# C.R. Palanidoss And 5 Ors. vs S. Arumugham And 11 Ors. on 18 March, 2003

## Equivalent citations: 2003(2)CTC10

## Author: Prabha Sridevan

## Bench: Prabha Sridevan

ORDER

Prabha Sridevan, J.

1. The suit is for declaration, injunction, delivery and possession.

2. The plaint averments are as follows:

> One Subbammal, W/o. Appavoo Chettiar dedicated the suit properties for performance of 'pradosha kattalai', 'thiruvilakku' and 'vasthram during the 'dwajarohanan', for the first plaintiff-temple, and for uthsavam and uchikala pooja, for the sixth plaintiff (originally the 12th defendant). Executors were appointed under the said Will. They erected a silasasanam in 'A' Schedule property. The properties have been absolutely dedicated for performance of the obligations mentioned in the Will. The executors were in management of the specific endowment and after their demise Kothandaramaswamy Chettiar, the first defendant in C.S.No.107 of 1970 was in management of the properties and also performing the 'pradosha uthsavam'. The plaintiffs were not in management of the properties. The family members of Kothandaramaswamy Chettiar filed C.S.No.107 of 1970 .for partition of 'A' Schedule property. A preliminary decree was passed. An application for final decree was also made. In the final decree proceedings, 'A' Schedule property was brought to sale. The plaintiffs seeing the auction notice made enquiries and found on the basis of the inscription that the properties had been absolutely endowed by way of specific endowment and that the suit properties are inalienable and there can be no partition suppressing the dedication. The plaintiffs in C.S.No.107 of 1970 were well aware of the dedication. The defendant Nos. 1 to 11 are the parties in C.S.No.107 of 1970 and after fixing the upset price at Rs.21,81,579 they intend to divide the sale proceeds without having any manner of right and are making an attempt to remove the silasasanam fixed in the property as there are no other document to show dedication to the plaintiff. Since the property had been dedicated to the plaintiffs they prayed for a declaration that the 'A' Schedule property is absolutely dedicated for performance of the religious charity in plaintiff Nos. 1 and 6 temples; for permanent injunction

restraining the defendants from bringing the 'A' Schedule property to sell by public auction; for delivery of possession of the property mentioned in A and B herein and for costs.

3. The defendant Nos. 5 and 6 did not contest the matter and their counsel reported 'No instructions' on 21.8.2002.

4. The third defendant filed a written statement on behalf of himself and the fourth defendant his son. According to this written statement, the suit for declaration and delivery of possession of 'A' Schedule property is not maintainable in law. The plaintiffs are quite aware of the defendants absolute ownership and enjoyment for over 100 years. The 'A' Schedule property is not absolutely dedicated to the performance of the religious charity. There was no specific endowment; the executors were not in management of the specific endowment. The allegation that Kothandaramaswamy Chettiar, S/o. Yegappa Chettiar was in management of the properties of the endowment and was performing pradosha utsavam etc., is false and fabricated one. Kothandaramaswamy Chettiar was one of the Upayakartha of the plaintiff and in the list of Upayakarthas published periodically by the temple it is stated as 'Kannarkadai Kothandarama Chettiar vahayara upayam' and not as 'Subbammal endowment'. Yegappa Chettiar became the owner of the property, his descendants continued in possession and the patta stands in their own name. Being a joint family property, C.S.No.107 of 1970 was filed and decree has been obtained. The claim that they know about existence of stone inscription was only on 24.8.1989 is false. The plaintiff concealed the relevant facts regarding the mortgage by executors and Court sale and purchase of the said property by Yegappa Chettiar and discharge of the debt. The executors had in fact no authority under the Will to create such silasasanam. One Subbammal W/o. Appavoo Chettiar was the owner of A, B and C Schedule properties. 'A' Schedule property consisted of 7 shops and a residential portion. During her life time Subbammal sold 1 ground 36 Square feet in 1825. She also sold the remaining portion to her brother's son Markanda Chettiar. She borrowed a sum of Rs.1000 on the security of the property from one Muthuswamy Chettiar. This mortgage was not discharged. She executed a Will, where she confirmed the mortgage debt and directed the executors to dispose of the property and discharge the debt and use the remaining portion for her funeral expenses. She had also directed to make provisions for contributions for Pradoshakattalai. The trustees of the temple knew about this and they never raised any issue for the past 130 years. They knew that since the executors failed to discharge the mortgage, the property was brought to sale in .O.S.No.203 of 1869 and Yegappa Chettiar, the defendants' grandfather had purchased the property and continued to enjoy the same as its absolute owner from 1869. The mortgage deeds executed by her and her executors in favour of the mortgagee, Muthusamy Chettiar have been filed in O.S.No.203 of 1869, which was a suit for recovery of mortgage debt payable by Subbammal. In 1828, the late Subbammal had sold away the property. Therefore, she ceased to be the owner of the property. Subsequently, Markandaya Chettiar had reconveyed the properties to Subbammal, and that is why the property was sold in Court auction for discharge of mortgage debt. The suit was decreed after considering the title and ownership with regard to 'A' Schedule property and it was brought to auction sale. There is no indication of the dedication of 'A' Schedule property. The alleged silasasanam is only an exaggerated and fabricated inscription created by the executors not in accordance with the terms of the Will but for defeating the creditors' interest. The defendant is one of the 'Upayakarthakkal'

mentioned in the temple and the plaintiffs had deliberately misinterpreted the word 'Upayakarthakkal'. The plaint 'A' Schedule property has been in continuous enjoyment of Yegappa Chettiar right from 1889 as owner paying municipal house tax in his name and was a subject matter of partition among his sons on 17.5.1939 and after partition, the plaintiff's father Kothandaramaswamy Chettiar had obtained the said property as and for his share and has been in enjoyment as absolute owner of this suit property. This suit property is shown as one of the properties of Yegappa Chettiar in the Income Tax Return. The defendants have in addition perfected their title as legal owners under Section 109 of the Tamil Nadu Hindu Religious and Charitable Endowments Act ('H.R. & C.E. Act' in short) as the property had already been vested in them. The suit is therefore, liable to be dismissed.

