1962

October 26.

L. JANAKIRAMA IYER AND OTHERS

v.

P. M. NILAKANTA IYER AND OTHERS

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR and RAGHUBAR DAYAL, JJ.)

Trust—Debtors conveying property to three trustees for repayment of debts—Administration suit by debtors dismissed on withdrawal—Subsequent suit on behalf of general body of creditors—If barred by res judicata—*Limitation claim for possession—Maintainability—Sale deed executed by two of the three trustees—Validity—Amendment of decree by High Court after admission of appeal by Supreme Court—Award of net profit to trust estate and interest to mortgagee—Adjustment of equities—Court's power—Validity of alienation in favour of person intermeddling with trust estate—Trustee* de son tort—*Indian Trusts Act, 1882 (2 of 1882), ss. 48, 63—Code of Civil Procedure, 1908 (Act V of 1908), ss. 11, 151 and 152—Indian Limitation Act, 1908 (IX of 1908), Arts. 134, 120.*

These appeals arose out of a representative suit filed on behalf of the creditors of defendants 1 to 6 who had executed a trust deed on August 26, 1936, conveying their properties to three trustees with authority to dispose of the same and distribute the sale proceeds rateably amongst the creditors. The trust deed required "the three trustees to act according to the decision arrived at either unanimously or by majority." The trustees accepted the trust and conveyed all the properties except the family house in administration of the trust. Two of the sale deeds in favour of two of the creditors, defendants 13 and 14, a mortgagee creditor, in the suit were executed by only two of the trustees. In a suit brought by the said defendants 1 to 6 for administration of the trust, the trial court passed a preliminary decree. The High Court on appeal remanded the matter to the trial court for a finding as to the market value of the lands sold. The trial court submitted its finding. At this stage defendants 1 to 6 withdrew the suit which was dismissed. The present suit under O. 1, r. 8 of the Code of Civil Procedure was filed on October 29, 1947, before such withdrawal. The claims made therein, *inter alia*, were for a declaration that the properties in question were still impressed with the trust, for the removal the surviving trustee and appointment of an administrator to realise the amounts, recover possession of the properties and re-sell them. The trial Judge passed a decree in favour of the plaintiffs. The High Court in substance confirmed that decree but modified it by awarding simple interest

instead of compound interest decreed in favour of defendant 14. The two sale deeds, executed by only two of the trustees, were declared invalid and it was found that the third trustee did not give his consent to it. The sale deed in favour of defendant 12 was declared invalid on the ground that he had intermeddled with the trust estate and had thus become a trustee *de sou tort*. The courts below also rejected the pleas of limitation and *res judicata* raised on behalf of the defendants. Some of the creditor defendants appealed. After the appeals had been admitted by this Court the High Court amended the decretal order by substituting the words 'mesne profits' by 'net profits' under ss. 151 and 152 of the Code of Civil Procedure.

Held, that the question whether Art. 120 or Art. 134 of Indian Limitation Act applied to a case had to be decided on the case made in the plaint, read as whole and properly construed. Since the present suit was not one for a mere declaration but for possession of property, having been valued and framed as such, deliverable to the administrator, it was governed by Art. 134 and not by Art. 120 of the Act and was thus within time.

It was not correct to say that s. 63 of the Indian Trust Act was exhaustive as to the remedies available to a beneficiary under a private trust or that a claim for constructive possession, such as was made in the present suit, was prohibited under that section.

Rani Chhatra Kumari Devi v. *Prince Mohan Bikram Shah*, (1931) I. L. R. 10 Pat. 851, distinguished.

Subbaiya Pandaram v. *Mohammad Mustapha Marachayar*, (1923) L. R. 50 I. A. 295, *A Subramania Iyer* v. *P. Nagarathna Naicker*, (1910)20 Mad. L. J. 151 and *Masjid Shahid Ganj* v. *Shiromani Gurdwara Prabandhak Committee Amritsar*, (1940) L. R. 67 I. A. 251, referred to.

Nor could the suit be said to be barred by *res judicata* since it did not fall within the scope of s. 11 of the Code of Civil Procedure. The suit being one under O. 1, r. 8 of the Code, it could not be said that defendants 1 to 6, plaintiffs in the earlier suit, and the creditors, plaintiffs in the present suit, were the same party or parties claiming through each other.

Clause 23 of the trust deed, properly construed, conformed to the provision of s. 48 of the Trusts Act that where there are more trustees than one, they must all join in the execution of the trust, and did not provide for an exception to that rule, even though it provided that decisions by the trustees need not a ways be unanimous but could be by majority as well. Such sale deeds as had been executed by

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two of the trustees only must therefore fail. The alternative case of consent given by the third trustee to the transactions could be of no avail since it could not be substantiated by evidence.

Lala Man Mohan Das v. *Janki Prasad*, (1944) L. R. 72 I. A. 39, referred to.

The High Court had jurisdiction under ss. 151 and 152 of the Code of Civil Procedure to correct the obvious error in the decretal order even though the appeals from the said decree had already been admitted by this Court. Nor could the amendment be challenged on merits. Although a successful plaintiff would not normally be entitled to mesne profits for more than three years in view of Art. 109 of the Limitation Act, the court had jurisdiction in the case of a trust to make appropriate directions in the decree, while awarding net profits to the trust and interest to the mortgagee, in adjustment of the equities between them.

Satgur Prasad v. *Har Narain Das*, (1932) L. R. 59 I. A. 147, *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*, (1908) L. R. 35 I. A. 48 and *Jagannath Prosad Singh Chowdhury* v. *Surajmal Jalal*, (1926) L. R. 54 I. A. 1, referred to.

