M. Kesava Gounder (Died) and ors. Vs. D.C. Rajan and ors.

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Court : Chennai

Decided On : Jun-21-1974

Reported in : (1976)1MLJ56

Appellant : M. Kesava Gounder (Died) and ors.;chinnammal and anr.

Respondent : D.C. Rajan and ors.;d.C. Rajan and ors.

Judgement :

T. Ramaprasada Rao, J.

1. The first defendant in O.S. No. 146 of 1963 on the file of the Additional Subordinate Judge of Salem, is the appellant in A.S. No. 846 of 1967. Defendants 3 and 4 in the said suit are the appellants in A.S. No. 13 of 1968. The first plain tiff is the brother-in-law of the first defendant (sister's husband) and the second plaintiff is the concubine of the first defendant's father. The second defendant is the first defendant's brother. The third and the fourth defendants are the alienees of some of the suit items of properties and the rest of the defendants are either alienees from the first defendant of some other items of suit properties or the tenants in occupation of one or the other items of the suit properties. The father of defendants 1 and 2 is said to be a leader of Vanniakula Kshatriya community in the village and is said to have earned a reputation of his own. He had considerable properties and under Exhibit B-1, dated 4th September, 1929 he effected a partition as between himself, the first defendant and other co-parceners of the family. It is some items of the properties which the first defendant obtained in the said partition, which are the subject-matter of a trust created by him under Exhibit A-1, dated 16th June, 1951. Under Exhibit B-2 it is said that Muthu Goundar himself executed a settlement in respect of some other properties with which we are not concerned in favour of the first defendant. It is also stated that in or about June, 1951 the first defendant has executed a gift deed of some of the properties obtained by him from his father in favour of his sister, who is the wife of the first plaintiff. Exhibit B-44 is the registration copy of the said gift-deed. On the basis of the above documents as also the oral evidence subsequently let in by the plaintiffs, it is claimed that the relationship between Muthu Goundar, the father, and the first defendant, the son, was quite cordial, when the father was alive. Having regard to the fact that his father was a prominent member of the community, the first defendant is said to have executed Exhibit A-1, which is the registered trust and settlement deed, dated 16th June, 1951. Under the said deed, the first plaintiff was constituted as the managing trustee and the second plaintiff, the first defendant and the second defendant as co-trustees. The plaintiffs claim that it was the desire of the first defendant that he should erect a statute of his father even during his life time and wanted a scheme to be drawn for its perpetual maintenance and also a contemporaneous scheme providing for the management of the properties so endowed by him. Under the deed, the trustees were authorised to collect sufficient

funds for erecting the statute and out of the income from the trust properties the trustees should spend a sum of Rs. 100 per year on the birth anniversary of the said Muthu Goundar and a further sum of Rs. 100 to be paid to one Kulanthai Goundar for assisting the trustees and a provision was also made in the trust-deed for the payment of school fees for four students of the community, if they are already getting a half scholarship towards such fees from any other institution or in in the alternative for two students, if they have to be paid the full school fee. Lastly it was stated that the net income from the properties after meeting the expenses for the above specified purposes be divided in equal shares as between the two plaintiffs and the first and the second defendants. A further devise in the nature of a bequest expressly provided that with reference to the amount payable to the Second plaintiff from the net income, she should be paid the same during her lifetime and afterwards, it should go to the first plaintiff. Thereafter, the respective shares so devised should be enjoyed by their respective male heirs and in the absence of such male heirs, their female heirs should divide the net income equally. Exhibit A-1, which is in Tamil, is appended hereto to this judgment for a fuller appreciation of the recitals in the deed. The above are the relevant clauses in Exhibit A-1. According to the plaintiffs, they accepted the trust and entered upon their duties and assumed possession of the suit properties and collected rents from the tenants in occupation. The case of the plaintiffs is that the first plaintiff also closed an unused well in the suit properties after spending a sum of Rs. 4,500 as that place has been decided upon for the purpose of erection of the statute of the first defendant's father. They would also state that they have placed an order for making the statute and thus made out a case that the entire trust was acted upon from the time when it was drawn up and the first and the second defendants were also parties to such acts of commission on the part of the managing trustee in the matter of the enforcement of the objects of the trust and the preservation of the trust properties. It is said that in or about the year 1955 under Exhibit A-2 dated 23rd August, 1955, the first defendant purported to cancel the trust deed Exhibit A-1 on the ground that the trust was never intended to be acted upon, nor did he ever intend to erect a statue for his father and that he signed the trust deed Exhibit A-1 at the behest and provocation of his father and the trust-deed itself is the result of the persuasion made by the plaintiffs and the influential hand they had over his father. For the above and other reasons, the first defendant is said to have cancelled the said trust deed. According to the plaintiffs the said cancellation is invalid and is void and the trust which has been accepted as 'T. Muthu Goundar Memorial Trust' is an enforceable one and the purported deed of cancellation of the trust is inoperative in the eye of law and cannot be given effect to. It is also stated that the first and the second defendants have forfeited their rights to continue as trustees as they have acted against the interests of the trust. It is finally said that the alienation made by the first defendant subsequent to the cancellation of the deed of trust in favour of some of the defendants to this action including defendants 3 and 4 are invalid and cannot bind the trust. The first plaintiff as the managing trustee claims that he is entitled to possession of the suit properties which were wrongly taken away by the first defendant and that disposition of the suit properties made in 1955 is unauthorised and has to be ignored. As without possession, the trust cannot be carried out and as the unilateral cancellation of the trust deed is of no avail and as defendants 3 to 13 do not derive any valid title to parts of the suit properties alienated by the first defendant in their favour, they have come to Court for a declaration that the first plaintiff is the managing trustee of the suit properties which are to be treated as trust properties under Exhibit A-1 and for a further direction to the defendants to deliver possession of the suit properties to the first plaintiff with further mesne profits etc.