5. The seventh defendant filed a written statement adopting the written statement of defendant Nos. 8, 10 and 11 and praying for dismissal.

6. The defendant Nos. 8, 10 and 11 filed a separate written statement, which runs as follows:

> According to them there was no specific endowment. There was only a direction to the executors for performance of pradosha kattalai. Subbammal created a mortgage over 'A' Schedule property prior to the Will. She has specifically stated that the mortgage should be executed by the executors for selling those shops. Even after the selling of these shops, the mortgage was not discharged. The mortgagee filed O.S.No.243 of 1987 filed a suit against the executors. The executors by a registered instrument renewed the mortgage and undertook to discharge the mortgage on demand. The mortgagee filed another suit, C.S.No.203 of 1869. The mortgage suit was decreed on 4.5.1869. The mortgagee filed execution for sale of 'A' Schedule property. In these circumstances, the property was purchased by Kuppu Chettiar and Yegappa Chettiar, the ancestors of the parties to C.S.No.107 of 1970. The allegation that the property was in the management of executors and after their demise, the Kothandaramaswamy Chettiar, the first defendant in C.S.No.107 of 1970 came to be in management was false and any bequest can take effect only after discharge of the debts. The suit is not bona fide. The present owner of 'B' and 'C' Schedule properties have not been impleaded. The suit has been filed as blackmailing action in collusion to parties in C.S.No.107 of 1970, who are in possession of 'A' Schedule property. Since D3 and D4 are the affected by the order directing the sale of 'A' Schedule property, they have filed the vexatious suit. The suit is barred by limitation. The puja and rituals performed by the family of the Kothandaramaswamy Chettiar was out of their own volition and had nothing to do with the endowment, the endowment in the Will cannot render the property inalienable. The suit is bad for non-joinder of all parties, silasasanam is a fake one and the suit must be dismissed.
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> Pending suit, the 'A' Schedule property was sold in accordance with the orders of the Division Bench in the O.S.A. filed by the plaintiffs herein who got impleaded in the final decree proceedings in C.S.No.107 of 1970. The sale proceeds were directed to be deposited. The entitlement to it was to be decided in this suit.

7. The following issues were framed:

> "(1) Whether the suit property has been absolutely dedicated for performance of Religious Charities in Sri Muthukumarasamy Devasthanam and Mallikeswarar Temple?
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> (2) Whether the plaintiff is entitled to possession?
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> (3) Whether the dedication by a Silasasanam is true and valid?
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> (4) Whether the ancestors of the defendants particularly Mr. Kothandarama Chettiar was in management of the property as trustees of Specific Endowment?
>
> (5) Whether the suit is barred by limitation?
>
> (6) Whether the suit is bad for non-joinder of parties?
>
> (7) Whether the suit property set out in 'A' Schedule was sold to discharge the mortgaged debts of the testatrix Subbammal under the Will dated 15.6.1854?
>
> (8) To what relief the plaintiff is entitled to?"

Yogappa Chettiar (died in 1920) | _____ | | Kothandarmaswamy chettiar kanimuthu chettiar (died in 1970) (separated from HUF in 1939) | | _____ | | | | | C.K.Sanmugam C.K. Venugopal(D3) C.k. Balasundaram | | | =(K.B.Kuppurangammal) | | V.Swaminathan(D4) -deceased(D8) | (Son)S.palani(D5) T.T.Rajalakshmi(D9)_____| (Son)S.Arumugam(D1) R.R.Vijalakshmi(D10)_____| (Son)S.Deivasigamani(D2) V.R.Dhanalakshmi(D11)_____| (Son)s.Natarajan(D6) (Grand daughter)S.Vasanthi(D7) The Accountant of the first plaintiff was examined as P.W.1 and the Executive Officer of the sixth plaintiff was examined as P.W.2. The fourth defendant gave evidence as D.W.1 and the husband of the eleventh defendant gave evidence as D.W.2. Exs-P1 to P10 were marked. Exs-D1 to D27 were marked.

9. Issue Nos. 1 and 3:

> There is no dispute that Subbammal had title to the suit properties. There is no dispute either that she wrote the Will. According to the plaintiff Subbammal created endowments in their favour under the Will. According to the defendants, Subbammal had directed the executors to discharge the mortgage debt and that culminated in the auction sale where the property was purchased by their ancestors. So the Will is the source of the claim made by both the parties. The crucial words in the Will of

Subbammal are as follows:

(ii) The learned counsel for the defendant Nos. 3 and 4 and the learned counsel for the defendant Nos. 10 and 11 submitted that there was no vesting of property and therefore, no specific endowment was created. According to them, Subbammal had not divested her right, title in favour of anyone. M.R. Goda Rao Sahib v.The State of Madras, 1966 (1) MLJ 145(SC)) was relied on, where it was held that, "a specific endowment attached to a math or temple may consist merely of a charge on property. It is not necessary that there must be a transfer of title or divestment of title to the property."

(iii) In that case, a settlement of the year 1914 provided that the properties would be responsible for meeting the expenses of charities specified therein and provided that the balance was taken by the male members. The Supreme Court held that, "it cannot be treated as an endowment of a percentage of the total income."