Even slight intermeddling with the trust estate is sufficient to make a person trustee *de son tort*. Since in the instant case, the acts of intermeddling by one of the defendant covered a fairly long period, the courts below were right in holding that the sale in his favour must be set aside as one in favour of a trustee *de son tort*.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 62 and 77 of 1959.

Appeals from the judgment and decree dated March 25, 1953, of the Madras High Court in A. S. Nos. 731 and 720 of 1950.

M. C. Setalvad, Attorney-General for India and *M. S. K. Sastri*, for the appellants Nos. 2 to 8 and also for legal Representatives of appellant No. 1 in C. A. No. 62 of 1959.

A. V. Visvanatha Sastri, M. K. Ramamurthi and *S. T. Venkataraman*, for respondents Nos. 2 and 10(in C. A. No. 62 of 59) and respondents Nos. 2 and 15 (In C. A. No. 77/59).

R. Ganapathy Iyer and *G. Gopalakrishnan*, for appellant No. 2 and also for legal Representative of appellant No. 1 (in C. A. No. 77 of 1961).

C. R. Pattabhi Raman and *G. Gopalakrishnan*, for appellant No. 3 in (C. A. No. 77/59).

1961. October 26. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—These two appeals have been brought to this Court by two sets of defendants with a certificate of the Madras High Court and they arise out of a suit instituted under O. 1, r. 8 on behalf of the general body of creditors for administration against the trustees and alienees of the properties which belonged to their debtors. Defendant 14 and his sons defendants 18 to 24 are the appellants in Civil Appeal No. 62 of 1959 while defendants 12, 13 and 16 are the appellants in Civil Appeal No. 77 of 1959. Defendants 1 to 6 are the debtors. They were members of an undivided Hindu family known as Kalakkad Pannayar family in Tirunelveli District. The family was doing commission agency business in petrol, kerosene and crude oil. It had secured agency rights from the Burmah-Shell Company. The members of the family became heavily indebted by about June, 1936, and as a result there was a pressure from their creditors. In order to meet the said pressure a deed of composition was executed (Ex. B. 2) on July 8, 1936. As a result of this composition 56 out of the creditors of the family agreed to a scheme for settlement of their debts. Under this deed defendant 7 was constituted as a trustee and as such was empowered to take over the assets of the debtors, sell them to the best advantage and distribute the proceeds rateably amongst all creditors. It appears that before the scheme under the composition could be successfully or effectively worked out one of the creditors, Ayyah Ayyar, filed an insolvency petition, No. 25 of 1936, in the Sub-Court at Tirunelveli on July 30, 1936. By this

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petition the creditor wanted defendants 1 to 6 to be adjudged insolvent. During the pendency of these proceedings, on August 26, 1936, defendants 1 to 6 executed a deed of trust, (Ex. B. 7); by this document they conveyed all their movable and immovable properties including the outstandings due to them to three trustees. These were defendant 7 Subbaravalu Reddiar, Veerabahu Pillai and Narayana Pillai. The trustees were authorised to dispose of the assets of defendants 1 to 6 and distribute the proceeds rateably amongst the creditors. Narayana Pillai died in February, 1938. Veerabahu Pillai died sometime before the present suit was instituted. Defendants 8, 9 and 10 are the undivided sons of defendant 7, whereas defendant 11 is the widow and defendants 12 and 13 are the step-brothers of Veerabahu Pillai. The trustees accepted the trust and entered upon their duties. They took possession of the immovable properties covered by the trust. They paid off the secured creditors, and in regard to unsecured creditors they arranged to pay 50% of their dues by selling the immovable properties either to the creditors themselves or to third parties directing them to discharge the secured debts, and the unsecured debts to the extent of 50% of their value. It is common ground that except their family house in which defendants 1 to 6 resided all other immovable properties belonging to them were conveyed under the trust deed.

Defendant 14 was a secured creditor in whose favour a mortgage of the first schedule properties had been executed for a sum of Rs. 30,000 on June 3, 1935 (Ex. B-95). This mortgage carried 10½% compound interest. It appears that he had also lent a sum of Rs. 3,000 on a promissory note on July 17, 1935 [Ex. B-95(a)]. This note carried interest at 12%. The promissory note was supported by the pledge of the mortgage deed. In order to pay off the debts thus due to defendant 14 the trustees conveyed to him schedule I mortgaged properties for Rs. 42,000 on May 22, 1937 (Ex. B-94).

Out of the said consideration the amount due under the mortgage as well as the amount due under the promissory note were satisfied leaving a balance of Rs. 3,030 in the hands of the purchaser. He was directed to utilise this balance for repaying 50% of the dues of plaintiffs 2 and 3 who have brought the present suit. The sale deed in favour of defendant 14 was executed by only two out of the three trustees, defendant 7 and Veerabahu Pillai. Defendants 18 to 24 are the sons of defendant 14. As we have already seen defendant 14 and his sons are the appellants in Civil Appeal No. 62 of 1959.

Defendant 7 who was one of the trustees was a creditor of the estate to the extent of Rs. 6,000. His daughter-in-law was a creditor to the extent of Rs. 2,000. In satisfaction of 50% of the debt due to these two persons the trustees conveyed schedule III properties to defendants 8, 9 and 10 who are the undivided sons of defendant 7 (Ex. B. 8). This document was executed on December 16, 1936, for Rs. 4,000. The purchasers in their turn sold the properties to defendant 17 on May 30, 1947.

