclude that only what is saved under Section 7 of Madras Act 2 of 1927 is stated; nothing more of the Repealed Act can be taken into account by virtue of the Madras General Clauses Act.

23. "The effect of repealing a Statute", as Tindal. C. J. said, "is to obliterate it as completely from the records of the Parliament as if it had never been passed and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law". (See 1912 AC 400, Lemm v. Mitchell). That stated the law as it was prior to the Interpretation Act, 1889 which corresponds to the General Clauses Act in this country. On our analysis noted above, Section 8 of the Madras General Clauses Act has no application, to the present case and as a consequence of repeal made by Section 6 of Madras Act 2 of 1927, provisions of Madras Act 1 of 1925 are only to be saved by virtue of Section 7 of Madras Act 2 of 1927.

24. It has been already held in two cases in Madras that the provisions of Madras Act 2 of 1927 are not retrospective. A Division Bench of that Court in AIR 1926 Mad 162 clearly stated, "There is nothing in that Act (Madras Act 2 of 1927) which gives retrospective effect."

Similar was the view expressed subsequently by Srinivasa Ayyangar. J, in AIR 1929 Mad 322, Chinnan v. Sundaresa. In the circumstances excepting what has been expressly saved or validated under Section 7(1) of Madras Act 2 of 1927 we are not prepared to hold that any provision of Madras Act 1 of 1925 can be deemed to have been saved or continued under the replacing Act. None of the three sub-sections of Section 7 can govern the case in question, that is, to validate an alienation without the sanction of the Board. Nor can we hold that the Board constituted or continued under Madras Act 2 of 1927 had jurisdiction to retrospectively sanction an alienation made prior to its commencement.

25. We will now proceed to examine the jurisdiction of the civil court to decide whether a particular property belonged to the religious endowment or not. We are called upon to decide this aspect on the rival contentions of the parties that the action of the Assistant Commissioner in delivering possession to defendant No. 1 appellant before us under Section 68 of Orissa Act 2 of 1952 was valid or invalid. As a matter of fact this and the next question relating to the Jurisdiction of the Assistant Commissioner to deliver possession under Section 68 of the Act can be disposed of together conveniently and we propose to do so.

26. Section 68 of Orissa Act 2 of 1952 is to the following effect so far as material:--

"(1) Where a person has been appointed:--

(a) as trustee or Executive Officer of a religious institution, or

(b) .....

(c) . . . . and such person is resisted in or prevented from, obtaining possession of the religious institution or of the record, accounts and properties thereof, by a trustee, office-holder or servant of the religious institution who has been dismissed or suspended from his office or is otherwise not entitled to be in possession, or by any person claiming or deriving title from such trustee., office-holder or servant, other than a person claiming in good faith to be in possession of his own account ..... the Assistant Commissioner concerned shall on application by the person so appointed, direct delivery of possession of the religious institution and its endowments ..... in the prescribed manner."

An Explanation has been appended to the following effect:--

"A person claiming under an alienation contrary to Sub-section (1) of Section 19 and Section 24 shall not be regarded as a person claiming in good faith within the meaning of this section."

It is contended by Mr. S. C. Roy for the plaintiff-respondent in each case that the jurisdiction exercised by the Assistant Commissioner was in excess of what is vested in him under Section 68 of the Act. A person claiming to be in possession of some property even though belonging to an endowment in good faith on his own account does not become amenable to the Assistant Commissioner's authority under Section 68(1) of the Act The alienation in question was not one covered by the Explanation to Section 68 of the Act and, therefore, in a case where the person who resisted the trustee in his attempt to obtain possession claimed to be in possession in good faith on his own account under an alienation not prima facie indicated under the Act could not be forced out of possession by an order under Section 68 of the Act. He, therefore, contends that where the Assistant Commissioner acts in derogation of or in excess of authority vested in him under Section 68 of the Act it would be not a dispute covered at all under any of the clauses of Section 41 of the Act. According to him the different disputes specified in the various clauses, of Section 41 do not cover a case of the present type and where the sole question for determination is as to whether the resister to the claim of possession by the trustee contends to have been in possession in good faith on his own account has been evicted he cannot obtain relief under Section 41 of the Act. In other words can the Assistant Commissioner entertaining a dispute under Section 41 of the Act hold that the resister was in possession bona fide on his own account and, therefore, can he restore the dispossessed resistor to possession? We assume that a claim by the resister within the limited compass can be maintained even if the property may have been of an endowment. Therefore, a disposal of the dispute within the limited forum does not require the determination as to whether any property is of a religious endowment.