Subbammal, on the other hand, did not bequeath the properties to anyone after the expenses of the charities were met.

(iv) The learned counsel for the plaintiff on the other hand relied on Byreddi Narasi Reddi v. Thamballa Balamma, , the following paragraphs in particular:

"A deed was executed in favour of a person describing him as a manager of particular temple for the time being. The purpose of grant as indicated was performance of certain rites or service in the temple. The income from the lands granted was however found to be very meagre. The instrument did not quantify the expenditure to be incurred for performance of specific services and did not also indicate, how the surplus, if any, was to he disposed of.

Held on construction of the document that there was a complete dedication to the temple."

(v) The nature of a grant is to be ascertained from the material terms used in the document and by asserting the true intentions of the parties on a fair and reasonable construction as a whole. It is seen from a reading of Ex-D11, the Will that the testatrix was a strong person with a clear idea of what she had to do and what she intended to do with her properties. She knew exactly what were her liabilities; she knew what her assets were; she indicated clearly who should do her obsequies; she indicated that her nephew Tharagu Ayyasamy Chettiar should have the benefit of income from the suit properties after the expenses for the temple sevais are performed. She even indicated to whom her nose-ring should go viz., Subbaraya Chettiar who is her gothra kinsman. Such a person would have clearly spelt out to whom the properties should go if her intention was only to give a direction that these temple charities were to be performed. It is abundantly clear that her intentions were otherwise. She had no issues. That is why, the adopted son of her deceased brother's wife was selected by her to do her funeral rites. She had also quantified the amounts that should be given to

him for performance of those rights.

(vi) The second paragraph of the Will, which is extracted above divides her properties into two categories. The one group consists of 5 shops on the northern side and the other group consists of her house and two shops. A dharma grant was created in respect of the suit properties and the executors had to perform the kattalai from and out of the rent from 'A' Schedule property for the first plaintiffs temple and the charities from the rent of 'B' Schedule property and the rent from 'C' Schedule property to be spent for the pooja for sixth plaintiff temple. The two shops and the house is the 'A' Schedule property, the chatram in Tiruvottiyur is the 'C' Schedule property and the house in Muthialpet is the 'B' Schedule property. With the rental income, the executors had to give 3-8-0 to her nephew Ayyasamy Chettiar,

(vii) The third clause says that after giving this monthly amount to Ayyasamy Chettiar from and out of the income generated from 'B' Schedule property, the pradosha kattalai, thiruvilakku kainkaryam, vasthram, dwajarohanam during brahmortsavam and wages to persons working in Tiruvottiyur Chatram and samarathanai to the Temple should be done. Finally she has said even the amount that she had directed to be given to Ayyasamy Chettiar had to be paid only for his lifetime and thereafter, it should be used for the aforesaid dharmas. There can be no doubt that Subbammal created an endowment and the properties were endowed for the benefits of the charities and the income to go completely for the performance of the charities after the lifetime of Ayyasamy Chettiar.

(viii) The fourth clause of the Will makes it clear that it was only the house in the 'A' Schedule property that she had given as security to Muthusamy Chettiar and the executors were given the power to sell the other five shops. The 'Will' does not provide for sale of the two shops and the house. The seventh clause makes a modification of the earlier clause with regard to the 'C' Schedule property and it is stated that though under the second paragraph she had directed payment of 3-8-0 to Ayyasamy Chettiar for his lifetime, since he asked to receive the rents in respect of the 'C' Schedule property in his lifetime he was permitted to do so. Therefore, the direction given under the 2 and 3 paragraphs of the 'Will' must be ignored since the latter bequest will prevail over the former. So the property was totally endowed for the performance of the charity free of even the obligation to pay 3-8-0 to Tharagu Ayyasamy Chettiar.

(ix) As regards 'C' Schedule property, Tharagu Ayyasamy Chettiar was given the right to receive the rents for his lifetime and with the rents he had to pay the tax and take care of the maintenance and give the bills therefor, to the executors as long as he lived. After his lifetime, the executors would receive the rents and use it for the Thiruvillakku kainkaryarm and even the brass vessels and the wooden vessels had to be given to the sixth plaintiff.

(x) The only contemporaneous evidence that we have of the 'Will' is the 'Silasasanam'. The silasasanam was attacked as being fraudulent and as having been put up to evade the creditors. But for that there is no proof. The silasasanam is of the year 1856. D.W.1 has spoken about the silasasanam and he has merely said that silasasanam was in front of the 'A' Schedule property and was visible to everyone and that Subbammal has not stated in her Will that the executors should keep the silasasanam. The witness volunteered that the executors have not mentioned the mortgage

in the silasasanam. In cross-examination, he has stated that the silasasanam was there in front of the passage and it is on the left side as one approaches and visible to all. The said silasasanam was installed by the executors.

> "It was there till 1991 when we vacated the property. The photographs alongwith the negative alone in Ex-Pi is the silasasanam. The temple authorities took the silasasanam and placed it inside the temple that is in the sannidhi of Vinayaga."

