



A.S.(MD)No.78 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 11.04.2023

DELIVERED ON : 26.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.78 of 2016
and C.M.P.(MD)Nos.4875 & 6587 of 2016

Arulmighu Subramania Swamy Deity,
Through its Joint Commissioner,
Executive Officer,
Thiruchendhur,
Tuticorin District.

... Appellant / Plaintiff

Vs.

- 1.S.Poovalingam (Died)
- 2.Sivasubramanian

(Memo dated 16.02.2023 presented before the Court
on 27.02.2023 is recorded as R2, who is already on record,
is also recorded as Lrs of the deceased 1st respondent
vide Court order dated 27.02.2023 made in
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- 3.S.Selvarathinam
- 4.A.Raj (Died)
- 5.S.Ramalakshmi
- 6.A.Prasanna (Died)



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7.Ramachandran

8.Narayanan

9.V.Gopalakrishnan

10.E.Vasuki

11.A.Lakshmanan

12.S.S.Nadar @ S.Sivaprasath Nadar

13.Uthirapandian (Died)

14.Mangai

15.Santhanam

16.P.Subbammal

17.Ramadhas

18.S.Saraswathi

19.R.Leela

20.Gandhimathi

21.Murugesan

22.S.Rathnasabapathi

23.E.Esakkiammal

24.Shanmugavadivu

25.S.Kandasamy

26.Gomathi

27.Muthulakshmi

28.S.Mariyammal

29. S.Sudalaimuthu

30.Muthukrishnan

31.S.Saraswathi

32.S.Ananthavalli



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33.R.Sivanpillai

34.S.Kannan

35.S.Balasubramanian

36.Maheswari (Died)

37.Sakthivairam

38.Akshaya (Minor)

Rep. though her mother and next
friend

(Respondents 36 to 38 are brought on record as
LRs of the deceased 4th respondent vide Court order
dated 15.09.2022 made in C.M.P.(MD)Nos.
3206 and 3210 of 2022)

39.Vallinayagam

40.Abinaya

(Respondents 39 and 40 are brought on record as
LRs of the deceased 6th respondent vide Court
order dated 15.09.2022 made in C.M.P.(MD)
Nos.3206 and 3210 of 2022)

41.S.Sarathadevi

42.Ayyanar

(Respondents 41 & 42 are brought on record as LRs
of the deceased 13th respondent vide Court order
dated 29.11.2022 made in C.M.P.(MD)Nos.9520
and 9521 of 2022 in A.S.(MD)NO.78 of 2016)

43.P.Algammal



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44.P.Meena Priyadharshini

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(Respondents 43 & 44 are brought on record as LR's of the deceased 1st respondent vide Court order dated 16.02.2023 made in C.M.P.(MD)No.1250 of 2023 in A.S.(MD)No.78 of 2016)

... Respondents / defendants

PRAYER: This Appeal Suit is filed under Section 96 of C.P.C. against the judgment and decree dated 31.07.2015 passed in O.S.No.33 of 2011, on the file of II Additional District Judge, Thoothukudi.

For Appellant : Mr.M.Muthugeethayan

For Respondents : Mr.S.Meenakshi Sundaram,
Senior Counsel for
Mr.T.Arivukumar for R2, R43 & R44

Mr.K.Karthick for R3, R7, R10, R17
to R19, R21 to R23, R25, R26, R30 and R32 to 35

Mr.T.Selvam for R5, R8, R9, R11, R14 to
R16, R20, R24, R27 to R29, R31, R41 and R42

Mr.P.T.S.Narendravasan for R12

Mr.M.M.Manivel Pandian for R36 to R38
(R38 Minor rep. by R36)

R39 and R40 – No Appearance
R1, R4, R6 and R13-Died (Steps taken)



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JUDGMENT

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Aggrieved over the dismissal of the suit filed for declaration and recovery of possession, the present appeal came to be filed.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking before the Trial Court.

3. The brief facts, leading to the filing of this Appeal, are as follows:-

3.1. The suit properties were purchased on 23.11.1894 by one Poovalingam Pillam, Veerabhagu Pillai and Vallinayagam Pillai as trustees to perform the 5th day Mandagapadi of Kanda Sasti Dharma at Arulmigu Subramaniya Swamy Deity, Thiruchendur. One of the Huqdar (Trustee) viz., Veerabagu sold his 1/3rd share in favour of Vallinayagam Pillai. After his death, on 30.01.1906, Vallinayagam Pillai's wife sold 2/3rd share to the Poovalingam, first defendant in the suit. Second defendant is the son of the first defendant. First defendant has sold first item of the property in favour of the 4th defendant without any authority to sell the property. For sale of any property endowed to the deity, a permission from the Commissioner of Hindu Religious and Charitable Endowment Act is mandatory. Therefore, the same is not valid in the eye of law. The 4th defendant has sold the



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property to defendants 5 to 35. Those sales also not valid in the eye of law. The above said sales also made during the pendency of the suit in O.S.No.215 of 1996.

3.2. In respect of the 2nd item of the suit property, the first defendant has filed a Trust O.P.No.5 of 1996 to sell the property. Originally, the District Court has granted permission. Pursuant to the said permission, the property has been alienated to the third defendant. However, the order of the District Court in Trust O.P.No.5 of 1996 was challenged in C.R.P.No.1312 of 1996 and C.M.A.No.1680 of 1996. This Court, by its order dated 23.06.1999, set aside the order passed by the District Court and remanded the matter to the District Court to dispose of the Trust O.P.No.5 of 1996 as afresh. Thereafter, the said Trust O.P.No.5 of 1996 was dismissed by the District Court and permission sought for sale of the properties was also rejected. As the defendants have derived no title to the said property and the property has been specifically endowed for performing Kattalai at Arulmigu Subramaniya Swamy Deity, the suit has been filed for declaration and recovery of possession.