Defendant 12 is the step-brother of the trustee Veerabahu Pillai and he purchased schedule V properties on November 7, 1941, for Rs. 2,000 (Ex. B-90). Defendant 13 who is the brother of defendant 12 purchased schedule II properties for Rs. 15,000 on August 29, 1937, (Ex. B. 37). This document was executed only by two out of the three trustees. Another sale deed was passed in favour of defendant 13 in respect of schedule VIII properties (Ex. B. 79) on February 6, 1942, for Rs. 2,000. Defendant 16 who is the son-in-law of defendant 13 purchased two sets of properties schedule VII and schedule VII-A on May 7, 1943, and June 4, 1943, (Exs. B-104 and B-105) for Rs. 8,000 and Rs. 600 respectively. The properties thus conveyed to the respective purchasers were put into their possession. It is with the sale deeds executed in favour of defendant 14 and those executed in favour of

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defendants 12, 13 and 16 that we are concerned in the present appeals. Defendants 12, 13 and 16 are the appellants in Civil Appeal No. 77 of 1959.

In 1943 defendants 1 to 6 brought a suit, O. S. No. 30 of 1943 in the Sub Court at Tirunelveli for the administration of the trust created by them, for account from the trustees and for recovery of the trust properties. To this suit they impleaded the surviving trustees and the alienees as defendants. In this suit a preliminary decree for account was passed by the Sub Court. Their claim, however, for the recovery of immovable properties was not granted. This decree gave rise to three appeals before the Madras High Court, one by defendants 1 to 6 and the others by the trustees and the alienees respectively. These appeals were appeals A. S. Nos. 473, 510 and 544 of 1944. The three appeals were heard together and on December 20, 1946, a common judgment was delivered. The High Court confimed the finding of the trial court that the trustees were liable to render account for the management of the trust, and it remanded the suit for a finding as to the market value of the lands covered by the respective sale deeds which had been challenged by defendants 1 to 6. The High Court thought that in determining the validity of the claim made by defendants 1 to 6 it was necessary to find out the proper value of the properties at the relevant time for that alone would enable the Court to decide whether the alienations had been effected by the trustees for grossly inadequate price as alleged by defendants 1 to 6. In the course of its judgment the High Court observed that it was not open to the authors of the trust to challenge the validity of the transaction which was permitted by them by the instrument of trust, for it was clear that under the said trust deed the trustees were empowered to convey properties to the creditors in the discharge of their duties. After remand the Subordinate Judge took

evidence, made his findings and submitted them to the High Court. It was at that stage that defendants 1 to 6 filed a petition for withdrawal of the litigation. This petition was allowed on December 12, 1947, with the result that the suit filed by defendants 1 to 6, O.S. No. 30 of 1943, was dismissed with costs throughout.

Whilst the proceedings in the said three appeals were pending in the High Court and before defendants 1 to 6 were allowed to withdraw the litigation the present suit was filed on October 29, 1947, by the three plaintiffs who are the creditors of defendants 1 to 6 and who purported to act on behalf of the general body of creditors. Leave was granted to the plaintiffs under O. 1, r. 8 and the suit has, therefore, been conducted as a representative suit. In the suit the plaintiffs ask for an account from defendant 7 and defendants 11 to 13 who are the legal representatives of Veerabahu Pillai on the allegation that the trustees have been guilty of wilful default. They also claim a declaration that the properties described in schedules I to VII-A and VIII are still impressed with the trust and they ask for an order for the administration of the trust by removing defendant 7 and appointing an administrator to realise the amount due from the trustees on such account and to recover possession of the properties mentioned in the said schedules, re-sell them and distribute the sale proceeds rateably amongst the unsecured creditors.

Several defences were raised to this suit by the several defendants. It was denied that the trustees were negligent in the matter of collecting the outstandings and that the alienations effected by them were for inadequate considerations and otherwise improper and unjustified. It was urged that the present suit was barred by *res judicata* as a result of the withdrawal of O. S. No. 30 of 1943. It was further alleged that the suit was not maintainable, that it was bad for non-joinder of

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parties and was barred by time. The respective aliences pleaded that the transfers in their favour were valid and binding. Defendant 7 specifically urged that he was not guilty of any breach of trust; and a plea was also raised that the creditors who had filed the present suit had acquiesced in some of the dealings. Defendant 12 resisted the plaintiffs' case that he had intermeddled in the management of the trust estate and was therefore liable as a trustee *de son tort*. An objection was raised about the proper valuation of the suit and it was urged that the proper court fee had not been paid. It was denied that sale deeds executed by only two out of the three trustees were invalid. On these pleadings twenty nine issues were framed by the learned trial judge.

In substance the trial judge rejected the plaintiffs' claim for account, but he passed a decree declaring that the properties described in schedules I to III, V, VII, VII-A and VIII continued to be impressed with the trust imposed upon them by the trustees. The decree directed the removal of defendant 7 and the appointment of two advocates instead as administrators. It further directed defendants 12, 13, 14, 16 and 17 to deliver possession of the properties in their respective possession and asked the administrators to re-sell the said properties and distribute the proceeds amongst the creditors and to pay the surplus, if any, to defendants 1 to 6. Under the decree defendants 12, 13, 14 and 16 were held entitled to receive the respective consideration of the sales and mortgages together with interest and they were also liable to render account for profits of the properties in their possession.