(xi) D.W.1 has stated that it is found in Ex-Pi that Subbamma's executors have installed the stone inscription. The silasasanam reads as follows:

> (x) According to the defendants, the silasasanam does not mention the mortgages and cannot be relied on and the silasasanam itself was put up only to defeat the rights of the creditors. There is nothing to support this case. Anyway, the silasasanam is only a public declaration of an endowment. It need not deal with all the encumbrances upon the properties. Soon after Subbammal's death the executors thought it fit to make a stone inscription and affixed it in front of the property for all the world to see, to show that this property was inalienable and had been dedicated permanently by Subbammal for performance of certain kattalai to the plaintiff.
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> (xi) Subbammal did not provide that her properties should go to anyone after the expenses of the kattalai and pooja are incurred. So the beneficiary under the Will were the temples.
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> (xii) The silasasanam is clear evidence of how the Will was understood and acted upon by the executors. A reading of the Will shows that the executor, Mottai Chettiar enjoyed the total trust of the testatrix. So the installation of the silasasanam is a clear indication of the intention of the testatrix. Therefore, the trustees who had been given the properties intended that there should be a hereditary trusteeship of the charities created by the testatrix.
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> (xiii) In Hindu Law & Usage at page 1165, para No.837 it is stated that in order to create a valid dedication a trust is not required. An appropriation of property for specific religious or charitable purposes is all that is necessary for a valid dedication. The dedication may be absolute or partial.
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> (xiv) In M.R. Goda Rao Sahib v. The State of Madras, 1966 (1) MLJ 145 (SC), it was held that, a "specific endowment" attached to a math or temple may consist merely of a charge on property. It is not necessary that there must be a transfer of title or divestment of title to the property."

In that case, since the settlement provided by the male members of the family, the Supreme Court held that it cannot be treated as an endowment of a percentage of the total income. In this case, the bequest is absolute and Subbammal did not intend anyone else to have any right in her properties

except for the life interest of Tharagu Ayyasamy Chettiar.

Thus, issue Nos. 1 and 3 are answered in favour of the plaintiff.

10. Issue No.7: The defendants are concerned only with 'A' Schedule properties. So the submissions made are only with regard to that property. They deny that there was an endowment and would say that even if there was an endowment, the executors themselves, as per the wish of the testatrix had sold the properties to discharge the mortgage deed and that their ancestor Yegappa Chettiar had purchased the property in Court auction and had been in possession and enjoyment for over 150 years and therefore, the property belonged to the descendants of Yegappa Chettiar.

(i) On the other hand, the learned counsel for the plaintiff would submit that there was absolutely no proof that Yegappa Chettiar had purchased the property in Court auction, the documents only show that he was a mortgagee in possession and until 1963, atleast his name found a place in the records only alongwith the executors of Subbammal's Will and therefore, their case that it was sold has not been proved.

(ii) According to the pleadings, it is clear that the present trustee do not know about the mortgage or a sale in Court auction. In the written statement filed by the third defendant it is pleaded that since the executors under Subbammal's Will has failed to discharge the mortgage the property was brought to sale in O.S.No.203 of 1869 and that Yegappa Chettiar, the defendant's grandfather has purchased the said property and he continued to enjoy the sale as its absolute owner right from 1869.

(iii) In the written statement filed by the defendant Nos. 8, 10 and 11, it is stated that the mortgagee filed C.S.No.203 of 1869 against the executors and that the mortgage suit was decreed on 4.5.1869 and that the mortgagee filed an execution for sale of 'A' Schedule property and that in these circumstances, the property was purchased by Kuppu Chettiar and Yegappa Chettiar, the ancestors of the parties to C.S.No.107 of 1970 and that they have been in uninterrupted possession for over 130 years. The plaintiff claims that Subbammal endowed the property for performance of certain performance of 'kattalai' and the defendants had stated that the executors under Subbammal's Will have purchased it from Court-auction. Therefore, the defendants would have to prove that there was a purchase.

(iv) D.W.1, who is the fourth defendant would state that his ancestors were tenants in 'A' Schedule property and had purchased it in Court auction in 1870 and that the public auction had taken place in front of the Temple and since tomtom was issued, everyone knew about this auction and that when Yegappa Chettiar purchased the property, the mortgagee had given all documents of title through the High Court. In his cross-examination, he admitted that he has no personal knowledge about all these facts. According to him, the "A" Schedule property was purchased by Yegappa Chettiar on 26.1.1870. Ex-D14 refers to the expenses of the Sheriff of the High Court for conducting the auction. According to this witness, his ancestors had the sale certificate, but he has not seen it. He has admitted that no document has been filed to show that Yegappa Chettiar has purchased the property in the Court auction.

(v) Exs-D24 and D25, which are of the year 1884 and 1888 are rental agreements in favour of Yegappa Chettiar and according to the defendants, this would show Yegappa Chettiar has title and enjoyed property. But on behalf of the plaintiff it was submitted that in Ex-D24 and D25, Yegappa Chettiar is not described as the owner. In his chief-examination, D.W.2 retracted the statement made in the written statement that "A" Schedule property was purchased by Kuppu Chettiar and Yegappa Chettiar and said that the property was purchased only by Yegappa Chettiar. In cross-examination, D.W.2 said that it was he who gave the information that Kuppu Chettiar and Yegappa Chettiar were the owners and the witness added that it was a mistake. It was also elicited from him that the Kuppu Chettiar mentioned in Subbammars Will may be the same as the Kuppu Chettiar referred to in the written statement.

(vi) Ex-D 12 is the registered mortgage deed executed by Thiagaraya Chettiar and Motlal Chettiar in favour of Muthusamy Chettiar. It is stated therein that they had sold the five shops and since there was still amounts due under an earlier mortgage executed in Muthusamy's favour, Muthusamy had filed O.S.No.240 of 1867. In that suit a compromise was effected whereunder the executors had mortgaged the two shops and the house, promising to pay the amount. Ex-D13 are the decree and orders dated 4.5.1869 granting a decree for 473-7-9 and that on default of payment of this amount the property could be brought to sale. It is seen from Ex-D13 that the immovable property has been attached and the copy of the said order was fixed at the entrance of the High Court and at the office of the Collector of Madras. Notice of the attachment was ordered on 13.7.1869 returnable on 9.1.1870.