2. The first defendant in his written statement while admitting the relationship between the parties says that his father was not the elder in the community and that he was living apart from his father, since he was afraid of him. He pleads ignorance of the fact that he wanted to erect a statue of his father in the suit properties even during his life time, and drew up a scheme for the perpetual maintenance of such a statue. According to him Exhibit A-1 was forced out from him by his father, who asked him to sign some documents, which he did not understand and it was all due to the machinations of the second plaintiff as the concubine of Muthu Goundar. It is also said that the first plaintiff had also a considerable influence over his father-in-law. According to the first defendant, he was treated as a condemned man in the family and Exhibit A-1 was prepared behind his back and without his knowledge and consent. He claims that the document is vitiated by fraud and undue influence by the beneficiaries and the other trustee Section He pleads ignorance as to the contents of Exhibit A-1 and does not admit that he made any of the devises or bequests as reflected in Exhibit A-1, nor any part of the trust deed was ever acted upon or given effect to and it was never intended to be acted upon hereafter. According to him the possession of the properties always remained with him and the first plaintiff did not assume possession of the suit properties at any time under any capacity. He denies that any rents were collected by the first plaintiff along with him as trustees of the above trust and that a sum of Rs. 4,500 was spent by the first plaintiff from out of his own moneys to close the unused well. The first defendant says that it was the 12th defendant, who closed the well at his cost. It is false to say according to the first defendant, that it was decided to erect a statue of his father on the space made available after closure of the well. He would add that the body of his father was buried in a portion of survey No. 28/11, which is a part of the suit properties and a Samathi had been put up by this defendant over the place of burial as a dutiful son. No order was placed by anyone including the first plaintiff for the making of the statue as claimed. He denies that the trust deed was cancelled at the intervention of the second defendant. He says that he consciously cancelled the trust deed knowing that it could not be enforced in the eye of law, nor was it acted upon and in those circumstances, he says that the cancellation deed is valid and the the so-called trustees did not enter upon their duties as trustees, nor did they discharge any duties annexed to that office. After such cancellation, the first defendant says, he dealt with the properties as his own either leasing them cut or usufructuarily mortgaging them or selling the properties at his choice. It was he who paid all the public dues on the properties and put up structures of considerable value thereon and the plaintiffs never took any objection to such dealing with the properties by the first defendant nor to the erection of superstructures which were put up openly to the knowledge of the plaintiffs. The plaintiffs were never in possession of the suit properties and the story that they were dispossessed by the first defendant only in 1955 is claimed to be false. He states that he had the power to alienate the properties in favour of the other defendants. It is also his case that so far as Survey No. 27/3, is concerned, it was poramboke property, which was assigned to him only in 1954 and it is only thereafter he could secure a right of ownership thereon. It is said that the suit is not maintainable without asking for cancellation of Exhibit A-2 and the prayers asked for arc, in this sense, misconceived. The third, sixth, seventh, twelfth and the thirteenth defendants have put up constructions over the properties new in their possession pursuant to the alienations made by the first defendant from time to time and their title and possession to the same cannot be disturbed

3. The second defendant adopts the statement of the first defendant. The third defendant as alience claims that he is a bona fide purchaser for value without notice

of the right of the plaintiffs and in all other respects adopts the written statement of the first defendant.

4. The fourth defendant denies the allegations in the plaint that the trust was acted upon. He, as an alienee, says that since the trust was not acted upon and it is also unenforceable, the alienations made by the first defendant in his favour and in favour of the other defendants are valid. The fourth defendant as a mortgagee of some of the suit properties has also obtained a sale of a part of it under valid registered instruments and the first plaintiff, who had at no time possession of the properties, nor exercised his office of trusteeship over the suit properties, cannot claim any right over the same or seek for the relief as asked for.

5. The fifth defendant is a tenant and says that he cannot be disturbed.

6. The sixth defendant is also a lessee and claims that he is in the property as a person, who was permitted to enter the same by one, who had the right to do.

7. So also the seventh defendant is a tenant and he claims protection from eviction.

8. Defendants 8 to 11 are also lessees of portions of the suit properties and they adopt the written statement of the first defendant.

9. The twelfth defendant speaks to certain facts and circumstances in the family of Muthu Goundar and says that it is false to say that the first plaintiff spent a sum of Rs. 4,500 and closed the unused well. He adds that it was the first defendant, who, after getting an assignment of the land, enjoyed this unused well situated in Survey No. 27/3, and closed it at his cost. According to him Survey No. 27/3 did not belong to the family of Muthu Goundar until it was assigned in or about 1953 or 1954 and, therefore, it could not have been the subject-matter of disposition under Exhibit A-1. He is the usufructuary mortgagee over the piece of land bearing Survey No. 27/3 and claims that he spent considerable moneys for erecting shops thereon. There was no obstruction by the plaintiffs at any time when the said shops were so constructed and for these reasons, it is said that he is in, possession of the properties as an. alienee from the real owner of the properties and his possession, therefore, cannot be disturbed.

10. The thirteenth defendant is also a tenant and he would add that he is running a shop in survey No. 27/3 and that was leased out to him by the first defendant.

11. On these pleadings, the learned Subordinate Judge has framed the following issues:

1. Whether the suit trust deed was executed by the first defendant in the circumstances mentioned in para. 4 of the 1st defendant's written statement and if so, is it not valid?

2. Whether suit trust deed was not acted upon?

3. Whether the cancellation of the suit trust is valid?

4. Whether the usufructuary mortgage deed dated 23rd October, 1958 and sale dated 7th December, 1962 in favour of the 3rd defendant are valid and binding on the trust?

5. Whether the trustee is estopped from claiming title in respect of the properties covered by the documents dated 23rd October, 1958, by his conduct?

6. Whether the third defendant is a bona fide purchaser for value?

7. Whether the improvements alleged by the 3rd defendant are true and if so, what is the value?

8. Whether the 5th defendant is a lessee in respect of a portion of the suit property and whether the lease is binding on the suit true?

9. Whether the alleged lease dated 25th April, 1961 for ten. years in favour of the sixth Defendant is valid and binding on the suit trust?

10. Whether the suit trustee is estopped from questioning the lease in favour of 6th defendant?

11. Whether the lease for five years dated 25th April, 1961, in favour of the 7th defendant is valid and binding on the suit trust true?

12. Whether the alleged lease in favour of 8th defendant is valid and in any event, is he entitled to continue in possession after 24th November, 1963?

13. Whether the leases in favour of defendants 9 to 11 and 13 are valid and binding upon the suit trust?

14. Whether the usufructuary mortgage of 27/3 in favour of 12th defendant by the 1st defendant dated 25th September, 1961 is valid and binding on. the suit trust?

15. Whether 27/3 was not validly included in the suit trust deed?

16. Whether the sale dated 7th July, 1958 and mortgage dated 15th March, 1962 in favour of the 4th defendant are true, valid and binding on the suit trust?

17. Whether the suit is not properly valued for Court-fees and jurisdiction?

18. To what relief is the plaintiff entitled?

12. On Issue No. 17, he found that the suit has been properly valued. On issues 1 to 13, the learned Subordinate Judge held that the trust deed was executed by the first defendant and it is valid and acted upon and that he had no right to execute Exhibit A-2 where under he purported to cancel the trust deed Exhibit A-1. He found as a fact that Exhibit A-1 was consciously and deliberately executed by the first defendant to perpetuate the memory of his father. Incidentally, after referring to the contemporaneous deeds executed as between Muthu Goundar on the one hand and other members of the family on the other, the learned Judge found that Muthu Goundar was affectionate towards the first defendant and that the theory that the first defendant was afraid of his father is not true. He also found, after scanning the evidence produced by both parties in the matter of payment of public dues and in relation to the collection of rents accrued from the suit properties etc., that Exhibit A-1 was acted upon and was given effect to and that the evidence of P.Ws. 1 to 4 cannot be disbelieved. According to him, the evidence of the witnesses examined on the side

of the defendants was interested and, therefore he rejected it. He added that as there was no express reservation in Exhibit A-1 enabling the author of the trust to revoke it, the revocation of such a document is in the teeth of Section 78 of the Indian Trust Act and, therefore, came to the conclusion that the deed of cancellation of the trust is not valid. Consequent upon his finding that the trust deed was valid, and enforceable, he decreed the suit as prayed for resulting in the alienations in favour of certain of the alienees being set aside and also the leases executed by the first defendant in favour of the other defendants being held to he not binding on the trust. Ultimately, he decreed the suit as prayed for. It is against this the first and the third and fourth defendants have appealed.