This decree gave rise to three appeals before the High Court. Appeal A. S. No. 720 of 1949 was filed by defendant 14 and his sons defendants 18 to 24. Appeal A. S. No. 731 of 1949 was filed by defendants 12, 13 and 16; and Appeal A. S. No. 21

of 1950 by defendants 8, 9, 10 and 17. In substance the High Court has confirmed the decree passed by the trial court and dismissed all the three appeals. The High Court has, however, modified the trial court's decree in regard to the interest which the decree had ordered to be paid to the alienees. The High Court took the view that in adjusting equities between the alienees, the alienations in whose favour were found to be invalid, and the trust, the contract rate of interest need not be awarded. Subject to the modifications made in regard to the payment of interest the rest of the decree has been confirmed. Defendants 8, 9 and 10 and the legal representative of defendant 17 who died pending the proceedings before the High Court have not challenged the decree passed by the High Court in their Appeal A. S. No. 21 of 1950. Defendants 14 and 18 to 24 as well as defendants 12, 13 and 16 have, however, challenged the decision of the High Court and have obtained a certificate from the said High Court in that behalf.

It would thus be seen that in the two appeals before this Court we are concerned with six transactions—Ex. B-94 which is executed in favour of defendant 14, Ex. B-90 which is executed in favour of defendant 12, Exs. B. 37 and B. 79 which are executed in favour of defendant 13 and Exs. B-104 and B-105 which are executed in favour of defendant 16. Broadly stated both the Courts below have found that all these alienations were effected for inadequate consideration. It has also been found that Exs. B-94 and B-37 are invalid for the reason that they have been executed by only two out of the three trustees, whereas the transfers under Exs. B-12, B-13 and B-16 are held to be invalid as they are transfers in favour of the relations of one of the trustees Veerabahu. It has further been found that defendant 12 intermeddled with the estate of the trust and must therefore be regarded as trustee *de son tort* and therefore the transfer made to him is

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invalid as a matter of law. Both the Courts have rejected the plea of *res judicata* and limitation raised by the defendants. There are some of the points of law which are common to both the appeals and it would be convenient to deal with them in the order in which they have been raised before us.

The first point argued before us by the learned Attorney-General on behalf of the appellants in Civil Appeal No. 62 of 1959 (defendants 14 and 18 to 24) is one of limitation. He contends that on a fair and reasonable construction the present suit attracts the application of Art. 120 and is therefore barred. On the other hand, Mr. Viswanatha Sastri, for the plaintiffs, contends that the plaint clearly shows that the plaintiffs are not asking merely for a declaration but they are also claiming that a new administrator should be appointed and a direction should be issued that the property in question should be delivered to him. Such a claim, according to him, obviously attracts Art. 134. It is common-ground that if Art. 120 applies the suit is beyond time, whereas if Art. 134 is applicable the suit is within time.

The decision of this question would naturally depend upon the construction of the plaint. Is the claim made in the plaint one of declaration, or is it a claim for possession of immovable properties? The plaint sets out all the material facts which constitute the background to the present litigation, marks material allegations in respect of all the alienations impeached in the plaint, and by paragraph 35 it prays, *inter alia*, that schedules I to VII-A and VIII should be adjudged as still impressed as trust imposed on them by the deed of August 26, 1936, and direct their re-sale. That is cl. (c) of paragraph 35. By cl. (d) it is prayed that the Court should order the administration of the trust by removing defendant 7 if need be and appointing an administrator or officer of court (1) to realise the

amounts mentioned in cl. (a), (2) to recover possession and re-sell the properties referred to in paragraph (c), (3) to distribute the proceeds rateably amongst the unsecured creditors and perform such other acts and functions as may be necessary to effectuate the trust in question. The learned Attorney General contends that cl. (c) asks for adjudication or declaration that the properties in question are impressed with the trust and that is no more than a declaration, and according to him cl.(d) prays for the appointment of an administrator to realise the amounts and to recover possession of the properties and re-sell them. He suggests that on a fair construction of cl. (d) all that the plaintiffs pray for is the removal of defendant 7 and the appointment of an administrator with power to realise the amounts specified and to recover possession of the properties indicated and to re-sell them. This is not a claim that possession should be delivered to the administrator in the present suit. It may be conceded that if read by itself alone cl.(d) may be capable of the construction which the learned Attorney-General seeks to put on it; but in construing the plaint we must have regard to all the relevant allegations made in the plaint and must look at the substance of the matter and not its form. It is significant that the plaintiffs have valued the suit for the purpose of court fee and jurisdiction at Rs. 23,745 and this valuation includes several items in respect of different properties valued under s. 7(5) of the Court Fees Act. The valuation made in respect of the different items of properties under s.7(5) is obviously and clearly valuation made on the footing that a claim for possession is made. In fact the plaint specifically avers that the plaintiffs valued the suit for possession covered by reliefs C and D-2 under s. 7(5) as indicated in the plaint. Thus there can be no doubt that the plaint has been valued on the basis that a claim for possession of the properties covered by the schedules is intended to be made. Besides,

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it is also significant that in regard to the claim made by the plaintiffs in respect of the transfer in favour of defendant 14 his sons defendants 18 to 24 have been joined specifically on the ground that since the plaintiffs claim possession of the said property the said defendants are necessary parties as it is found that they are in possession of the said properties. In other words, the joinder of defendants 18 to 24 to the present suit is based solely on the ground that a claim for possession is made in the plaint and defendants 18 to 24 being in possession are necessary parties to the suit. Therefore, in our opinion, reading the plaint as a whole it would be unreasonable to construe cl. (d) in paragraph 35 in the manner suggested by the learned Attorney-General. The prayer which the clause really purports to make is that an administrator should be appointed and that an order should be passed against the respective defendants asking them to deliver posession of the properties to the said administrator. If that we so the plaint cannot be construed as one in which a mere claim for declaration is made. It is a plaint in which a declaration is no doubt claimed but based on the said declaration or adjudication a further claim for possession to the administrator is also made. The result, therefore, is that the argument that the prayer made in the plaint attracts Art. 120 must be rejected.