4. Defendants 1 and 2 have filed a written statement stating that the suit schedule properties was purchased only for the purpose of conducting 5th day of



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Kanda Sasti Mandagapadi Kattalai festival. According to them, the properties are enjoyed by the first defendant's family. Therefore, the first defendant has every right to deal with the property as per the title deed. According to them, the first defendant need not necessarily to seek permission from the Commissioner of HR & CE. However, with abundant caution has sought permission from HR & CE and therefore, the innocent purchaser should not be put to any hardship. The mere permission sought by the first defendant will not confer any right over the HR & CE department and plaintiff. According to them, defendants 5 to 35 are *bona fide* purchasers and they are not trespasser.

5. The first defendant is the third generation Manager of the Kattalai. The first defendant and his predecessors are continuously doing Kattalai without interception out of his own income derived from his profession. It is also stated that Civil Court has also no jurisdiction. The first defendant has also taken a further stand that the Temple has already filed a suit in O.S.No.215 of 1996 for permanent injunction not to alienate the property. However, the suit has been dismissed. Therefore, the present suit is not maintainable and hit by Order 2 Rule 2 of C.P.C. Hence, prayed for dismissal of the suit.



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6. The 4th defendant has filed a statement to the effect that even before the property has been purchased, the Huqdars (Trustees) of said Kattalai were performing the 5th day of Kanda Sasti Mandagapadi Kattalai. They purchased the suit property on 23.11.1894 for their absolute enjoyment. They would have to perform the 5th day of Kanda Sasti Mandagapadi as Huqdars independently out of the income realized from the property. The property was not purchased in the name of 5th day of Kanda Sasti Mandagapadi and it was purchased in the name of three individuals. When the property was purchased in 1894 there were number of palmyrah trees yielding income. But now, it is only a barren sandy land with fine sand and not fit for any cultivation.

7. Admitting that one of the co-owners Veerabhagu Pillai transferred his 1/3rd share to Vallinayagam Pillai and after his death, 2/3rd share was transferred to Poovalingam. Besides they also received Maniyam from Government for performing the 5th day of Kanda Sasti Mandagapadi. Poovalingam was exclusively enjoying the plaint schedule property and he was also as Huqdar of the 5th day of Kanda Sasti Mandagapadi, getting money as Maniyam (grant) periodically without any default and performing the Kattalai. In the course of time, all the palmyrah trees have withered and fallen down and the land has



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become only sandy track of land and not fit for cultivation. The right as Huqdar of the 5th day of Kanda Sasti Mandagapadi has nothing to do with the right and title to the plaint schedule property, which was purchased by them individually to augment their income to facilitate the smooth and uninterrupted functioning of the Kattalai. For doing the kattalai, they were given a separate maniyam by the Government. It has nothing to do with the property purchased by Poovalingam and his brothers. The Patta for the property also stood only in the name of Poovalingam and his brothers exclusively. After becoming the absolute owner, Poovalingam was enjoying the property exclusively. After his death, the right as Huqdar for the 5th day of Kanda Sasti Mandagapadi along with the maniyam devolved upon his son Sivasubramanian Pillai, who is the father of the first defendant. First defendant become entitled to the suit property as well as the right, after the death of his father Sivasubramanian Pillai.

8. As the property was lying vacant, the first defendant found it very difficult to preserve it from encroachment by unauthorised persons. Therefore, he decided to sell it and sold 1 acres 53 cents in S.No.184 in favour of the 4th defendant for proper and valid consideration and possession of the property also handed over to the fourth defendant. First defendant has also made a deposit of



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Rs.1.5 lakhs in fixed deposit and arranged to meet the expenses relating to the 5th day of Kanda Sasti Mandagapadi, out of the interest earned from it apart from the amount received as Maniyam for doing the Kattalai. As the property is not the property of Kattalai, there was no necessity for the first defendant to get any permission from HR & CE department for sale of the property.

9. After purchase, the 4th defendant got Patta and also enjoying the property. 4th defendant divided the land into house sites and sold the same to defendants 5 to 35. The purchasers also put up house therein bearing various door numbers spending several lakhs and are enjoying them for over 5 years. The plaintiff never raised any objection. After construction, the properties were assessed in their names and they are paying the panchayat tax till date. The first defendant has also taken a further stand that the Temple has already filed a suit in O.S.No.215 of 1996 for permanent injunction not to alienate the property. However, the suit has been dismissed. Therefore, the present suit is not maintainable and hit by Order 2 Rule 2 of C.P.C. Hence, prayed for dismissal of the suit.

10. Defendants 3, 7, 12, 13, 17, 18, 19, 21, 23, 25, 26, 27, 31 to 35 were also took a similar defence as that of the fourth defendant.



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11. 6th defendant has also filed a written statement to the effect that the suit is not maintainable and only to harass the defendants the suit has been filed. He has purchased the suit property for valuable consideration and he has sold the property to one Venkateswaran and Vijayarani and therefore, he is unnecessary party to the suit property.

12. 8th defendant has also taken a similar defence and stated that his purchaser Muthulakshmi has not been made as party and therefore, the suit is bad for non-joinder of necessary party.

13. 9th defendant has also taken a similar defence. Similarly, the defendants 10, 14, 15, 16, 22, 24 and 28 were also taken the same defence.

14. 13th defendant has also filed an additional written statement to the effect that as per Section 63(d) of 'The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959' [hereinafter referred to as 'HR & CE Act' for brevity], the Civil Court has no jurisdiction to decide the character of the property.