(vii) Ex-D14 is a document on which strong reliance was placed. It lists the Sheriff's charges, for preparing advertisement, for making four copies for affixing the copy at the Collector's Cutcherry, for inserting Advertisement in the Fort Saint George Gazette and for 100 Hand Bills. This is dated 1.3.1870. The day after Ex-D14, the rental agreement, Ex-D15 was executed. Therefore, according to the defendants this would show that there was indeed a Court auction sale.

(viii) The other documents relied on are;

(a) Ex-D 16, which is the permit given by the Madras Municipality to make improvements and the name of the applicant is shown as C. Yegappa Chettiar.

(b) Ex-D 17, which is a notice of assessment issued by the Corporation of Madras in the year 1913 and 14 where the owner's name is shown as Yegappa Chettiar.

(c) Ex-D 18, which is dated 24.8.1939, the assessment by the Income Tax Department where the property at Nainiappa Naicken Street is referred to.

(d) Ex-Pl9 is the notice under Section 11(1) of the Madras Urban Land Tax Act, 1966 dated 28.10.1969.

(e) Ex-P20 is the Urban Land Tax Assessment of suit property and here as against the name of the owners, the defendants' are shown.

(f) Ex-P21 is an extract from the permanent land register which also shows the defendant's name as name of the owner. According to the defendants, though the sale certificate is not produced, documents to show the events leading up to the sale have been produced and also documents to show that Yegappa Chettiar dealt with the property as owner after 1870 and so the inescapable conclusion is that there was a sale.

(xi) As against this, the plaintiff marked some documents which were actually filed by the defendants. Ex-P5, which is the extract from the permanent land register of 1919, in which the name of the owner is shown as Balu Chettiar as executor to the Will of Subbammal and name of the occupier is shown as Yegappa Chettiar, mortgagee with possession. Ex-P6 is dated 7.11.1919 a letter written by Yegappa Chettiar to the Officer-in-charge of the special survey land records in which he has objected to the register showing Balu Chettiar's name and he has stated that, "I am in enjoyment and possession of the property for nearly 50 years. I am paying all taxes to the Government. I am collecting the rent. I am the real owner of the property."

(x) Ex-P7 is the Summons to Yegappa Chettiar calling upon him to attend the hearing before the Land Records Tahsildar with title deeds and documents relating to this property. Ex-P8 is the Orders of the Assistant Commissioner under Section 18(2) of the Madras Urban Land Tax Act, 1963 in which the name of the owner is shown as S. Balu Chettiar as executor of the Will of Subbammal. It shows Balu Chettiar's name alone in the provisional list published under Section 16(3) of the Madras Urban Land Tax Act and Balu Chettiar's name alongwith the defendants' name in the provisional list modified under Section 18(2) of the Madras Urban Land Tax Act. Against this, a revision was filed. The memorandum of revision petition marked as Ex-P9, reads thus:

> "The property has been dealt with as ancestral property and allotted to the members of the petitioners' family and ultimately enjoyed by the petitioners alone,...
>
> 8. The Asst. Commissioner having been satisfied about the title and possession of the petitioners and having included the names of the petitioners as assessees, ought to have deleted the name of S. Balu Chettiar, as executor, who must have died about a century age and his executorship cannot continue beyond his lifetime."

(xi) Ex-P10 is a letter dated 15.11.1920 from the Tahsildar of Madras to Sri P. Venkataramana Rao, High Court Vakil. The following extract is relevant:

> "The name of Balu Chettiar as Executor to the Will of Subbammal and that of Yellapah Chetty as Mortgagee with possession in respect of the above property have been registered in the permanent Land Register. If you forward to me documentary evidence to prove that the property has been absolutely transferred to your client C.C. Egappa Chetty your request to transfer registry in his name will be complied with."

(xii) The provisions relating to sale of immovable property contained in Order 21 of the Code of Civil Procedure are quite elaborate. The sale becomes absolute only when the Court makes an order confirming the sale and a certificate is issued to that effect by the Court specifying the properties

sold and the name of the person who at the time of sale is declared to be the purchaser, such certificate shall also bear the day on which the sale became absolute. The sale certificate has not been produced and curiously even Yegappa Chetty while responding the Tahsildar's Summons to produce the documents merely says that he has been the owner of the property for the period of over 60 years. If he had really purchased the property by Court auction he was the best person to speak of the date of purchase and to produce the sale certificate. The Code of Civil Procedure also provides for stoppage of sale, if the debt and the costs are tendered to the Officer conducting the sale or proof is given to his satisfaction that the amount of such debt and costs have been paid in the Court which ordered the sale.

(xiii) The learned counsel for the plaintiff submitted that the possibility of Yegappa Chettiar depositing this amount into Court to stop the sale cannot be ruled out. It was submitted that Yegappa Chettiar belonged to the Kannarakadai family, to which Kuppu Chettiar, whose name is mentioned in the Will belonged. This family was in possession of the shops. Fearing that they would be dispossessed by third party purchasers at the Court-auction, they might have deposited the amount and obtained a satisfaction from the mortgagee. When there is no document to show that the sale was conducted the above. hypothesis must be accepted. It acquires greater evidentiary strength, since Yegappa Chettiar's name is found either under the heading 'occupier' or as 'mortgagee' with possession in the statutory notices, etc. The defendants are unable to show that there was a Court auction sale and one cannot presume that there was a Court auction sale.