13. Mr. Parasaran, learned Counsel for the appellants at the outset prayed for permission to raise additional grounds in A.S. No. 846 of 1967 but based his request not on further elucidation of the facts already on record or on further evidence to be brought to our notice hereinafter, but, on pure questions of law, which arise on the pleadings and on the admitted facts noted by the learned trial Judge.

14. In C.M.P. No. 4092 of 1974 a verified petition was filed at the commencement of the argument whereunder a request is made to permit the petitioner to raise two additional grounds of appeal, namely: (1) Exhibit A-1 on its proper interpretation, violates the rule against perpetuity and the purported interest created by Exhibit A-1 is, therefore, invalid; and (2) the lower Court should have held that the tying down of the property offends the rule against perpetuity and the trust in the present case not being a public trust of a religious and charitable nature, the suit based on Exhibit A-1, is not maintainable.

15. As we said, the request to raise these additional grounds are made out only because they are pure questions of law turning on the construction of the document Exhibit A-1, but it is stated that the said questions of law do go into the root of the matter. On its own terms, Mr. Parasaran submits that Exhibit A-1 discloses that the net income from the suit properties alone has been settled on some of the named settlees and the corpus not having been disposed of, the said bequest, and the totality of the disposition as reflected in Exhibit A-1 do offend the rule against perpetuities. Further, it is said that the erection of a statue for a living person is unknown in Hindu Law and as the Supreme Court has stated in various cases that properties dedicated for the erection and maintenance of a tomb of a Hindu, cannot be said to be an endowment for a religious purpose, it is argued analogically that the erection of a statue during the lifetime of the individual and its maintenance as a memorial is also a strange concept in Hindu Law having no religious efficacy and no Sastraic precedent for the same to be upheld by Courts of Law as a religious endowment. In any event, it is stated at this stage, that considerably prejudice would be caused, if the additional grounds of appeal are not allowed to be raised.

16. The contesting respondents have filed a counter-affidavit and say that the construction of Exhibit A-1 set out in paragraph 2 of the verified petition is not tenable. According to them, the new grounds of appeal cannot be allowed to be raised at this stage. On the merits it is stated that the properties dealt with under Exhibit A-1 are not tied down as alleged in violation of the rule against perpetuity, and as such grounds were never raised in the trial Court or in the memorandum of grounds of appeal, the appellants ought not to be permitted o raise the same, as according to them, such an attempt is neither bona fide nor just.

17. We are of the view, that C.M.P. No. 4092 of 1974 filed in A.S. No. 846 of 1967 has to be allowed. No doubt in the written statement of the contesting defendants an unequivocal allegation has been made to the effect that the trust deed is vitiated by fraud etc. Though there is no express pleading in the first instance about the so called trust created under Exhibit A-1 being hit by the rule against perpetuity and that it is not a public trust as is popularly or ordinarily understood, it is for the Courts in such circumstances, to allow such pure questions of law to be raised so that Courts of law which are the zealous guardians of equity and good conscience may not be led astray by a strict adherence to technicalities and pleadings. If, in a given subject it is patent that pubic policy is likely to make indelible dents on it, then, the Courts themselves ought so raise the questions touching on public policy, even if none of the parties docs so. No doubt public policy, which is often described as an unruly horse, should be carefully handled, lest, any improper riding of it, should take the Courts to difficult and unexplored heights and regions. Judges as the accredited expounders of the doctrine of public policy always act with precision and care to sift the material confronting them before they invoke this not-too-certain and evasive doctrine. When once it is brought to the notice of the Courts, that the language in the instrument offends certain accepted and unavoidable principles coming within the charmed circle of public policy and the pigeon holes therein, then, it would not be proper 'o avoid a just, strict and necessary scrutiny of the document, to see whether the questions of law raised even at the appellate stage are to be adjudged upon or not. The mere fact that such a question of law was not raised earlier in the pleadings or before the trial Court, may not always be a proper guideline to shut out a litigant from pressing into service such a question which would tilt matters and on appreciation of which real justice could effectively be rendered.

18. The Supreme Court in Chittoori Subbanna v. Kudappa Subbanna : [1965]2SCR661 , by a majority judgment held that a pure question of law not dependent on the determination of any question of fact should be allowed to be raised for the first time in the grounds of appeal by the first appellate Court and such pure questions of law are allowed for the first time at later stages also.

It further held:

Where a new point not taken in the grounds of appeal is sought to be raised as an additional ground by a substantive application for that purpose, the High Court has discretion to allow the application or refuse it. But the discretion exercised by the High Court will not be interfered with except for good reasons, for example, where the Court acts capriciously or in disregard of any legal principle..

The omission of the appellant to raise the point before the trial Court did not amount to his waiving his right to raise the objection.

19. Thus, it is now settled that pure questions of law, though not pleaded, unless waived by parties, can in the discretion of the appellate Court, be permitted to be raised even at the appellate stage, provided sufficient opportunity is given to the other side and no fresh investigation or delving into facts are undertaken. If a question of law does arise on the facts, but it went unnoticed by both the parties and even so by the trial Judge, there is a legal, indeed a conscious duty on the part of the appellate Court either suo motu or on its attention being drawn to it to adjudge upon such a question, even though it is brought up for the first time, and no doubt inordinate delay in the discovery of such a question by the parties may be a ground

for the appellate Court to be cautious in the matter of the exercise of its discretion in favour of such a lachy litigant. The points of law that arise for consideration in the instant case arc whether the terms in the so called trust deed reflected in Exhibit A-1 offend the rule against perpetuity and whether the trust is a public trust of a religious or a charitable nature. These points were not adverted to by the trial Court or even by the litigating parties. As pointed out by us earlier, the Courts themselves sometimes can raise such questions suo motu if such questions have a bearing on public policy. This was the view of the learned Judges in Beresford v. Royal Insurance Co. (1938) A.C. 586 and obviously this recognition of the suo motu powers in Courts in such a situation is based on the principle that justice should not only be done but seem to be done. For all these reasons, we allow the civil miscellaneous petition C.M.P. No. 4092 of 1974.

20. Mr. Parasaran, therefore, rightly asked us to re-scrutinise Exhibit A-1 and its terms from a different perspective to find out whether the bequest or the dispositions therein offend the rule against perpetuity.