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15. Based on the above pleadings, the trial Court has framed the following issues:

- “1. Whether the plaintiff is entitled to seek a declaration that suit properties endowed for performing the 5th day of Kanda Sasti Mandagapadi Kattalai?
2. Whether the plaintiff is entitled for recovery of possession as prayed for?
3. Whether the suit is barred by Order 2 Rule 2 of C.P.C.?
4. Whether the suit is not maintainable?
5. Whether the Civil Court has no jurisdiction to decide the suit?
6. Whether the suit is bad for non-joinder of necessary parties?

16. Before the trial Court, on the side of the plaintiff, one witness was examined as P.W.1 and 8 documents were marked as Ex.A1 to A8. On the side of the defendants, 13 witnesses were examined as D.W.1 to D.W.13 and 47 documents were marked as Ex.B1 and B47.

17. Based on the evidence and materials, the trial Court has dismissed the suit in its entirety. Challenging the same, the present appeal came to be filed by the Temple. During the pendency of the appeal, an application has been filed in C.M.P.(MD)No.4876 of 2016 for reception of additional evidence. At the time of



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hearing, both sides fairly conceded that no oral evidence is required, since the said documents have already been considered by the District Court in Trust O.P.No.5 of 1996. Accordingly, by order dated 15.03.2023, this Court has received the above said documents as additional documents and marked the same as Ex.A9 to Ex.A12.

18. The learned counsel appearing for the plaintiff / appellant submitted that the property has been purchased by the Trustees to perform the 5th day of Kanda Sasti Mandagapadi Kattalai. When the very purchase itself is made for the purpose of performing the charitable activities, it cannot be said that the properties are the absolute properties of the Trustees. It is his contention that more than 4 acres of land which has been specifically endowed for the charitable purpose and dealt by the Trustees, sold to the various third parties viz., the defendants 3 to 35 to make unjust enrichment.

19. It is the further contention of the learned counsel appearing for the plaintiff / appellant that the first defendant himself has filed an application under Section 34 of the Indian Trusts Act for seeking permission to sell the property. Though the said application was originally allowed, the same has been challenged



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before this Court in C.R.P.No.1312 of 1996 and also in C.M.A.No.1680 of 1996.

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This Court, by an order dated on 23.06.1999, set aside the order passed by the District Judge and remanded the matter for fresh disposal by the District Court. After the remand, the learned District Judge has passed an order rejecting permission to sell the property. In the interregnum period, the property has been sold to the 4th defendant. Therefore, it is the contention of the learned counsel appearing for the plaintiff / appellant that once the very permission itself is rejected, any sale made during the pendency of the proceedings is not binding.

20. It is the further submission of the learned counsel appearing for plaintiff / appellant that under Ex.A4, judgment in Trust O.P.No.5 of 1996, the District Court has clearly held that the properties were specifically endowed to the Temple deity for charitable purpose and it was not a mere charge. Therefore, when the first defendant approached the Court and invited a finding, which reached its finality, now it cannot be contended that there was no need to seek a permission to sell the property. It is his further contention that three times an application has been filed before the authorities under the HR & CE Act for seeking permission to sell the properties, which were also rejected. Hence, submitted that the trial Court has gone beyond the pleadings and findings.



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21. Therefore, it is his contention that once the property itself is endowed for performing the 5th day of Kanda Sasti Mandagapadi Kattalai for the benefit of the worshipers and the charity has a public character and it is associated with Hindu festival, such charity falls within the specific endowment under Section 6 (19) of the HR & CE Act. Therefore, when the very performance of the Mandagapadi for the benefit of the worshipers and it is a religious charity, in such a case, a specific endowment is automatically created. Hence, submitted that when the first defendant himself has failed in his attempt to get the permission from the competent Civil Court and also before the authorities, now estopped from contending that there was no need to get the permission from the authorities dealing with the properties. Therefore, merely because, the sale deeds are executed in favour of the defendants by the original Trustees, the same will not confer any title to them. They will be considered only as trespassers. Therefore, it is his contention that though there is a specific provision under the HR & CE Act to evict the persons, Civil Court jurisdiction is not barred. According to him, still the Civil Court has got jurisdiction to entertain the suit filed for declaration and for recovery of possession.



22. It is further contention that originally the trial Court has wrongly held that suit is barred under Order 2 Rule 2 of C.P.C. It is relevant to note that originally the suit has been filed for bare injunction against the fourth defendant for restraining the alienation. Since the properties were already transferred, the suit has been dismissed. Therefore, filing a comprehensive suit for declaration and recovery of possession will not be barred. Hence, it is his contention that the suit is maintainable before the civil Court and in support of his submissions, he has also relied upon the following judgments:

1. *A.N.Kumar Vs. Arulmighu Arunachaleswarar Devasthanam, Thiruvannamalai* reported in (2011) 3 MLJ 230;
2. *R.M.Sundaram @ Meenakshisundaram Vs. Sri Kayarohanasamy and Neelayadhasathi Amman Temple* reported in 2022 (2) MWN (Civil) 813;
3. *Palanivelayutham Pillai Vs. Ramachandran* reported in (2000) 6 SCC 151;
4. *Joint Commissioner, Hindu Religious and Charitable Endowments, Admn. Department Vs. Jayaraman and others* reported in (2006) 1 SCC 257:

23. The learned Senior Counsel appearing for the defendants / respondents would submit that though the property was purchased by the three



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individuals as Huqdars, the very document itself clearly show that it is purchased for the individual enjoyment and only a specific charge alone has been created and not a specific endowment. According to him, the income from the property was derived only from the palmyrah trees that alone has to be utilized for performing Kattalai. The suit properties in the lands are only sandy land and no income was derived from the suit properties, even then the Kattalai has been performed by the defendants. Besides, Government has also provided Maniyam from time to time to perform the Kattalai. According to him, there is no specific endowment and it is only a charge to perform the 5th day of Kanda Sasti Mandagapadi Kattalai. It is his contention that dedication of the properties is not complete in this matter. The very recital in the sale deed makes it very clear that the property has to be enjoyed absolutely. Therefore, it is his contention that the mere recital to the effect that 5th day of Kanda Sasti Mandagapadi Kattalai to be performed from the income of the property, the same will not amount to complete dedication. At the most it is only a partial dedication for the performance of the Kattalai. Therefore, it is his contention that only the charge was created in favour of the charity. Therefore, it cannot be said that the defendants have no right to deal with the properties.