(xiv) In addition, under her Will, Subbammal desired that the properties should be used for the dharmams. The executors had informed by the silasasanam that the right to manage the property must devolve as a hereditary right. The executor's right to carry out the charities must have devolved hereditarily. That is why one Balu Chettiar's name is found under the caption 'executor' under the Will of Subbammal. Originally S. Thiagaraya Chettiar and Kadankulam Mottai Chettiar were nominated as executors. This Balu Chettiar whose name is found even in revenue records had probably inherited the right to manage the suit properties after the exectuor, abovenamed. That is why he is also called executor of Subbammal's Will. In Yegappa Chettiar's letters there is nothing to show that this Balu Chettiar has no consideration to Subbammal's Will. All that it says is he has been in enjoyment of 'A' Schedule property. If Balu Chettiar was a stranger, Yegappa Chettiar would have been the first to point it out. Yegappa Chettiar merely says that he has been in possession and enjoyment, that he has been collecting rents and that he is the owner. These statements also indicate that there was no sale.

(xv) Any person who had purchased a property and has a sale deed or a sale certificate as evidence would first refer to that and state that he is the owner of the property having purchased it on such and such a year, on such and such a month at the Court auction sale held in execution of the decree in O.S.No.203 of 1869. But in none of the documents such recitals are found. A Court auction sale cannot be presumed. Perhaps, Yegappa Chettiar paid off the mortgage dues of Muthusamy Chettiar and became the mortgagee in possession.

The events relate to something that happened 130 years ago. All the documents are not available. So one has to draw the more plausible and legally sustainable inference. There is no sale certificate. In

none of the documents is there a reference to the date of court auction. The rental agreements do not describe Yegappa Chettiar as the owner. The so-called owner never removed the silasasanam which declares that the property is endowed and so inalienable.

(xvi) The statement made by D.W. 1, that it has not been mentioned in the silasasanam that 'A' Schedule property is absolutely endowed to the temple, deserves to be rejected because the silasasanam, in fact casts a curse on the persons, who acts in violation of the Trust. D.W.2 had pleaded in his written statement that Kuppu Chettiar and Yegappa Chettiar had purchased the property together. He retracted this statement while giving evidence. A suggestion has been put to D.W.2, that the 'A' Schedule property had been maintained by Yegappa Chettiar after the death of Kuppu Chettiar. This question was strongly opposed by the defendants that, that is not what the plaintiffs had pleaded. But according to the plaintiffs, they had stated that the executors were in management of the property and thereafter, Kothandaramaswamy Chettiar, the first defendant came to be in management. Apart from stating that the defendants belonged to Arya Vaisya Community whose members are very religious and would have in any way contributed the 'pradosha kattalai', the defendants have not been able to refute the plaintiffs claim that this 'pradosha kattalai' was performed by them for four generations only in accordance with the Will. The silasasanam is an almost contemporaneous evidence of the endowment and the fact that the Will came into effect, the Court documents that were marked by the defendant only show that the property was attached and there was notice of sale; but there is nothing to show that there was in fact a sale. If there had been a sale, the notice thereof would have been forwarded to the Collector's Office etc., and the Tahsildar and the Collector would not have asked the ancestor of the defendant to produce the documents to show his title. This does not mean the conclusion is based on surmises. Even after the Clerk from the Tahsildar's office had written to the learned Advocate of Yegappa Chettiar to forward the documents of title, so that necessary corrections would be made to the entry of Yegappa Chettiar, as a mortgagee in possession, the records were not changed until 1963. This only shows that Yegappa Chettiar had no document to show that the title had passed. He was fully aware that he was only a mortgagee in possession of the properties over which an endowment had been created, the beneficiary being Sri Muthukumaraswamy Devasthanam.

(xvii) Since the question whether the defendant had proved the purchase by Court auction was very crucial and since the alleged date of purchase was said to be in 1870, I thought it might be of interest to see how the defendant could have proved the sale and traced backwards the legal position.

Under Section 89(2) of the Registration Act, the Court granting a sale certificate of immovable property under the Code of Civil Procedure, V of 1908, shall send a copy of such certificate to the registering officer, and such officer shall file the copy in his book No.1. The intention behind this provision is evident. But this Section did not find a place in the Act originally.

The Registration Act, XVI of 1908 consolidates all the enactments relating to the registration of documents. Section 17(2) of the Registration Act, which deals with the registrable documents states clearly that it does not apply to sale certificates. This clause corresponds to Clause (o) of Section 17 of the Registration Act III of 1877 and it was added in that Section only by the Amending Act VII of 1888.

Sanjeeva Row's Registration Act, 1 Edition states that this provision was to be construed as if the amendment made in Act 3 of 1877 had been made therein by Act 12 of 1879 before the Act of 1978. Only after the amendment in 1888, a sale certificate when tendered in evidence is admissible eventhough unregistered. So before that there was a difference of opinion as to whether a sale certificate needed a registration.