21. From time immemorial the owner of property has a vested right inhered in him to deal with it in accordance with his discretion. The right of disposition or alienation, which is co-existent with a right of ownership is so absolute that it is easy to comprehend the potential force of that right. But equally salient and time honoured is the well-known rule against perpetuity which is based on public policy which necessarily had to make certain dents on the exercise of such absolute power in case it is sought to be abused.

22. The fundamental principles engrained in the rule against perpetuity are that attempts to tie down the property and prevent the same from normal circulation, are all said to be contrivances which are void, as 'the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable or untransferable from one hand to another, being a damp to industry, and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered.' (See Mulla on Transfer of Property Act, 6th Edition P-110). As pointed out by the learned author Jowett perpetuity has been said to be odious in law, destructive, to the common-wealth, and an impediment to commerce, by preventing the wholesome circulation of property. It is in this context that public policy enters into the picture and discountenances in equity, such dispositions the result of which is to take away from the owner the power to alienate the property or gives the owner the power to create future unknown interests. The underlying principle is that restraints in alienations and the rule against remoteness being the two principles well knit as between each other ought not to be encouraged by Courts of law, which administer not only but also equity and good conscience. It is in this back ground, the recitals in Exhibit A-1 have to be adjudged to find whether they offend the rule against perpetuity.

23. On a prima facie reading of Exhibit A-1, it is clear that the first defendant has tied up the circulation of the properties and has created devises whereby certain benefits are conferred only upon certain named individuals and their heirs and thus the Course of normal inheritance is hampered with. Though, of course, Exhibit A-1 begins with a dedication for the purpose of erecting a statue for first defendant's living father and for payment of scholarship to students, yet, the other bequests therein, which are indeed separable from the above, make it clear that the dedication is not the real one but is only a devise for settling the property in perpetuity on the

descendants of the donors in certain specified lines. There is no enabling clause whereby the trustees could at any time alienate the properties. At all material times the income has to be divided between the plaintiffs on the one hand and defendants 1 and 2 on the other. The first defendant and his heirs do not have the right to deal with the corpus of the property. It is in this sense that the initial dedication appears to be an attempt to give a colourish garb to the entire deed and to make it operate. Mulla, in his book on Hindu Law, 13th Edition, paragraph 385, points out thus:

(1) Gift : No transfer of property can operate to create an interest which is to take effect/after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(2) Bequest : No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The rule applies to private trusts also.

See the decision in Ajitkumar Mitra v. Tarubala Dasee I.L.R. (1936) Cal. 209. As pointed out in Halsbury's Laws of England, Third Edition, Volume 29, although the principle of private ownership requires that an owner of property shall have power to dispose as he thinks fit, either during life or on death, of his whole interest in the property he owns, yet public policy requires that the power should not be abused. Accordingly the law has from early times discouraged dispositions of property which either impose restrictions on future alienations of that property or fetter to an unreasonable extent the future devolution or enjoyment of that property.

24. The last clause in Exhibit A-1 does offend the rule against perpetuity as stated in Section 14 of the Transfer of Property Act. The precedents and opinions of experts reference to above also support our conclusion that the tying up c f the net income as between male and female heirs of the donees as mentioned in the last clause in Exhibit A-1 is obviously an odious clause, which is nothing but an illegal exercise of power of disposition inhered in the owner of the property. The general purpose of the disposition in the last clause in Exhibit A-1 is to tie up the corpus and create a new and an unknown line of succession as regards the net income which includes the heirs to be born male or female of the brother-in-law and the brother of the family. It is a line of descent not comprehended in Hindu Law or the Hindu Succession Act of 1956; such an innovation and purpose, motive being irrelevant in such a situation, is to be characterised as an abuse of the absolute power of disposition vested in the first defendant. Therefore, the ultimate clause in Exhibit A-1 which deals with the division of the net income as between the first plaintiff on the one hand and defendants 1 and 2 on the other and ultimately their male or female heirs, after meeting the expenses towards the other objects mentioned in the trust, without any indication as to how the corpus has to be dealt with, is certainly a fetter on the normal exercise of rights of ownership. As pointed out in Under-hill's Law of Trusts and Trustees, 12th edition, page 78:

It is against public policy that property should be settle d on private trusts for an indefinite period, so as to prevent it from being freely dealt with; and, consequently, the power of so doing has been curtailed by a rule known as the rule against perpetuities.....

Certain trusts which at first sight appear to be public charitable trusts are in fact private trusts and thus liable to be vitiated for transgressing the rule. In particular this is so in the case of a trust for a group of persons whose common and distinguishing quality is personal relationship to a single propositus..

To a similar intent is a passage in Perry's Trusts and Trustees, 6th edition, page 624:

In private trusts the beneficial interest is vested absolutely in some individual or individuals who arc, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under same disability, it is, or within the allowed limit will be competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity.

It, therefore, follows that the last clause dealing with the division of the net income as between the named individuals in existence and to be born offends the rule against perpetuities.

25. If, therefore, when a particular portion of the bequest or the disposition in Exhibit A-1 is unenforceable in the eye of law, does it follow that the entire instrument has to be ignored and the parties left to treat the properties which are the subject-matter of Exhibit A-1, as if there was no trust deed at all?

26. At this stage, it is necessary for us to consider whether Exhibit A-1 could be considered as a private trust or as a public trust. As already pointed out by us the rule against perpetuities has to be borne in mind even while dealing with a private trust. It is also conceded by the learned Counsel for the respondent that if Exhibit A-1 could be adopted as creating a private trust, then, the rule against perpetuity contained in Section 14 of the Transfer of Property Act can certainly be invoked to set at naught the last bequest under Exhibit A-1.

27. The next aspect, which would arise for consideration is whether the other terms of Exhibit A-1 do project a public trust of a religious or a charitable nature. Quite intricately connected with this aspect of the case is the subject whether it is partly a private trust and partly a public trust or whether the property not having been dedicated to a trust known to Hindu Law and not being capable of being enforced as a private trust because it offends the rule against perpetuity, whether the desire of the first defendant could be carried out in any reasonable manner so as to safeguard certain bequests therein, which are charitable or claimed to be religious in nature.

28. Amongst Hindus, there is no marked distinction between a religious and a charitable endowment. The dichotomy, if at all, is of modern origin tempered by modern western jurisprudence. From ancient times, one endowment is telescopable into the other. Manu says:

In the Krita the prevailing virtue is declared to be in devotion, in Treta divine knowledge, in the Dwapara holy sages call sacrifice the duty chiefly performed; in the Kaili liberality alone.

Mukherjee, a famous author on Hindu Law of Religious and Charitable Trusts, in the Third Edition, of his book (page 10) says:

In the Hindu system there is no line of demarcation between religion and charity. On

the other hand charity is regarded as part of religion. The Hindu religion recognises the existence of a life after death, and it believes in the law of karma according to which the good or bad deeds of a man produce corresponding results in the life to come. All the Hindu sages concur in holding that charitable gifts arc pious acts par excellence, which bring appropriate rewards to the donor, and the seer in the Rigveda says in clear accents that he who gives alms goes to the highest place in heaven.