The next contention urged is that the plaintiffs cannot sue for possession but must confine themselves only to a claim for declaration. It is not disputed by the learned Attorney-General that in regard to public charitable trusts the beneficiaries are entitled to sue for setting aside alienations of the trust properties improperly effected by the trustees, and to ask for the restoration of possession of the said trust properties to the trustees newly appointed. Indeed, there is ample judicial

authority in support of this position. In *A. Subramania Iyer* v. *P Nagarathna Naicker* (1), it was held by the Madras High Court that in a suit by the worshippers of a temple to have the alienation of the trust property by some of the defendants, trustees, to the other defendants declared invalid and for possession to the trustees, the proper decree to be made if the Court be of the opinion that the alienation is invalid is to decree possession to those defendants who are trustees. It was further held that the trustees need not be referred to a separate suit for the purpose. In *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar* (2), the Privy Council has recognised this right in these words: "The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the *waqf* property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the *Mutawali* or of some other person for the purposes of the *waqf*".

The argument, however, is that in regard to private trusts which are governed by the Indian Trusts Act such a course is not open to the beneficiary because of the provisions of s. 63 of the Trusts Act. Section 63 provides that where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. The learned Attorney-General contends that the only remedy available to a beneficiary under a private trust is that prescribed by s.63 and no other. He can either require the alienee to admit that the property is comprised in the trust, or if the alienee refuses to make the admission the

(1) (1910) 20 Mad. L. J. 151. (2) (1940) L. R. 67 I. A. 251, 267.

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benficiary may bring a suit for a declaration in that behalf. In support of this contention strong reliance has been placed on the decision of the Privy Council in *Rani Chhatra Kumari Devi* v. *Prince Mohan Bikram Shah* (1). In that case the respondent had claimed title to the properties as owner in various ways and had sued as the proprietor of the properties covered by the action. All these grounds were rejected and it was held that the respondent could claim no title as a proprietor at all. Even so, while dealing whith the question of limitation the Privy Council made certain observations and it is those observations which are pressed into service by the learned Attorney-General. Article 144 on which the respondent relied in that case, it has been held, is applicable only to a possessory suit by the owner of the property claimed against a person holding adversely to him without title, and the plea made by the respondent that he was the owner on several grounds was rejected; but in the course of its judgment the Privy Council assumed that by reason of the contract pleaded by the respondent the properties were impressed with the continuing trust in favour of the respondent, and observed that even so their Lordships were unable to hold that "this would entitle him to sue for possession as owner". Sir George Lowndes, who delivered the judgment of the Board, referred to the fact that "the Indian law does not recognise legal and equitable estates. By that law, there can be but one owner, and where the property is vested in a trustee, the owner must, their Lordships think, be the trustee, and so the right of a beneficiary is, in a proper case, to call upon the trustee to convey to him". It is in that connection that Sir George Lowndes further observed that "the enforcement of this right would, their Lordships think, be barred after six years under Art. 120 of the Limitation Act, and if the beneficiary has allowed this period

(1) (1931) I. L. R. 10 Pat. 851.

to expire without suing he cannot afterwards file a possessory suit, as until conveyance he is not the owner. It is clear that such a trust as is relied upon in the present case would not fall within s.10 of the Limitation Act as it would be impossible to hold that the properties which vested in the appellant under the terms of the wills which have been proved were so vested for the specific purpose of making them over to the respondent". It would thus be seen that these observations mean no more than this that the beneficiary under a private trust cannot claim to recover possession of the property from the trustee so as to attract the application of Art. 144 of the Limitation Act. He can make the claim for a declaration which would be governed by Art. 120. It is quite clear that the question as to whether in a proper case the beneficiary cannot apply for the removal of the trustee, for for the appoinment of a new trustee, and for the delivery to the new trustee of the property improperly alienated by the previous trustee did not fall to be considered in that case. All that the Privy Council was called upon to consider was whether a beneficiary can bring a suit for possession against a trustee and whether such a suit can be governed by art. 144; and in holding that such a suit cannot be brought by the beneficiary the Privy Council pointed out that Art. 144 postulates a suit by the owner and a beneficiary is not an owner under the Indian Law of Trusts. We are, therefore, satisfied that the observations on which reliance is placed by the learned Attorney-General cannot be said to amount to a decision that in no case can a beneficiary claim that the trustee appointed under the trust should be removed and new trustee should be appointed and the trust properties improperly alienated by the previous trustee should be ordered to be delivered into the possession of the new trustee. Section 63 no doubt provides for the two remedies which are avaliable to the beneficiary, but in our opinion

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s. 63 cannot be treated as exhaustive on the subject and so it cannot be urged that a claim for constructive possession like the one made in the present suit is prohibited by s. 63. *Prima facie* s. 10 of the Limitation Act seems to contemplate an action by a beneficiary under a trust to which s. 10 applies and provides that in such an action the beneficiary may follow the property and ask for a proper order as to the delivery of the said property to the new trustee. If that be so, the provisions of s. 10 would suggest that the remedies prescribed by s. 63 are not exhaustive.