The question regarding admissibility of an unregistered sale certificate was considered by a Full Bench in Srinivasa Sastri v. Seshayyangar, ILR (3) Mad. (1878) 37 and the Full Bench has held that, under Act 8 of 1859, Section 259 and Act 20 of 1866, Sections 17 and 42, it was necessary to register the certificate of sale itself and not merely the memorandum of certificate of sale. In that case, the plaintiff had purchased a portion of a property, which was brought to sale in execution of a money decree. A certificate of sale was issued. Subsequently, he filed a suit for partition. The defendant resisted and would limit the plaintiff to the right, title and interest of the first defendant, which was less than the plaintiff's claim. The plaintiff had to show clearly what he purchased; he could not do this without the best available evidence, which is the sale certificate. But the sale certificate was not registered. The judgment begins with the line:

> "The Court Turner, C.J., Innes and Kernan, JJ.) delivered the following judgments:--
>
> Innes, J.-- Under the Act of 1866, Section 17, the certificate of sale required to be registered. The registration of the memorandum of the order was not sufficient. This has been held in Bombay and in several cases in Madras which I recollect, but, which are unreported A ruling to this effect was made and is reported in the Appendix to the 6th Volume of Madras High Court Reports, p.39, and that the matter was carefully considered is apparent from its being expressly mentioned that the Judges were induced by the general importance of the question to depart from their usual practice of declining to express an extra-judicial opinion.
>
> The Act governing in this case is the Act of 1866.(See explanation, Section 50 of the Registration Act of 1877.) The certificate, therefore, is not admissible in evidence."

Therefore, it was held that the suit failed for want of registration of this document.

This is just a de-tour made to find out what the law was in 1870 and what is the best evidence that the defendant could have produced to show their title. Even an unregistered sale certificate was inadmissible according to the law on that date. In the absence of any document to show that there was even a Court auction, the defendants' case cannot be accepted.

Therefore, this issue is also held in favour of the plaintiff.

11. Issue No. 5:

> According to the defendants the suit is barred by limitation. Their ancestors had been in possession for more than 100 years and therefore, the plaintiff has lost whatever

right he might have had. Adverse possession was not pleaded and no issue was framed on that question. The learned Counsel for the defendant Nos. 10 and 11 submitted that the pleadings must be construed as a plea of adverse possession. But even in evidence, the question of adverse possession was not established or proved. The learned counsel for the plaintiff on the other hand submitted that Section 10 of the Limitation Act and Section 109 of the H.R. & C.E. Act would save the suit from being time-barred.

(i) In Jammi Raja Rao v. Sri Anjaneya Swami Temple Valu, 1992 (2) SCC 14, the Supreme Court referred to the Section 103 of the A.P. H.R. & C.E. Act, which is similar to the above, runs thus:

"In order to succeed the appellant would have to establish that he had acquired the right over the suit properties by prescription before September 30, 1951 .. or that it vested before that date."

(ii) In this case, there is no plea with regard to adverse possession. Even assuming that the defendants had been in the suit property for over 100 years, there is nothing to show that they were holding the property adverse to the title of the real owner. In fact, since they had never removed the silasasanam, but had continued to occupy or enjoy the property with the silasasanam embedded in it, there was nothing to show any overt act of hostility to the real owner. When the Tahsildar addressed Ex-P10 asking Yegappa Chettiar to forward his documents of title Yegappa Chettiar, was content to let the status quo continue with Balu Chettiar's name shown as owner and his name shown as mortgagee with possession. It is only in 1960, that his heirs seek modification of the amendment. Modification is effected, not by deleting the name of Balu Chettiar, but by including the defendants' names alongwith him (Ex-P8). Therefore, we do not know if and when the property vested in them. The H.R.&C.E. Act uses the word 'vest'. The Section deals with the right to resist recovery of possession, so one must understand the word 'vest' as being possessed with the legal right to the property either by transfer of title or by prescription and for that there has to be clear proof.

(iii) In Srinivasa Reddiar v. N. Ramaswamy Reddiar, , the application of Article 134B of the Limitation Act to alienation of endowment property was considered; and it was held that the successor, who challenges the alienation must prove the property belongs to the religious endowment. This has been proved in this case. The other findings do not apply to this case, because the plaintiffs do not admit any previous alienation, their case is that they came to know that the defendants are trying to divide the property amongst themselves only after the auction notice.

(iv) In 5.5. Kavaraya Community Endowments v. Vellayappa Pillai, 1978 (1) MLJ 354, it has been held by the learned Judge that unless the defendants can show that the property had vested in them by adverse possession prior to 30th September, 1951, there was no question of the plaintiffs title to the property being lost by the law of limitation in view of Section 109 of the H.R. & C.E., Act. In this case, the defendants do not plead adverse possession. They only plead limitation, but are unable to prove if it vested in them and if so, when it did.

(v) With no evidence to show that the property vested in the defendants before 30.9.1951, the plaintiffs are definitely entitled to take advantage of Section 109 of the H.R. & C.E. Act and claim that nothing in the law of limitation could defeat their right for recovery of possession.

Therefore, this issue is answered against the defendants.

12. Other Issues:

> The learned counsel for the plaintiff also relied on Section 90 of the Indian Trusts Act, which deals with the advantages gained by a qualified owner like a tenant for life, co-owner, mortgagee or other qualified owners of any property.
>
> (i) In Suryanarayana Iyer's, The Indian Trusts Act, 5th Edition, the following passage is found:
>
> "This section raises a constructive trust where a qualified owner of property obtains an advantage by reason of his possession in favour of person holding interest in the property.
>
> Specifically, with regard to mortgagee it says the mortgagee stands in a fiduciary possession and he cannot avail himself of his position as such to gain an advantage in derogation of the rights of the mortgagor. He must hold any advantage so gained in trust for the mortgagor."

(ii) In Padmanabha Bhatta v. H. Ramachandra Rao, it is held as follows:

> "Where property belonging to a temple is held by a Hindu family as trustees of the said property and in the original partition in the family evidenced by a deed there is a clear recital that the property is the deity's 'uttara' (which means, 'full fee simple') property incapable of being alienated then any subsequent treatment of the property on the footing that it is joint family property will not amount to an assertion of claim adverse to the trust as such.
>
> ... The word "person" in Section 10 includes joint family. If the properties in the hands of the family are impressed with the character of trust, the trustee-family, by becoming sub-divided, cannot throw out that character. If, by the arrangement in the family, one person is to discharge certain religious duties, that does not mean that the family as such renounced the trusteeship and the other members can claim to be holding trust properties adversely to the trust. By mere assertion it is impossible to prescribe a hostile title against the trust because the assertion must be against a person who would be entitled to face the opposition and get rid of that assertion."