In a given case whether the purpose of the grant is religious or charitable is a matter, which is to be decided upon in accordance with Hindu notions. (See S.V. Gupta, Hindu Law, 2nd Edition page 828). An endowment to be valid must be made for a purpose recognised by Hindu law as religious or charitable. As pointed out by the Supreme Court in Ramchandra v. Shree Mahadeoji : [1970]2SCR809 ,

A trust in the sense in which it is understood in English law is unknown in the Hindu system. Hindu piety found expression in gifts to idols, to religious institutions and for all purposes considered meritorious in the Hindu social and religious system. Therefore, although Courts in India have for a long time adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the Statute of Elizabeth, and, therefore, all purposes which according to English law are charitable, will be charitable under Hindu Law the Hindu concept of charity is so comprehensive that there are other purposes in addition which are lecognised as charitable purposes. Hence, what are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu Law.

Again, the Supreme Court in Ram Saroop Dasji v. S.P. Sahi : AIR1959SC951 , stated the law as follows:

Charitable trusts are public trusts, both under the English and Indian Law; in England a religious trust being a form of charitable trust is also public, but in India, according to Hindu Law, religious trust may be public or private. But the most usual and commonest form of a private religious trust is one created for the worship of a family idol in which the public are not interested. Any other private religious trust must be very rare and difficult to think of.

As was stated in an early Madras case cited in Mulla's Hindu Law, 13th Edition, page 443:

Where the estate created by a grant is in its nature secular, the mere fact that the motive for the grant was religious docs not constitute it a religious endowment, so as to exempt it from the rule against perpetuities See Anantha v. Nagamuthu I.L.R. (1882) Mad.

29. There is a distinction, though fine, between public religious endowments (and private religious endowments. In the former, a conferment of benefit to the public or a decipherable class or members of the public is foreseeable. But in a private Hindu religious endowment, the bounty is intended to serve the kith and kin of the author of the trust through the medium of an accepted Hindu religious endowment. As pointed out in Ram Saroop Dasji v. S.P. Sahi : AIR1959SC951 a known form of private religious endowment is a grant to a family deity in which the public at large are not interested. The distinction between a public and private religious endowment has been brought out succinctly by the Supreme Court in Ran Saroop Dasji v. S.P. Sahi :

AIR1959SC951 . thus:

The essential distinction in Hindu Law between religious endowments which are public and those which are private is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private trust the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust.

Examples, though not exhaustive, but illustrative may be cited.

Bequest for sadavrats, for Dharmasalas, rest houses, for choultries, for establishment and support of schools, colleges, and universities, for dispensaries and hospitals, for the construction and maintenance of tanks, wells, and for provision, of drinking water for men and animals, etc.

have all been held to be charitable endowment, whereas gifts to idols already installed and consecrated or to bf installed and consecrated and for their worship, gifts for the worship of God, gifts for the building of temples, gifts for religious festivals with regard to idols, and gifts to math, have all been hold to be valid religious endowments. In essence, therefore, in Hindu Law, religious and charitable endowments are not confined to cases of public utility or benefit but also acquisition of religious merit is one of the criteria. The halo, which perceivably envisages both types of endowments, is that the purpose should be one ordained by Shastras and Hindu tenets.

30. After thus seeing the fine distinction, between a private trust and a public trust, we shall refer to some other essential features of a public trust. If it is a public trust whether for a religious or a charitable purpose, the rule against perpetuities will not offend the same. Section 18 of the Transfer of Property Act provides as follows:

The restrictions is Sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

There are certain acid tests to find out whether a particular disposition, by a person in India is a public trust or not. In that context it is necessary to ascertain whether the purpose of the trust is for the advancement of (1) religion, (2) knowledge, (3) commerce, (4) health, (5) safety and (6) and other objects beneficial to mankind. In deciding the case on a projected hypothesis, Courts invariably bear in mind the customs, habits, traditions, the force of personal law, the sacred-ness of an object, which is uniformly considered as venerable by the community to which the donor belongs and such other like considerations. It is not every kind of disposition importing into it a sense of obeisance to elders; an unknown and a strange course of benefaction involving misguided bounties or a slightly modernised, but unusual concept of creating an unimaginative religious or charitable endowment, would all come within the framework of public religious or public charitable endowments. Every such bequest should have the support of history, backing of custom or the prop of established usage. Otherwise, it would not be easily accepted by Courts as a public

religious or charitable trust or even as a private religious endowment in Hindu Law. As precedents and practice of shastraic injunctions were always held out as landmarks and guidelines for a meaningful understanding of the expression Hindu religious or charitable trusts, it is necessary to consider the intentions of texts of Hindu Law to find whether an endowment to erect a statue of a living Hindu father by a Hindu son was or has to be accepted as a public religious or a public charitable trust.

31. Mr. Parasaran, with his usual alacrity thoroughness and soundness has placed before us abundant authorities both from Shastras and judge - made law. But for such illuminating assistance given by the learned Counsel, it would not have been easy for us to steer clear through the rather abstruse propositions arising for our decision in the instant case.

32. Before we deal with the merits of the case, a clear understanding as to what are the Hindu notions which ought to prevail in such matters so as to make the ultimate bounty whether of a religious or a charitable nature, a valid endowment in Hindu Law, is essential.

33. In the book, Mayne on Hindu Law and Usage, 11th Edition, page 911. the following passages are illuminating:

Gifts for religious and charitable purposes were impelled by the desire to acquire religious merit. They fall into two divisions, ishta and purta; the former meant sacrifices and sacrificial gifts and the latter meant charities. The former led to heaven and the latter to moksha or emancipation; charity was thus placed on a higher footing than religious ceremonies and sacrifices. Manu says : 'Let him, without tiring always offer sacrifices (ishta) and perform works of charity (purta) with faith; for offerings and charitable works made with faith and with lawfully earned money procure endless rewards. Let him always practice, according to his ability with a cheerful heart, the duty of liberality (danadharma) both by sacrifices (ishta) and charitable work (purta) if he finds a worthy receipient for his gifts:

Ishta works arc enumerated by Pandit Prannath Saraswati in his work or. Endowments as: (1) Vedic sacrifices; (2) Gifts offered to priests at the same; (3) Preserving the Vedas; (4) Religious austerity; (5) Rectitude; (6) Vaisvadeva sacrifices; (7) Hospitality (atithya). Purta or charitable acts are tanks, wells with flights of steps, temples, planting of groves, the gift of food, dharmasalas (resthomes) and places for supplying drinking water, the relief of the sick, the establishment of processions for the honour of deities and so on. Gifts for the promotion of education and knowledge are specially meritorious. It will be noticed that temples and processions for deities were considered as charitable acts (purta), while hospitality (atithya) was consideerd as a sacrificial gift (ishta).