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24. The learned Senior Counsel appearing for the defendants / respondents would further submitted that merely because, the first defendant have moved an application for seeking permission to sell the properties before the District Court and suffered orders that will not operate as a *res judicata*. According to him, the question as to whether any property or money has been specifically endowed or not is to be decided only by the Joint Commissioner and Deputy Commissioner as per Section 63 of the HR & CE Act. Therefore, it is his contention that merely because the finding has been rendered by the District Court in Trust O.P.No.5 of 1996 to the effect that there is a specific endowment in favour of the religious institution, such finding cannot operate as a *res judicata* since the District Judge has no power to go into the question to decide whether the property is a specific endowment or not? Hence, it is his contention that when the Court has no jurisdiction to decide such issue and the jurisdiction entirely vest with the authorities under the HR & CE Act, the findings rendered by the District Judge in Trust O.P.No.5 of 1996 under Ex.A4 will not operate as *res judicata*.

25. Further, it is the contention of the learned Senior Counsel appearing for the defendants / respondents that merely permission to sell the property was rejected by the authorities, the same will not take away the property right of the



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defendants. Hence, it is his contention that those proceedings have no relation to decide this issue and they will not operate as an estoppel. According to him, there cannot be any estoppel against the statute. That apart, it is his contention that Civil Court has no jurisdiction to decide the issue and civil suit is not maintainable as per Section 108 of the HR & CE Act. When the Civil Court jurisdiction has been specifically ousted under the HR & CE Act, filing of the suit for seeking declaration and recovery of possession is not maintainable. Hence, it is his contention that the suit is not maintainable in the eye of law. Further, it is the submission of the learned Senior Counsel appearing for the defendants / respondents that it is only a charge and not complete dedication. Hence, opposed the appeal.

26. In support of his submission, he has relied upon the following judgments:

1. *Idol of Sri Renganathaswamy, Represented by its Executive Office, Joint Commissioner vs. P.K.Thoppulan Chettiar, Ramanuja Koodam, Anandhana Trust, Represented by its Managing Trustee and others* reported in (2020) 17 SCC 96;



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2. ***Kulalar Peravai Vs. A.S.S.Nataraj and others*** reported in ***2022 (1) CTC***

207;

3. ***Joint Commissioner, HR & CE, Administration Department Vs. Jayaraman & others*** reported in ***2006-1-L.W.306***; and

4. ***M.Dasaratharami Reddy Vs. D.Subba Rao*** reported in ***AIR 1957 SC 797***.

27. In the light of the above submissions, now the points arose for consideration in this appeal are as follows:

1. Whether the suit properties completely dedicated towards the charity or only a partial dedication?

2. Whether the charge alone is created for the purpose of performing the charity?

3. Whether the suit is not maintainable before the Civil Court for declaration and recovery of possession?

4. What other reliefs the parties are entitled to?



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Points Nos.1 and 2

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28. It is the case of the plaintiff / appellant that the suit properties originally purchased by the Trustees to perform the charity of 5th day of Kanda Sasti Mandagapadi Kattalai. Whereas it is the contention of the defendants / respondents that the suit property has been purchased with absolute right to enjoy the property and it is only decided to perform charity from the income. Therefore, it is the contention of the learned Senior Counsel appearing for the defendants / respondents that it is only a charge and there is no complete dedication in favour of the public religious charity. It is well settled that dedication of the property to religious or charitable purpose may be either complete or partial. Whether dedication is complete or not would be decided only on the basis of the facts of the case. The intention of the charges would be gathered on a fair and reasonable construction of the document as a whole. Whether the parties have intended to dedicate the property for a charity can be found out from their intentions.

29. It is not in dispute that the property has been purchased by three brothers being Trustees under Ex.A6, dated 23.11.1984. Though the document shows that the vendor has executed the property in favour of the Trustees for absolute



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enjoyment, now the intentions of the parties have to be seen from the subsequent conduct of the parties and other documents relating to the properties. Ex.A9-sale deed dated 24.03.1902 executed by one of the co-owners of the property viz., Veerabhagu Pillai in favour of his brother Vallinayagam Pillai, makes it clear that the property has been dedicated for the purpose of charity of doing the 5th day of Kanda Sasti Mandagapadi Kattalai. The recitals in the above document make it clear that though the property has been sold, the properties were primarily used only for the purpose of doing charity. Similarly, Ex.A10, sale deed dated 30.01.1906, executed by Kangammal, W/o. of Vallinayagam Pillai, who has purchased 1/3 share under Ex.A9, re-conveyed the property to Poovalingam wherein it is clearly recited that the property has been dedicated to performance of Mandagapadi. The specific recital in the document Ex.A10 is as follows:

“சண்முக சிவராம விளங்கும் பெருமாள் பிள்ளை அவர்களுக்கு கிரயம் செய்து கொடுத்து அவர்களிடமிருந்து என்னுடைய பாகத்துக்காக வாங்கிய தேதி வருமடியிலிருந்து வந்ததில் பிரதி போதுயென்னுடையதிற்காக போனது..... கடன்களை நிவர்த்திக்கும் பொருட்டுமான மேலே கண்ட மண்டகப்படி அகப்பாத்தியதையை அதற்காக விட்டிருக்கிற இதன் தபசில் கண்ட சொத்துக்களை ஷை மண்டகப்படிக்கான வருமானம், மானியம் இவைகளில் மூன்றிலோரு பாகத்தை தங்களுக்கு கிரயம் செய்து கொடுத்து வாங்கியது ரூபாய் 500/- இந்த ரூபாய்