(iii) In Vagesa Mudaliar (Dead) & 3 others v. Dakshinamurthy, 2002 (4) L.W. 370, the Division Bench of this Court held that when total dedication of the property is made under the deed, not even

a minuscule of income is set apart for any other purpose, the conclusion is that the properties are trust properties and alienations in derogation of the trust cannot be supported.

(iv) The descendants have admittedly been performing the specific charities that are mentioned by Subbammal. According to the plaintiff, they were doing these charities in accordance with the terms of the Will In fact, according to learned counsel for the plaintiff, Kannarakadai Vallam Kuppu Chettiar was appointed as an executor and the defendants being his descendants were equally bound by the directions in the Will. However, the witnesses would say that they were doing it on their own accord. D.W.1 has admitted in his evidence that in Subbammal's Will, the 'pradosha', 'kattalai thiruvilakku' and 'vasthram' has to be performed by the executors from the income derived from the property. He also admitted that they had been doing the pradosha uthsavam, but he added that it is not because of any recital in the Will. According to him, for four generations they had been performing this particular 'uthsavam'. He is unable to say why this particular uthsavam had been performed. It is relevant to note that the descendants are 'doing on their own accord' allegedly, the same poojas or utsavams specified in the Will.

(v) The learned counsel for the defendant Nos. 3 and 4 would strenuously contend that the discharge of the mortgage had priority over the bequest and that assuming without admitting mat, Subbammal had bequeathed her properties to the temples and created a trust, if the properties were sold to discharge the mortgage and there was nothing left, then the temple cannot claim anything. But in this case, there is no evidence to show whether there was a Court auction and if there was a Court auction, how much was realized, if there was balance remaining after satisfaction of the decree debt and whether such balance would not form an endowment etc. These questions have to be answered by the defendants who claims that their ancestor purchased the suit property.

The counsel for the defendants also raised the question of maintainability in view of the provisions of the H.R. & C.E. Act. This was answered by the learned counsel for the plaintiff by relying on (a) Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi, , where it is held that the party seeking to oust jurisdiction of ordinary Civil Court must establish its right to do so; and (b) on Sri Venkataramanaswamy Deity of Kothur v. Vadugammal, 87 L.W.481(DB), where it was held that the preponderance of authorities is that a civil suit is not barred in respect of a relief which cannot be granted by the Deputy Commissioner and that "Relief as to title cannot be had before the Deputy Commissioner and at any stage, a suit for declaration of title is maintainable in a Civil Court." The question raised in this case regarding the title and the court auction sale cannot be decided by the Authorities under the H.R. & C.E. Act. So the suit is not barred.

(vi) The decisions referred to above and the extracts also support my conclusion that there was a dedication. There are reference to the mortgage and to a life interest to Tharagu Ayyaswami, but there must be a vesting of the property. If one were to accept the defendants' case that there was no endowment, then the property, which remained after the discharge of the mortgage, will hang in vacuum; Subbammal obviously was under the impression that after the mortgage debt was discharged, the properties would be available for generating the income, for performance of kattalai and pooja, so the 'dharma grant' was intended to be an endowment.

(vii) The defendants have raised the question of court-fee in the written and oral submissions. But there are no pleading objecting to the court-fee, no issue was framed. So this question does not arise for consideration.

(viii) The plaintiffs have proved their title and the defendant have not proved that they had purchased the property or that the law of limitation would operate to defeat the rights of the plaintiff. So the declaration sought for is granted.

(ix) As regards the injunction, this relief has become infructuous since the Court auction sale was conducted by order of the Division Bench of this Court and a sum of Rs.21,81,579 was realized and is kept in deposit to await the result of this suit. So this relief will have to be modified keeping in mind that a trust property should be protected by Court. In Sri. Madhavaperumal Devasthanam v. Smt. Dhanalakshmi & Ors. 1996 (1) L.W. 231 it is held that, "It should not be forgotten that an idol is in the position of a minor. A person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interests. The principle would certainly apply in a case where the persons in management of a temple have not been as diligent as is necessary in conduction a litigation on behalf of the temple. The court can take notice of the fact that Executive Officers who are put in charge of the temple are changed periodically and in many a case, they do not get fully acquainted with the history or affairs of the temple. If there is some slackness on the part of the Executive Officer or even the trustees of the temple, it is the duty of the Court to see that the idol does not suffer thereby. Courts should be astute to protect the interests of an idol in any litigation."

These observations have also been borne in mind while granting this relief. The amount in deposit shall be invested in a Nationalized Bank in the name of the first plaintiff-A/C. Subbammal Charities and the interest shall be utilized for the performance of the charities mentioned in her Will. The plaintiffs may seek clarifications if necessary by filing appropriate application in this suit regarding the investment of the sale proceeds.

(x) As regards 'C' Schedule property, the plaint does not ask for recovery of possession with regard to 'C' Schedule property. As regards 'B' Schedule property, the plaintiff is not aware of the persons who are in possession and has not impleaded the persons from whom recovery of possession should be obtained. A decree can be granted against nobody. Therefore, the relief of recovery of possession of 'B' Schedule property is not granted to the plaintiff.

The suit is decreed as above with costs.