34. In Parthasarathy Pillai v. Thiruvengada Pillai I.L.R. (1907) Mad. 341, Subramania Ayyar, J., in an elaborate exposition, of what is ishta and purta acts, summarises the position thus:

Ishta gifts refer to gifts at the altar in connection with sacrificial ceremonies prescribed by Hindu sacred books, and poorta gifts refer to gifts for other purposes mentioned and extolled therein.

Quoting Dr. Buhler's translation, the learned Judge continued to say:

Let him, without tiring, always offer sacrifices (ishta) and perform works of charity (poorta) with faith.

The learned Judge also refers to the famous passages already referred to by Mayne and propounded by Saraswati. Elucidating the expression Yoga-Kshema the learned Judge quoting the Mitakshara added:

The term Yoga-Kshema is a conjunctive compound resolvable into Yoga and Kshema. By the word Yoga is signified a cause of obtaining something not already obtained (ishta):that is, a sacrificial act be performed with fire consecrated according to the Veda and the law. By the term Kshema is denoted an auspicious act which becomes the means of conservation of what has been obtained, such as the making of a pool or a garden, or the giving of alms elsewhere than at the altar (poorta).

35. The lexicographers defined religion as action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; the exercise or practice of rites or observances implying this. Again it is stated that religion is an out-ward act for form by which men indicate their recognition of the existence of a God or of Gods having power over their destiny, to whom obedience service and honour are due. Ramaswami, J., in Sri Ramanasramam v. Commissioner Hindu Religious and Charitable Endowments Madras : AIR1961Mad265 observed:

As distinguished from morality, religion denotes the influences and motives to human duty which are found in the character and will of God, while morality described the duties to man, to which true religion always influences. Religions, by which are meant the modes of divine worship proper to different tribes, nations or communities, are based on the belief held in common by the members of them severally. There is no living religion without something like doctrine.

At this juncture, two important decisions, one of the Supreme Court and the other of the Privy Council may be referred to with advantage. In Saraswathi Animal v. Rajagopal Ammal : [1954]1SCR277 , the question came up whether dedicating property for any religious purpose is valid. Jagannadhadas, J., rendering the loading Judgment said:

To the extent therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a shastraic basis so far as Hindus are considered. No doubt since then other religious practices and beliefs may have grown up and obtained recognition from certain classes, as constituting purposes conducive to religious merit. If such beliefs are to be accepted by Courts as being sufficient for valid perpetual dedication of property therefor without the element of actual or presumed public benefit, if must at least be shown that they have obtained wide recognition and constitute the religious practice of a substantial and large class of persons ...It cannot be maintained that the relief in this behalf of one or more individuals is sufficient to enable them to make a valid settlement permanently tying up property. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society.

The Supreme Court, therefore, made it clear that the question whether a dedication by Hindu is for a religious purpose should be microscopically examined through the lens of a Hindu notion. What acts are productive of a religious merit or easily perceivable to be so by a Hindu or what conduces to religious merit in Hindu Law is primarily a matter guided by Shastras. Therefore, if any purpose is sought to be sustained as if it is productive of religious merit, then it must have the backing and support of Shastras or Hindu notions. The mere fact of development of certain other practices in society by passage of time cannot by themselves be a safe guide for adoption and acceptance, as practices, which are capable of producing religious merit. It should be established as a matter of fact that such religious practices have attained such importance in Hindu society and it is that universal acceptance of that act or a religious practice which could possibly be taken advantage of to sustain a bequest in a will or a settlement, so as to carve out different Hindu religious or charitable endowments.

36. The other case is the one which is reported in Colgan v. Administrator Gereral, Madras I.L.R. (1892) Mad. 424, where it has been observed as follows:

In the case of Tear Cheap Neo v. Ong. Cheng. Neo. L.R 6 P.C. 381 a Chinese woman resident in Penang by will directed (inter alia) that a house termed ' Sow Chong' for performing religious ceremonies to the testatrix's deceased husband and herself should be erected. It was held by the Judicial Committee that the devise was void being in perpetuity and not for a charitable purpose. Their Lordships quote with approval the decision of the Chief Justice Sir P. Benson Maxwell in the case of Choach Choom Nioh v. Spottiawoode that whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it, and go on to observe: This rule which certainly has been recognised as existing in the law of England independently of any statute, is founded upon consider-derations of public policy, which seem to be as applicable to the condition of such place as Penang as to England, viz., to prevent the mischief of making property inalienable unless for objects which are useful or beneficial to the community. 'And further on in the judgment they observe, speaking of the ceremonies to be performed in the Sow Chong House', although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage and can benefit or solace only the family itself.

37. With the above background, the clause relating to the erection of a statute and the annual expenditure of Rs. 130 on the birth - date of the father and a further bequest of Rs. 100 to one Kulandai Goundar for the assistance he was expected to render to the trustees in the maintenance of the memorial has to be considered.

38. What is strongly urged by Mr. Ramanathan, learned caunsel for the respondent, is that the grant is a private trust for religious or charitable purposes and that the dedication is total. The deed, according to him, has to be understood as creating a power in specific individuals for performing a specific object and it has to be sustained as a valid power. It is claimed that the purpose of the trust is purta in nature or in the alternative, it is one of the Nitya Karmas or Kamya Karmas of a dutiful son. For the purpose of exhibiting objectively his veneration to his father, the first defendant has created a bounty and it is, therefore, equatable to a religious endowment in favour of a deity. The intention of this trust is sought to be supported

on the theory of ancestral worship and spiritual benefit. On these lines the above clauses are sought to be sustained.

39. We have already referred to the essential ingredients in a religious and charitable endowment whether public or private. No tall claim is made that the erection of a statute by a son and endowment for its maintenance as a memorial is a public religious endowment. The reason is obvious. Muthu Goundar has not been shown to be a spiritual leader or for the matter of that, the accepted leader of the community. There is absolutely no evidence as to his credentials regarding this leadership or to his involuntary claim for veneration by the members of the public. By erecting a statute of Muthu Goundar and by providing properties for its suitable erection and maintenance, no one of the members of the public are benefited. The classified test of vesting the beneficial interest of the trust in the public is conspicuously absent. Therefore, the clauses, if they could be characterised as an endowment at all are certainly not a Hindu, public religious endowment.