27. In the premises the irresistible conclusion seems to be that a suit questioning the action under Section 68 of the Act would be maintainable in the civil court and the bar under Section 73 of the Act that a civil court shall not have jurisdiction to entertain a suit for which specific provision is made in the Act cannot be raised to question the maintainability of the suit. It is too well known that the civil court has jurisdiction to examine whether it has jurisdiction and on that principle collateral facts necessary for determination to confer jurisdiction are allowed to be determined by the court.

28. In a little different background from the one in the present case a question of this type was being examined in AIR 1963 SC 1547. Firm Seth Radha Kishan v. Municipal Committee, Ludhiana. In that case the Act debarred any authority other than that prescribed under the Act from deciding the question of liability of any person to tax or his right to get refund of a tax paid. In short, the Act contained a self-contained code conferring a right, imposing a liability and prescribing a remedy for an aggrieved party. We have already indicated that the right on this question in the eventuality indicated does not appear to have been prescribed by the special Act. Even then when the question posed was as to the limit of the civil court's jurisdiction an answer came in the words of Subba Rao, J., as he then was, in the following paragraph:--

"Under Section 9 of the Code of Civil Procedure the court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. A suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."

This conclusion of the Supreme Court has recently been approved by their Lordships in AIR 1968 SC 271, Pabhojan Tea Ltd v. Dy. Commr., Lakhimpur where the entire principle has been rediscussed and the conclusion reached in the aforesaid paragraph has been stated to represent the law correctly.

29. This aspect of the matter, therefore, must be concluded by our saying that the remedy under Section 41 of the Act is not the remedy meant for the present redress in the suit and, therefore, the civil court had jurisdiction to deal with the reliefs claimed and the present suits were not hit by Sections 41 and 73 of Orissa Act 2 of 1952.

30. The next question is one relating to acquisition of title by adverse possession. Mr. Mohanty contended that with reference to the provisions of Section 134-B of the First Schedule of the Limitation Act, 1908, the cause of action to defendant No. 1 to obtain possession could arise only upon the death of the alienor, that is, defendant No. 2. Until then there could be no question of acquisition of title by adverse possession. The first aspect of the proposition is beyond dispute. But the second aspect of the proposition is open to objection and has been seriously challenged by Mr. Roy for the respondent. It is stated by Mr. Roy that the alienation was made at a time when there was no statutory inhibition. The property passed on to the hands of the original alienee and in partition came into the hands of the different plaintiffs. On the finding recorded by the courts below it has been in exclusive possession of the plaintiffs for long many years than what is necessary under the Statute for acquisition of title by adverse possession. We are satisfied that each of the suits is

within the period of limitation and as a matter of fact issue No. 7 raised in the suit has not been pressed in the courts below. We would, therefore, hold in respect of this question that the suits are within time and are not hit by Section 134-B of the First Schedule of the Limitation Act, 1908 in any manner.

31. Our conclusions, therefore, are:

(1) Madras Act 1 of 1925 was not a valid piece of legislation;

(2) The liability created tinder Section 72(1) of Madras Act 1 of 1925 was not saved by the subsequent legislation;

(3) The present suits were maintainable in the civil court and the lower appellate court rightly went into the matter and came to find that the Assistant Commissioner of Endowments had exceeded his jurisdiction while acting under Section 68 of Orissa Act 2 of 1952;

(4) The present suits are not barred by limitation.

32. On the aforesaid conclusions of ours, we are of the definite view that the lower appellate court was right when it decreed the suits of the plaintiffs and its judgment is not open to challenge in these appeals. These Second Appeals are, therefore, dismissed. In the peculiar circumstances of the case, we think it proper that parties would bear their own costs throughout.

S.K. Ray, J.

33. I agree.