Besides, it would be relevant to observe that if s. 63 is held to be exhaustive as to the remedies available to a beneficiary it would lead to very anomolous results. If a trustee improperly alienates the trust property the only remedy which would on that view be available to the beneficiary is to obtain a declaration. How would this declaration be effective to bring back to the trust the property improperly alienated? Strictly and literally contsrued s. 63 does not refer to the remedy for the appointment of a new trustee either, so that on a literal construction of s. 63 even that remedy may be outside its purview; but assuming that a beneficiary can ask for a declaration that the property alienated is comprised in the trust and also add a prayer for the appointment of a new trustee that only means that after the new trustee is appointed he will have to sue the alienee for possession and very often this suit would be defeated by the alienee's plea of adverse possession. It is hardly necessary to emphasise that when the beneficiary sues for a declaration as required by s. 63 and the alienee resists the said suit the adverse possession of the alienee is emphatically brought out and the pendency of the beneficiary's suit would not affect that position so that on the view that s. 63 is exhaustive more often than not the beneficiary's claim would in substance be defeated by the adverse possession of the alienee.

In *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (1), this is exactly what happened. In the presence of the purchaser it was declared that the trust had been validly created and that the property was in fact a trust property. Their Lordships pointed out that "at the moment when the said decree was passed the possession of the property was adverse and the declaration that the property had been properly made subject to the trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted when it was too late." We would like to add that if for bringing back to the trust the properties improperly alienated by the trustees two suits are required to be filed we apprehend that the second suit by the newly appointed trustee for obtaining possession of the properties would almost always be too late, and so s. 63 cannot be read as exhaustively dealing with all the remedies available to the beneficiary. We must, therefore, reject the argument that the suit for possession in the form in which the prayer has been made by the plaintiffs is incompetent.

That takes us to the question of *res judicata*. The argument is that on general grounds of *res judicata* the dismissal of the suit (O. S. No. 30 of 1943) filed by defendants 1 to 6 should preclude the trial of the present suit. It has been fairly conceded that in terms s. 11 of the Code cannot apply because the present suit is filed by the creditors defendants 1 to 6 in their representative character and is conducted as a representative suit under O. 1, r. 8; and it cannot be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who have brought the present suit are the same parties or parties who claim

(1) [1923] L.R 50 I.A. 295.

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through each other. Where s. 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of s. 11 and no other. In our opinion therefore, there is no substance in the ground that the present suit is barred by *res judicata*.

The next question which falls to be considered is the most important question in these appeals. We have already seen that three trustees were appointed under the trust deed executed by defendants 1 to 6 and two of the impugned sale deeds have been executed by only two out of the said three trustees. The Courts below have held that two out of the three trustees could not convey a valid title and so on that ground alone the two transfers are invalid. It is urged before us that this conclusion is not justified on a fair and reasonable construction of cl. 23 of the trust deed. Before considering this point it is necessary to state the legal position in the matter under the Trusts Act.

Section 48 of the Trusts Act provides that when there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides. It is thus clear that all acts which the trustees intend to take for executing the trust must be taken by all of them acting together. Therefore, there can be no doubt that if the validity of the alienations effected by the trustees falls to be considered only in the light of s. 48 the fact that out of the three trustees only two have executed the sale deeds would by itself make the transactions invalid and would not convey title to the alienees. This position is not in doubt.

Lewin on "Trusts" has observed that "in the case of co-trustees the office is a joint one. Where the administration of the trust is vested in

co-trustees they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee but the Court knows no such distinctions, all who accept the office are in the eyes of the law acting trustees. If anyone refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved (1)". If one of the trustees refuses to join in the execution of the trust, under the Indian law s. 34 of the Trusts Act provides for the remedy. The other trustees can apply to the Court as contemplated by s. 34 and the trust may accordingly be executed.

As we have seen s. 48 contemplates that its provisions will not apply where the instrument of trust otherwise provides. In other words, if a trust deed under which more trustees than one are appointed expressly provides that the execution of the trust may be carried out not by all but by one or more then of course the matter would be governed by the special provision of the trust deed. The argument urged by the learned Attorney-General is that cl. 23 of the trust deed in suit makes such a provision. Both the Courts below have rejected this plea but it is urged that the said conclusion is based on a misconstruction of the relevant clause.

Clause 23 has been thus translated by the High Court: "In all the proceedings to be taken in connection with this estate, you three, either unanimously or according to the decision of the majority, shall act". In the earlier litigation stated by defendants 1 to 6 this clause was thus translated:

(1) Lewin on trusts, 15th ed., p. 190.

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"All the steps to be taken in connection with this estate should be according to the unanimous opinion of all the three of you or as decided by the majorty". The learned trial judge has made this translation of the clause in the present proceedings: "In all the proceedings to be taken in connection with the estate all the three should act either unanimously or according to the decision of the majority". The learned Attorney-General has supplied us with the literal translation of the clause which reads thus: "In connection with this estate, in all proceedings to be taken you three unanimously or according to the decision of the majority shall act". We have carefully compared all the translations, and we feel no difficulty in holding that the translation supplied in the earlier litigation is somewhat inaccurate, whereas all the three translations made in the present proceedings substantially agree. Taking the translation supplied by the learned Attorney-General it is clear that what this clause requires is that the three trustees shall act, and it provides that they shall act according to the decision which may be reached either unanimously or by majority. "You three," that is to say the three trustees, is the subject of the predicate "shall act"; and the words between the subject and the predicate indicate how the decision has been reached. Reading the clause as a whole it is difficult to accept the argument that this clause allows two of the three trustees to act without joining the third trustee in the actual action to be taken in the execution of the trust. It is not necessary under the clause that in the matter of executing the trust every decision must be unanimous. The clause recognises that in some matters decision may be by majority; but nevertheless it requires that once a decision is reached either unanimously or by majority, in giving effect to the decision and in taking any given action in the execution of the trust all the three must act. Thus read this clause conforms to the statutory provision