40. But is it a private religious endowment? In spite of the grand all round dimensional impact of modernisation and technocracy on the community regard to ancient precepts and respect far Hindu notions has survived and is still evoking awe and reverence in the minds of the people belonging to the Hindu community. Judged by this yardstick of living, no Court of law can accept a concept, which is strange and unknown and not even incidentally referred to in the Shastric edicts. It is said that Nitya Karma or Anushtana is at the bottom of the bequest, Surely, Pitru Devo Bhava is a mandate, which is deeply rooted in Hindu religion. But such an obeisance cannot be extended to illogical ends so as to achieve a purpose unknown, to Hindu notions. We have already referred to what is the underlying meaning of the word religion. Mr. Ramanathan's implied suggestion is that it was in the contemplation of the first defendant to deify his father and venerate him and, therefore, it is Nitya Karma or Kamya Karma that prompted him to make the grant. But, as pointed out by the Supreme Court in Ram Saroop Dasji v. S.P. Sahi : AIR1959SC951 , apart from creating a private religious trust for the worship of an idol, any other private trust is rather quite difficult to think of. Faced with this difficulty, it is urged that it is a purta gift. Here again, there is a fallacy. Purta acts are charitable acts. There is high authority already touched upon by us to find that purta acts are weaved round a charitable vision of the author. Prannath Saraswati, Mukerjee, illustrious Judges of Courts here and elsewhere have already referred to purta acts with some significance and purpose. Any such purta act in juxtaposition to an ishta act in its ultimate analysis springs from charity. In most cases charitable acts and religious acts are interchangeable because the words are more often understood in Hindu Law as synonymous. But in our case, charity is not behind the grant nor can it be said so. The concept of charity is to be merciful and no one would describe the erection of a statue of the father by the son as a charitable or merciful act unless, of course, the father is an extraordinary being admittedly held in high esteem by the members of the public including the members of the community to which he belongs. The decision in Gosami Sri Gridharji v. Romanlalji Gosami I.L.R. (1890) Cal. 3, is distinguishable. There, the idol of the person created by the grant was accepted by the public as a religious head to whom veneration was due and mandatory. But here, there is no whisper in the pleadings that such was the personality of Muthu Goundar. The grant cannot be sustained on the ground of an ancestral worship. Propitiation of ancestors and a visible demonstration of obeisance to elders is certainly a respected Hindu doctrine. But such secular exhibitions in Hindu faith, though prompted by a religious motive, cannot reach unknown heights resulting in the creation of a private religious

endowment by a junior member vis-a-vis a senior member of the family. The creation of an endowment consisting of immoveable property and a direction to spend a sizable income therefrom for the purpose of erecting a statute of the propositus and ere long respect the statue as a memorial and treat the entire trust as a memorial trust is something which is not comprehended in Hindu Law, as it is not in accordance with Hindu notions. As Jagannadhdas, J., says in Saraswathi Ammal v. Rajagopal Ammal (1964) 1 S.C.J. 271 : (1964) 45 I.T.R. 229 : A.I.R. 1963 S.C. 491, that if any purpose is to be claimed to be a perpetual dedication on the ground of religious merit, it must be shown to have a shastraic basis so far as Hindus are concerned. If as is sought to be made it is stated that for paying respect to the father or to venerate an ancestor by erecting a statue and by making an endowment for it without public benefit should be treated as a practice which is of later origin, it must at least be alleged, shown and proved that such trusts have obtained wide recognition and constitute the religious practice by a large majority of the generality of the Hindu public or the community in particular. This has not been established in this case. Again as pointed out by the Privy Council in the Chinese case cited above, to accept the clause relating to the erection and maintenance of the memorial of the father would mean to encourage the mischief of making property inalienable unless for objects which are useful or beneficial to the community. Thus, the grant and the allied clauses in Exhibit A-1 to erect a statue for the father cannot be accepted by us as a pious or charitable duty on the part of the son, in accordance with Hindu notions. It fallows from the foregoing that as the first three clauses in Exhibit A-1, do not constitute a Hindu public religious endowment or a private Hindu religious endowment, the grant, therefore, in so far as this portion of Exhibit A-1 is concerned fails, as the bequests are void, unlawful and unenforceable.

41. The next question is, whether the bequest in the nature of free scholarship to two students in certain circumstances or four students in certain other circumstances, cannot be upheld. In our view, this bequest has to be up held inasmuch as it benefits the members of the public and is in the modern accepted sense a purta act as well. To impart aid in the cause of education to deserving students of the community is certainly laudable. It may be that a defined class of students are benefited but nevertheless as the body of beneficiaries is a fluctuating and uncertain one, it has to be upheld as a public charitable endowment. In fact Mr. Parasaran, does not dispute this proposition. The question is whether these clauses alone could be severed from the totality of the bounties enumerated in Exhibit A-1 and whether such a tearing of one from amongst the other void bequests is possible. If so, what is the modus operandi to enforce such a valid bequest is question

42. The Supreme Court while expatiating the doctrine of cypress observed as follows in State of Uttar Pradesh v. Bansi Dhar : [1974]2SCR679 :

Where the donor has determined with specificity a special object or mode for the course of his benefaction the Court cannot innovate and undo, but where a general charitable goal is projected and particular objects and modes are indicated the Court, acting to fulfil the broader benevolence of the donor and to avert the frustration of the good to the community, reconstructs, as nearly as may be, the charitable intent and makes viable what otherwise may die.

With utmost respect we adopt this reasoning to the bequest in favour of students to gain a scholarship from the estate of the first defendant. It cannot be doubted that the first defendant has specified his charitable intent and the purpose of the same is

to benefit a section of the com munity. In that sense, this bequest which could stand alone has to be accepted by the Courts and given effect so. In C.A. No. 1555 of 1967, the Supreme Court after elaborately quoting the case law, reiterated the test to find out as to when a dedication may be either absolute or partial. If only 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. In a case like the one before us, We are satisfied that the first defendant solemnly intended to provide for the benefit of the students of his community. But as sandwiched this bounty is in the midst of other bequests which we have already held to be unenforceable and void. In such a case, the only possible way to give effect to the provision in Exhibit A-1 is to treat the property which is the subject-matter of the trust as alienable and partible in the ordinary way and treat the same as the property of the first defendant, as there is certainly no direct gift of any ascertainable portion of the properties mentioned in Exhibit A-1 in favour of the disposition for the giving of scholarship to students. In those circumstances, whilst we find that the properties described in Exhibit A-1 are the properties of the first defendant and they have to descend to his heirs in accordance with the normal law and in the ordinary way, the only way in which we could effectuate the partible intent of the first defendant is to state that the properties pass with the charge upon it for the purpose of respecting the above bequest.

43. In the result, therefore, we have to sustain the bequest in favour of two students who have to be paid a full scholarship and in favour of four students, if they have to be paid half scholarship for the prosecution of their studies, and that for such payment, the properties, which are the 'subject-matter of Exhibit A-1 are to be charged and shall stand charged.