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அயிநூறையும் பணப்பற்று விபரப்படி தங்களிடம் நான் பெற்றுக் கொண்டதனாலே தபசில் கண்ட சொத்துக்களையும், மானிய தொகையையும் ஷை மண்டகப்படி அகப்பாத்தியதையும் தாங்களே சர்வ சுதந்திர பாத்தியமாய் ஆண்டனுபவித்து கொண்டு ஷை தர்மத்தையும் நடத்துக் கொள்வீர்களாகவும். ”

The above recital makes it clear that the property originally purchased under Ex.A6 by the three Trustees of the 5th day of Kanda Sasti Mandagapadi Kattalai. The parties are in fact intended to dedicate the properties only for the purpose of charity. Specific recital in Ex.A10 makes it very clear that the property has been dedicated for the purpose of charity and in fact from the above document the intention of the parties can be easily inferred that the property was purchased by the Trustees originally under Ex.A6 for the purpose of doing the charity alone. Therefore, the mere recitals in Ex.A6 that they enjoyed the property absolutely that will not amount to absolute right.

30. In fact Section 6(17) of HR & CE Act reads as follows:

“(17) “Religious endowment” or “endowment” means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and



also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service holder or other employee of a religious institution;

Explanation.—(1) Any inam granted to an archaka, service holder or other employee of a religious institution for the performance of any service or charity in or connected with a religious institution shall not be deemed to be a personal gift to the archaka, service holder or employee but shall be deemed to be a religious endowment.

Explanation.— (2) All property which belonged to, or was given or endowed for the support of a religious institution, or which was given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity shall be deemed to be a “religious endowment” or endowment” within the meaning of this definition, notwithstanding that, before or after the date of the commencement of this Act, the religious institution has ceased to exist or ceased to be used as a place of religious worship or instruction or the service or charity has ceased to be performed:

Provided that this Explanation shall not be deemed to apply in respect of any property which vested in any person before the 30th September 1951, by the operation of the law of limitation;

31. The above definition makes it clear that any property endowed for the performance of any service or charity of a public nature connected therewith or any other religious charity is a religious endowment. It is also relevant to note that



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the defendants themselves has approached the HR & CE Department for seeking permission to sell the property and the same has been rejected as early as on 19.09.1989 as could be seen from Ex.A12 order. It is also relevant to note that once the above application was rejected, the respondent has moved an application under Section 34 of the Indian Trusts Act before the learned District Judge in Trust O.P.No.5 of 1996. At the first instance, the learned District Judge has granted permission. However, the same was challenged before this Court in C.R.P.No. 1312 of 1996. This Court by its order dated 23.06.1999, set aside the order of the District Judge and in fact remanded the matter to the District Judge once again to decide the issues on merits. Pursuant to such remand order, the District Judge has passed a detailed order, rejecting permission and the District Judge has also held that the property was endowed to the charitable purpose.

32. It is relevant to note that in C.R.P.No.1312 of 1996, challenging the order passed in Trust O.P.No.5 of 1996, this Court in paragraphs 9 and 10 has held as follows:

“9.....The learned Judge ought to have realised that the application filed by the respondent on 18th December, 1985 for permission to sell was not at all maintainable having regard to an earlier application filed by respondent on 8th April, 1987 being an application under Section 34 of the Endowment Act which application



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was duly considered and rejected by an order passed on 19th September, 1989. The learned Judge ought to have noted that though appealable, the said order was not challenged by filing an appeal. The said order is therefore final and binding between the parties. The same operated as *res judicata*. Hence, no contrary order could be passed in a subsequent application filed by respondent. The Endowment Act is a Special Act and the same would prevail over the Indian Trusts Act under which the later application was filed. Section 34 of Endowment Act specifically deals with sale of immovable property belonging to a religious institution whereas Section 34 of the Indian Trusts Act deals with application for opinion for the management of the trust property. Though a opinion in respect of sale of immovable property could justifiably be issued under section 34 of the Indian Trusts Act, since State enactment has been enacted in the forum of Endowment Act, the same would prevail over the Indian Trusts Act. In the circumstances, report to section 34 of the Indian Trusts Act is misconceived.

10. It has been brought to the notice of the learned District Judge that the respondent had approached the Court to set aside the order, with unclean hands and out of malafide intention to make illegal enrichment. The remedy of the respondent, if any was under the Endowment Act and that the respondent was guilty of "*suppressio veri and suggestio falsi*." It is now brought to my notice that not only the earlier application filed by respondent under the Endowment Act has been rejected, but also on respondent has also taken steps to have the other property transferred in his personal name."



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33. By setting aside the order, the matter has been remanded to the District Judge to decide the issues after giving appropriate opportunity to the parties. The very order of this Court in C.R.P.No.1312 of 1996 has not been challenged and reached the finality. When this Court has categorically recorded the finding that since the application for sale of property under Section 34 of Indian Trusts Act was already rejected by the authorities under HR & CE Act, the said order is operate as a *res judicata* and binding on the parties. Therefore, the findings recorded by this Court in C.R.P.No.1312 of 1996 are certainly binding on the defendants. Same is not only binding on the parties but the said issue also operate as an estoppel against the defendants from contending that there was no necessary to get the permission from the HR & CE authorities under Section 34 of the HR & CE Act.