contained in s. 48 of the Indian Trusts Act and is not intended to provide for an exception to the said provisions at all. It is urged that if no departure was intended to be made from the principles laid down in s. 48 the clause need not have been added at all. This argument is wholly inconclusive. There are several other clauses in the trust deed which also bring out provisions corresponding to the relevant provisions of the Trusts Act and this argument may apply to the said clauses as well. The authors of the trust, while creating the trust, have made elaborate provisions in respect of the trust, while creating the trust, have made elaborate provisions in respect of the several matters concerning the execution of the trust, and the whole scheme of the trust deed is consistent with the operative cl. 23 in that it seems to require all the trustees to act together even though the decisions which they seek to give effect to may have been majority decisions and not unanimous decisions. Therefore, in our opinion, the Courts below were right in holding that cl. 23, like the main provision of s. 48, requires that all the trustees should have joined in the execution of the sale deeds in question. That being so, Exs. B-94 and B-37 which are respectively executed in favour of defendant 14 and defendant 13 are invalid and can pass no title to the alienees on the ground that only two out of the three trustees have executed them [Vide : *Lala Man Mohan Das* v. *Janki Prasad* (1)].

In support of the validity of these transfers an alternative argument has been urged before us. It is pointed out that according to Lewin on Trusts, if the act to the two trustees has been done with the sanction and approval of the third trustee then it may be regarded as an act of the three trustees, and it is urged that in the present case the third trustee had consented and shown his approval to the transactions in question. The two sale deeds have been executed by defendant 7 and Veerabahu

(6) [1944] L. R. 72 I. A. 39.

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Pillai, and they do not bear the signature of Narayana Pillai but this alternative contention proceeds on the assumption that though Narayana Pillai did not sign the document (Ex. B-94) he had in fact consented to it and had shown his approval to the transaction. This argument, however, cannot be accepted having regard to the concurrent finding recorded by the Courts below on this point. Dealing with this question the trial court has referred to the discrepant versions given for Narayana Pillai not joining in the execution of the sale deed. He points out that no mention is made in the sale deed as regards the circumstances under which the third trustee did not join. Then he examines the evidence given by defendant 7 and points out the infirmities in the said evidence. He compares the evidence given by defendant 13 in the previous suit and observes that the explanations given are inconsistent. One of the explanations was that Narayana Pillai declined to come to the Sub-Registrar's office as he was heavily involved and that people would think that he was selling his property. The other explanation was that Narayana Pillai wanted some accommodation, and when his co-trustees refused to agree he declined to jointhe execution of the document. The trial court has observed that there was nothing to show that Narayana Pillai was financially involved at the relevant time, and he points out that in fact Narayana Pillai had gone to the Sub-Registrar's office near about that time in connection with another transaction. That is how the trial court has rejected the argument that Narayana Pillai was a consenting party to the transaction in question. The High Court has concurred with this conclusion. In dealing with this question the High Court has preferred to believe the evidence of the first defendant that Narayana Pillai considered the prices fixed for Ex. B-94 as very low and for that reason refused to be a party to it. It has contrasted this reason with the other reasons given on behalf of the alienees, and it has recorded its conclusions in these words :

"Whatever may be the reason it is certain that Narayana Pillai was not a consenting party to the transaction and there being no other evidence by way of minutes of any meeting of the trustees had decided with the knowledge of Narayana Pillai, though he had dissented, we are unable to hold that there has been such a decision of the majority as would bind the dissenting trustee". It does appear the original draft of Ex. B-94 was made on the assumption that all the trustees would join in the execution of the document but the hope and anticipation formed by the two trustees was believed and so the doucument was ultimately executed by two of them without Narayana Pillai joining. We have considered the evidence to which our attention was invited in this connection, and we see no reason to interfere with the concurrent conclusion recorded by the Courts below that Narayana Pillai was not a consenting party to the transfer in question. That being so, the alternative ground made in support of Ex. B-94 fails. If the transfers in favour of defendant 14 (Ex. B-94) as well as Ex. B-37 in favour of defendant 13 fail on this ground it is really not necessary to consider the further question as to whether both the said transfers were effected for grossly inadequate consideration.

The next question which has been raised on behalf of defendant 14 is in regard to the amendment made by the High Court in its decretal order. It is urged that this amendment was made after the appeals to this Court had been admitted and so it is without jurisdiction. It appears that the certificate was granted by the High Court to the respective defendants who have come to this Court as appellants on November 26, 1954, and the appeals were admitted on December 4, 1955, whereas the amendment has been made after the appeals were admitted. The application for the amendment in question was made under ss. 151 and 152 of the Code; and it became necessary because the decretal order drawn in the High Court referred to the profits