44. The above conclusion of ours necessarily lead on to the consideration of the merits in this case.

45. The argument of Mr. Parasaran is that the trust deed has never been acted upon. We are unable to agree. The learned trial Judge after having accepted the evidence of P.Ws. 1 to 4 referred to documents such as Exhibits A-8 to A-10, A-23 and A-24 and found that Exhibit A-1 was acted upon. It is impassible to believe that the first defendant could never have joined the first plaintiff in issuing rental receipts to the tenants in occupation, if he did not accept the trust, which he sought to create under Exhibit A-1. Even public bodies like the panchayat board of the area had given notices under Exhibits A-32 and A-33 demanding arrears of property tax from the first plaintiff acting for the trust. All the above documents are before the cancellation deed Exhibit A-4. But the vague argument of Mr. Parasaran is that the statue has not been put up, that no order has been placed by the first plaintiff for the purpose and no efforts have been taken to effectuate the purposes of the trust. It is one thing to say that the managing trustee was not as diligent as was expected of him; but it is a quite different thing to argue that the trust-deed was never acted upon. No doubt Mr. Parasaran has referred to Exhibits B-7 to B-11, B-13 to B-20 as also B-34, B-49 and B-50 under which the first defendant purported to ignore the trust and alienate some of the properties for the purpose of establishing that the deed was not acted upon. These are all stray instances. Probably, there was no normal and friendly relationship between the first defendant and the first plaintiff. But that by itself will not be a safe guide to conclude that the trust deed was never intended to be acted upon. The non-payment of the sum of Rs. 100 to be paid, to Kulandai Gounder, when he was alive,

and the non-payment of the scholarship to the students and the non-performance of the primary objects of the trust such as erection of a statue etc., are pressed into service. The first defendant also is equally responsible as a trustee for not having discharged his duties under Exhibit A-1. These laches could be attributed to all the trustees and not necessarily to the plaintiffs alone. Yet another circumstance relied upon is that the pattas have not been transferred in favour of the trust and that the plaintiffs have belatedly filed this action even though they were dispossessed according to the pleadings even in 1955. The person, who dispossessed the managing trustee so as to obtain possession of the properties of the trust is yet another trustee. We are not impressed by the argument that this is a case where the first defendant took over the property from the first plaintiff, in his capacity as absolute owner. If he dispossessed the managing trustee and took possesion of the property himself, he cannot take advantage of his own wrong and claim that the enforceable part of the benefactions in Exhibit A-1 ought to be totally ignored and that the trust-deed itself had never been acted upon or intended to be acted upon. There is varying evidence in this case as to who filed up the well. It is the case of the first plaintiff that he did it, whilst the first defendant would say that it was the 12th defendant, who expended for filing up the well and putting up the structure thereon. We are not satisfied that there is such clinching evidence in this case for us to disturb the finding of the Court below and hold that the trust was never acted upon or intended to be acted upon.

46. Even so, we are constrained to accept the finding of the learned trial judge that Exhibit A-1 was not forced down from the first defendant as alleged by him. Exhibit B-2, is a settlement deed executed in 1951 by Muthu Goundar, the father, in favour of the first defendant and Exhibit B-44 is again a document of gift executed by the first defendant in favour of the first plaintiff's wife. Even so, is another settlement deed executed in 1951 by the first defendant under Exhibit B-45. Excepting for the ipse dixit of the first defendant, who claimed that he was terribly afraid of his father and he was inimically disposed towards him and the interested testimony of D.Ws. 2 and 3, we do not find anything on record to show that the relationship between the first defendant and his father Muthu Goundar was strained. It is said that the recital in Exhibit A-1 that the first defendant conceived the idea of erecting a statute Was thought of when he was 41/2 years old at the time when the partition in the family took place under Exhibit B-1. This recital is a too innocuous recital, which does not take anybody to any understandable heights. It is an irrelevant recital. Once we find that the mind of the first defendant was with him when he executed Exhibit A-1 then he cannot wriggle out of it by cancelling the same by executing Exhibit A-2- He had not reserved any power of cancellation either. Obviously, this was so done, when there were strained feelings between himself and the brother-in-law, the first plaintiff. Exhibit A-2 is the product of an afterthought. As in the course of our judgment we have held that the bequest in the nature of scholarship to students has to be sustained as a purta act on the part of the first defendant under Exhibit A-1, it follows that Exhibit A-2 is inoperative in the eye of law and the specific object of the trust found to be valid and enforceable still gains ground.

47. To sum up, Exhibit A-1 is a document, which has to be found as one which was executed by the first defendant with his full knowledge and that, therefore the cancellation of the same under Exhibit A-2 is invalid and unlawful. Excepting the purta act of charity in favour of the students of the community and for the payment of scholarship to them as demarcated therein which we find as the only sustainable clause, the other bequests being founded on notions unknown to Hindu Law, are invalid and unlawful. For the purpose of effectuating this purpose contained in

Exhibit A-1 and as there is no absolute dedication of any demarcated property for the aforesaid purpose, whilst upholding the clause relating to the grant of scholarship to students in Exhibit A-1, we hold that the entirety of the properties in Exhibit A-1 are properties of the first defendant but charged for the aforesaid purpose. The alienees, who are the appellants in A.S. No. 13 of 1968, are, therefore, bound by this charge. The alienations by themselves and the lease-deeds in favour of the other defendants are thus upheld as valid sales, mortgages or leases effected by the owner of the properties, namely, the first defendant, subject to a charge thereon in the matter of payment of scholarship to students as provided in Exhibit A-1. This charge undoubtedly is effective from the date of this judgment and it is for the body of the trustees named in Exhibit A-1 to implement them in a manner known to law by enforcing them as against the alienee? and the lessecs in possession of the properties. We therefore, hold that the third defendant is a bona fide purchaser for value but the properties purchased by him are subject to the charge above mentioned and that the improvements made by him are to be taken as his improvements to the property to which he is entitled in law.

48. In this view the findings of the trial Judge on issues 4, 6 and 7 are reversed.

49. Consequent upon our findings as rendered above, we find that the sale and mortgage in favour of the fourth defendant is valid and enforceable and reverse the finding of the trial Judge on issue No. 16.

50. On issues 8 to 13, we find that the first defendant is entitled to lease out the properties to defendants 5 to 13 and consequently the findings of the trial Court on these issues are reversed.

51. On issues 14 and 16, it is unnecessary for us to go into the question whether R.S. No. 27/3 was in the possession and enjoyment of the first defendant prior to the date when Exhibit A-1 was made out. As in our view, the said property should be deemed to be the property of the first defendant, it is unnecessary for us to express any further opinion, on this.

52. In the result, the properties, which are the subject-matter of Exhibit A-1, are held to be the properties of the 1st defendant and the alienations by way of mortgages, sales or leases made by the first defendant in exercise of his proprietory interest over the same are held to be legal and enforceable. However, as already stated, all the aforesaid alienations are subject to a charge.

53. With these modifications, the appeal A.S. No. 846 of 1967 is partly allowed and A.S. No. 13 of 1968 is allowed, but subject to the condition that the properties in the hands of the appellants in A.S. No. 13 of 1968 stand charged in respect of the payment of scholarship to students as provided for in the relevant clause in Exhibit A-1. The parties in each of these appeals shall bear their respective costs.