34. As referred above, from the construction of the document, the conduct of the parties and recitals found in Exs.A9 and A10, it is seen that the first defendant's parties themselves understood that the property comes within the ambit of HR & CE Act and filed an application for seeking sale of the property and suffered an adverse order, which also reached the finality, therefore, now they



cannot turn around and take a stand that the property is not a complete dedication and it is only a partial dedication. It is relevant to note that from the nature of the recitals found in the documents viz., Ex.A9 and A10 referred above and the very purchase itself made by the Trustees of the 5th day of Kanda Sasti Mandagapadi Kattalai, it can be easily held that the parties are intended to dedicate the title completely only for the purpose of charity.

35. In *M.Dasaratharami Reddy Vs. D.Subba Rao* reported in *AIR 1957 SC 797*, the Hon'ble Supreme Court has held as follows:

“Dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to and follows, the property which retains its original private and secular character.

Whether or not dedication is complete would naturally be a question of fact to be determined in each cases in the light of the material terms used in the document. In such cases, it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word “trust” or “trustee” is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as



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decisive of the matter. The answer to the questions whether the private title over the property was intended to be completely extinguished or whether the title in regard to the property was intended to be completely transferred to the charity charity can be found not by concentrating on the significance of the use of the word “trustee” or “trust” alone but by gathering the true intent of the document considered as a whole.”

36. D.W.1 in his evidence in cross examination, has clearly admitted that suit properties have been purchased only for the purpose of doing charity and the admission of D.W.1 is as follows:

“தாவா சொத்துக்கள் கட்டளை செய்வதற்கதாக வாங்கப்பட்டவை என்பதை ஒத்துக் கொள்கிறேன்”

The above admission itself clearly shows that as Trustees they have purchased the property only for the purpose of charity and the recitals in Ex.A9 and A10 make it very clear that the property has been dedicated only for the purpose of charity. From the above recitals and admission of D.W.1 and the conduct of D.W.1 approaching the authorities under Section 34 of the HR & CE Act for seeking permission to sell the property, make it clear that properties completely dedicated for the purpose of charity. Therefore, the contention of the learned Senior Counsel appearing for the defendants / respondent that only a charge is created over the



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property cannot be countenanced.

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37. It is also to be noted that the first defendant has also filed a suit for permanent injunction in O.S.No.110 of 2011. The trial Court also dismissed the suit holding that he has come to the Court with unclean hands. The judgment copy of the said suit was also marked as Ex.A7 and the above suit itself was filed during the pendency of the present suit, which was filed for declaration and recovery of possession. Therefore, considering the entire gamut of evidence, the trial Court dismissed the suit by holding that the plaintiff therein has come to the Court with unclean hands and the said judgment has also reached the finality. The fact remains that during the pendency of the proceedings, the properties have been transferred to the various parties viz., defendants 2 to 35. The fourth defendant was also one of the major purchasers and has developed the land as plots and sold the property. It is relevant to note that all the sales have been made during the pendency of the proceedings particularly, in an earlier occasion when the District Judge has permitted to sell the property, immediately the transfer took place.

38. It is further to be noted that the said order has been set aside by this Court in C.R.P.No.1312 of 1996. Therefore, when the very basis has gone, the



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consequences also automatically will go. Therefore, the sale deeds cannot confer any title to the defendants / respondents. Further once the property is proved to be public endowment and dedicated to the public charity, any sale without permission of the Commissioner under Section 34 of the HR & CE Act is void. Admittedly, in this case, a permission to sell the property was already rejected by the Commissioner, Hindu Religious Endowment Department in the year 1989 itself. This is also captured in the order of this Court in C.R.P.No.1312 of 1996. The copy of the said order has also been marked as Ex.A11. Such being a position, merely on the basis of sale executed in favour of the defendants and some tax receipts have been filed to show that they developed the property by way of some constructions that will not confer any right on the defendants to claim their rights over the property. It is relevant to note that very charity for doing service of Mandagapadi is not confined to first defendant's family alone. The worshipers and the public at large are also beneficiary on the said Mandagapadi. Therefore, the contention of the defendants that only a charge has been created over the property for doing service cannot be countenanced.

39. In *Idol of Sri Renganathaswamy, Represented by its Executive Office, Joint Commissioner vs. P.K.Thoppulan Chettiar, Ramanuja Koodam,*



Anandhana Trust, Represented by its Managing Trustee and others reported in

(2020) 17 SCC 96; the Hon'ble Apex Court in paragraphs 18 and 19, has held as follows:

“18. The distinction between a public and private charity was set out by a Constitution Bench decision of this Court in Ram Saroop Dasji v. S.P. Sahi [Ram Saroop Dasji v. S.P. Sahi, 1959 Supp (2) SCR 583 : AIR 1959 SC 951] . In that case, the Court had to determine whether the Bihar Hindu Religious Trusts Act (1 of 1951) applied to both public as well as private trusts. It described the difference between public and private charities as follows : (AIR p. 956, para 6)

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

19. Where the beneficiaries of a trust or charity are limited to a finite group of identifiable individuals, the trust or charity is of a private character. However, where the beneficiaries are either the public at large or an amorphous and fluctuating body of persons incapable of being specifically identifiable, the trust or charity is of a public character. This test has been consistently followed by subsequent Benches of this Court, most recently in a three-Judge



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Bench decision of this Court in M.J. Thulasiraman v. Hindu Religious & Charitable Endowment Admn. [M.J. Thulasiraman v. Hindu Religious & Charitable Endowment Admn., (2019) 8 SCC 689 : (2019) 4 SCC (Civ) 420] In the present case, the deed of settlement states that the charity is to be carried for the benefit of the “devotees” who visit during certain Hindu religious festivals. The charity is one which benefits the public and the beneficial interest is created in an uncertain and fluctuating body of persons. The “devotees” as a class of beneficiaries are not definitive and therefore, the respondent trust is a public trust.”

40. From the above, it can be easily said that where the beneficiaries are either the public at large or an amorphous and fluctuating body of persons incapable of being specifically identifiable, the trust or charity is of a public character. Considering the entire documents particularly, the sale deeds Ex.A6, A9 and A10 and conduct of the parties, this Court is of the view that in fact there is a complete dedication for the purpose of performing the charity and therefore, the contention of the defendants that there is no complete dedication cannot be countenanced. The order of this Court in C.R.P.No.1312 of 1996, marked as Ex.A11, binding on them. Besides the defendants also estopped from taking different stand in the present suit.

41. The yet another submission of the learned Senior Counsel appearing for



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the defendants / respondents that whether there is a complete dedication of property or specific endowment has to be decided only by the Joint Commissioner and Deputy Commissioner under Section 63 of the HR & CE Act and therefore, the civil Court cannot decide the matter, also cannot be countenanced for the reasons that the defendants / respondents themselves in fact approached the authorities under Section 34 of the HR & CE Act for sale of the property, which has also been rejected under Ex.A11. When, they themselves understood that the property is a complete dedication and specific endowment, the question of deciding the same issue once again under Section 63 of HR & CE Act does not arise at all.

42. The trial Court has also non-suited the suit for non-joinder of necessary parties. It is relevant to note that after sale of property by the first defendant to the fourth defendant, several transactions have been made by various other defendants and the purchasers have also started to create an encumbrance to various other persons. The cross examination of the other defendants clearly indicate that they have not even verified the titles and other relevant records at the time of purchase. All these facts clearly indicate that some how or other to make them enrichment, they got the sale deed in respect of the Temple property. The properties situated



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just adjacent to the very famous temple viz., Arulmigu Subramaniya Swamy Thirukovil, Thiruchenthur. Therefore, in order to commercially exploit the property, taking advantage of the sale deed, several transactions have been taken place. Therefore, merely because, 1 or 2 purchasers have not been arrayed as parties, this Court is of the view that the suit cannot be non-suited for non-joinder of necessary parties.

43. Though the trial Court has also non-suited the plaint on the ground of Order 2 Rule 2 of C.P.C, the above issue has not been canvassed by the defendants / respondents before this Court. However, it is relevant to note that the plaintiff has originally filed a suit in O.S.No.215 of 1996, for permanent injunction restraining the defendants from alienating the property. The said suit has been dismissed as infructuous, since the transfer has already been taken place. It is relevant to note that mere filing of the said suit for bare injunction, it cannot be said that the comprehensive suit filed for declaration and recovery of possession is barred under Order 2 Rule 2 of C.P.C. The cause of action arose for the suit in O.S.No.215 of 1996 is only to prevent the sale by the first defendant and as the sale has already been done, the suit has become dismissed as infructuous. Therefore, it cannot be said that the subsequent suit filed for larger relief, the same



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is bad under Order 2 Rule 2 of C.P.C. To apply Order 2 Rule 2 of C.P.C., the defendants have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which, the claim in the latter suit is based, the bar under Order 2 Rule 2 of C.P.C., will not apply automatically. The plea of Order 2 Rule 2 of C.P.C., can be established only if the defendants / respondents file an evidence and pleadings in previous suit and thereby proves to the Court the identity of the cause of action in the two suits. Admittedly, in this case, the pleadings in the previous suit have not been filed.

44. Therefore, in the absence of any pleadings in the previous suit, now the bar Order 2 Rule 2 of C.P.C., cannot be pressed into service. Of course, the trial Court without going into that aspect, has simply held that the bar under Order 2 Rule 2 of C.P.C., also applicable. Though the above plea has not been canvassed before this Court by the learned counsel appearing for the defendants / respondents, this Court on perusing the judgment of the trial Court found that the trial Court based on the judgment, which was marked as Ex.B1, has simply held that the present suit is barred under Order 2 Rule 2 of C.P.C., which is not according to law. That apart as already held mere filing the suit for preventive



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relief, it cannot be said that the comprehensive suit would not lie later. Such view of the matter, the bar under Order 2 Rule 2 of C.P.C., will not apply to the present case.

Point Nos.3 and 4:

45. Yet another submission of the learned Senior counsel appearing for the defendants / respondents is that the Civil Court has no jurisdiction to decide the character of the property, since there is totally a bar contained in Section 108 of HR & CE Act. It is relevant to note that the property has been purchased, as admitted by D.W.1, only for performing the charities and Ex.A9 and Ex.A11 clearly show that the parties were always intended to treat this properties as specific endowment. That apart the first defendant himself moved an application before the HR & CE Act under Section 34 of the HR & CE Act for sale of the property and the order rejecting the request made by the first defendant / first respondent has reached the finality. Therefore, it is very clear that the property was specifically endowed to the temple. Only in that circumstances, the first defendant himself sought permission to sell the property under Section 34 of the HR & CE Act. Therefore, once the property has already been endowed, it cannot



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be said that the Civil Court has totally barred in entertaining the suit filed for declaration and recovery of possession. When the property has already been specifically endowed and the property was in enjoyment of the Trustees, such enjoyment is unlawful. Despite the fact that permission to sell the property has been rejected and properties have been sold to the other defendants, the same would not confer any title to them, therefore, their enjoyment would be only unlawful as trespasser.

46. Therefore, in such a scenario, the civil suit, not only for the declaration but also for recovery of possession, is maintainable. Section 108 of HR & CE Act does not bar such suit and exclusion of the civil Courts jurisdiction for recovery of possession cannot be inferred. For establishing the civil rights, the suit is very well be maintained before the Civil Court. The bar contains in Section 108 of the HR & CE Act will not exclude the jurisdiction of the civil Court in such cases. This case has also been held in judgment of this Court in ***Ponniah Nadar Vs. Chellam Nadar*** reported in (1970) 2 MLJ 526. That apart this Court in ***Kulalar Peravai Vs. A.S.S.Nataraj and others*** reported in 2022 (1) CTC 207 has held that the property comes within the ambit of HR & CE Act, suit for declaration and recovery of possession is held to be maintainable and decreed the suit.



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47. The Division Bench of this Court in *A.N.Kumar Vs. Arulmighu Arunachaleswarar Devasthanam, Thiruvannamalai and others* reported in (2011) 3 MLJ 230; in paragraph 49 has held as follows:

“49. We summarise our conclusions as under:

(i) *So far as the suits filed by the temple for eviction of tenants/licensees/lessees/mortgagees for filing of the ejectment suit, the Civil Court's jurisdiction is not barred. The decision to approach Civil Court or invoke the provisions of H.R. & C.E. Act vests with the Temple.*

(ii) *In cases of encroachers, temple authorities can either resort to the provisions under Sections 78, 79, 79-A, 79-B or to approach the Civil Court. The decision to elect a particular procedure lies with the owner of the property, being the Temple.*

(iii) *In view of the express bar under 2nd proviso to Section 79, in so far as the suits by the encroachers/lessees/licensees/mortgagees, the bar under Section 108 will get attracted excepting in instances specifically stated in the 1st proviso to Section 79.”*

48. It is also to be noted that though the defendants took a stand that they were doing the charity from getting a Maniyam from the Government, there is no document whatsoever has been produced. Whereas the evidence of D.W.1 indicates that the properties have become a sandy land and no income is deriving



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from the property. Such being the position, when the permission to sell the property is already rejected, the property held to be an endowment and transferring the property to various other defendants that too during the pendency of the proceedings, even assuming that all the persons are in enjoyment of the property and exercise some control over the property, their status would be only construed as an encroachment since they did not derive any valid title. Such being the position, it is for the temple authorities to choose the forum for taking action to recover the possession of the suit properties. Therefore, the contention of the learned Senior counsel appearing for the defendants / respondents that civil Court has no jurisdiction also cannot be countenanced.

49. Much emphasis has also been made with regard to the judgment of the Hon'ble Apex Court in *Idol of Sri Renganathaswamy, Represented by its Executive Office, Joint Commissioner vs. P.K.Thoppulan Chettiar, Ramanuja Koodam, Anandhana Trust, Represented by its Managing Trustee and others* reported in (2020) 17 SCC 96, wherein the Hon'ble Apex Court in paragraph 26 held that since the document created as a “specific endowment”, as regulated by 1959 Act, the specific endowment is created as regulated by the 1959 Act, the specific endowment created is an absolute endowment in favour of the “religious



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charity” as understood under the Act. Such being the position, the suit filed under Section 34 of the HR & CE Act before the District Court for permission to sell the property is not maintainable. Therefore, the same cannot be pressed into service to hold that the present suit is not maintainable.

50. Yet another submission is also made by the learned Senior Counsel appearing for the defendants / respondents to the effect that as the District Court has passed order rejecting permission to sell the property under Ex.A4 it was also held that property endowed to the charity. Therefore, it is his contention that since the District Court itself did not have jurisdiction to go into the above matters, the order passed under Ex.A4 will not bind on the defendants / respondents. It is relevant to note that the District Judge has passed a detailed order pursuant to the direction of this Court in C.R.P.No.1312 of 1996, which has been filed as Ex.A11. This Court has held that since earlier the Commissioner of HR & CE has already passed an order under Section 34 of HR & CE Act, rejecting the permission, the same is operate as a *res judicata*. The defendants / respondents themselves moved the Court and also taken advantage of the orders of the District Judge, granting permission to sell the property, sold the property. The said order was set aside by this Court and the matter has been remanded back and thereafter the order has



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been passed dismissing the application. Therefore, the defendants / respondents now cannot contend that the said order is not binding on them. The defendants cannot take undue advantage of the order in their favour which was originally passed and now cannot contend that the later order which negated the request of the defendants will not bind on them. As the petitioner themselves approached the Court and invited certain findings, certainly the said findings are binding on them. It is not only operate as a *res judicata* and it is also operate as an estoppel against the defendants / respondents from taking a different stand in later litigation. The order of this Court passed in Ex.A11 certainly binding on the defendants / respondents. The High Court representing the sovereign as *parens patriae*, passed such order only to protect the properties of the religious institutions. Therefore, it cannot be said that pursuant to the direction of this Court the order passed by the District Judge will not bind the defendants.

51. Such being the position, this Court holds that since the first defendant and the predecessor being the Trustees dedicated the properties for specific charity and there is a complete endowment for performing the charities and have dealt the property detriment to the interest of the religious charity and sold the property to the other defendants, their rights if any would be only as that of encroachers.



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Therefore, this Court being a *parens patriae* of religious institutions cannot stand on the technicalities to non suit the plaintiff. The paramount duty of the Courts to safeguard the religious properties. Such being the position, this Court is of the view that the order of the learned II Additional District Judge, Thoothukudi dismissing the suit is liable to be interfered and the same has to be set aside. Accordingly these points are answered.

52. In the result, this Appeal Suit is allowed and the decree and judgment of the learned II Additional District Judge, Thoothukudi in O.S.No.33 of 2011, dated 31.07.2015 is set aside and the suit is decreed granting declaration and recovery of possession with costs. The defendants / respondents are liable to hand over the possession to the plaintiff / Temple within a period of two months from the date of the judgment. Consequently, connected miscellaneous petitions are closed.

26.04.2023

NCC : Yes /No
Index : Yes/No
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N.SATHISH KUMAR, J.

vsm

To

- 1.The II Additional District Judge, Thoothukudi.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

Judgment in
A.S.(MD)No.78 of 2016

26.04.2023