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of which accounts were directed as mesne profits. The use of the words "mesne profits" would have inevitably brought in the period of three years beyond which acccounts could not be claimed. By their application the plaintiffs alleged that the use of "mesne profits" in the decretal order was inconsistent with the judgment which had directed accounts of the net profits and so they claimed that the decretal order should be corrected in cl. III, sub-cl.(3). According to the prayer thus made it was suggested that the clause should read as follows "that the defendants 12, 13 and 14 are liable for the net profits of the properties purchased by them under schedule V, schedule II and schedule I respectively". The word "net profit" was used in the place of "mesne profits" originally introduced in the order. When this application for amendment was argued before the High Court the defendants pleaded that the use of the words "mesne profits" was proper and should not be changed. It was urged on their behalf that in its judgment the High Court had introduced the words "mesne profits" deliberately and so the decretal order was perfectly correct. This contention has been negatived by the High Court, and in our opinion rightly. It appears that in the earlier portion of his judgment Krishnaswami Naidu, J., summarised in one paragraph the effect of the decree passed by the trial court; and in giving this summary he observed that under the decree defendants 12, 13, 14 and 16 were held entitled to be paid the respective considerations of the sales and mortgages together with interest they being liable to account for mesne profits as per the terms of the decree. Two things are clear. This part of the judgment does not contain the decision of the High Court at all. It is really concerned with the narration of the relevant facts and it purports to summarise the effect of the decree and nothing more. Besides, the use of the words "mesne profits" in the context is obviously the result of inadvertence because the decree of the

trial court had in the relevant clause used the words "net profits" and not "mesne profits". Thus, there can be no doubt that the decretal order drawn in the High Court through error introduced the words "mesne profits" and such an error could be corrected by the High Court under ss. 151 and 152 of the Code even though the appeals may have been admitted in this Court before the date of correction.

But apart from this technical argument about the jurisdiction of the High Court to make the correction the point in question has been raised on the merits before us; and it is urged that the plaintiffs are not entitled to anything more than three years' profits from the respective defendants. The argument is that Art. 109 of the Limitation Act applies to such a claim and the claim is confined to three years under that article. Article 109 deals with claims for profits of immovable property belonging to the plaintiffs which have been wrongfully received by the defendants and it prescribes three years' period of limitation commencing from the time when the profits were received. Normally there is no doubt that a successful plaintiff would be entitled to mesne profits for three years and not more; but in the present case we are dealing with a claim made by the plaintiffs on behalf of the trust and the decision in their favour has rendered it necessary to adjust equities batween the trust and the respective alienees alienations in whose favour have been set aside as invalid. We have already seen that having set aside the alienations in favour of defendant 14 and others the Courts below have directed that the aliences should get the amounts due to them from the trust. It has also been directed that interest at the rate awarded by the decree should be paid to them on the said amounts. This clearly is an equitable relief granted to the alienees. Having held that the alienees should get interest on the amounts due to them from the dates of their respective mortgages or

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sales the Courts in fairness have directed that the alienees in turn should give an account of the net profits of the properties which were wrongfully in their possession commencing with the date when they got possession. If the technical argument based on Art. 109 is upheld as a matter of law there would be no scope for giving equitable relief to the alienees at all and they may be driven to file fresh actions to recover their claims and such actions would have to face the possible plea of limitation. That is why the High Court has observed that the question about the net profits awardable to the trust and interest awardable to the alienees involves considerations of equitable adjustment, and it is by way of an equitable adjustment that the relevant directions have been issued by the decree. It is not disputed that the Court had jurisdiction to make such an equitable adjustment. Indeed, in many cases of this type Courts have made equitable adjustments between rival parties [Vide: *Satgur Prasad* v. *Har Narain Das* (1); *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (2)]. The principal and interest ordered to be paid to defendant 14 and the profits ordered to be paid by him are thus integral parts of an equitable adjustment between the plaintiffs and defendant 14.

It is also urged on behalf of defendant 14 that the High Court was in error in modifying the decree passed by the trial Court by changing 10½% interest at compound rate to 10½% simple interest in favour of defendant 14. The contention is that under the mortgage executed in favour of defendant 14 (Ex. B-95) the contract rate was 10½% compound interest and as mortgagee defendant 14 was entitled to that rate. In support of this argument reliance is placed on the decision of the Privy Council in *Jagannath Prosad Singh Chowdhury* v. *Surajmal Jalal* (3). In that case the Privy Council has held

(1) (1932) L. R. 59 I. A. 147. (2) (1908) L. R. 35 I. A. 48, 59.

(3) (1926) L.R. 54 I. A. 1.

that on a preliminary decree for foreclosure or sale under O. XXXIV, rr. 2, 4 of the Code, a mortgagee is entitled to interest at the rate and with the rests stipulated in the mortgage, down to the date fixed for redemption by the decree. This position cannot be disputed; but the answer to the plea is that the present decree is not passed in an action instituted by defendant 14 as a mortgagee. The present decree is passed while adjusting equities between defendant 14 the alienation in whose favour is set aside; his rights as mortgagee are equitably recognised and thereby further litigation is avoided. Since the decree by which defendant 14 is allowed to recover his mortgage dues has been passed for giving him equitable relief it was open to the High Court to consider whether compound interest should be paid to him or not. As the High Court has pointed out, while adjusting equities between the parties the mortgage does not become revived as such but the relief granted to the 14th defendant is based on equity and justice, and so the High Court thought that the interests of justice would be met if he is paid out of the sale proceeds the principal amount of the mortgage with simple interest at 10½%. We have carefully considered the contention raised by the learned Attorney-General in this behalf but we do not think that we would be justified in interfering with the modification made by the High Court in the decree passed by the trial court. In the result Civil Appeal No. 62 of 1959 filed by defendants 14 and 18 to 24 fails and is dismissed with costs.

We now turn to Civil Appeal No. 77 of 1959 filed by defendants 12, 13 and 16. We will take the case of defendant 12 first. We have already seen that in favour of defendant 12 a sale deed has been executed on November 7, 1941 (Ex. B-90). This sale deed has been set aside on two grounds—one that it is executed in favour of a person who by intermeddling with the estate of the trust has

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become trustee *de son tort*, and second that the properties covered by the document have been sold for idadequate consideration. It is conceded by Mr. Ganapathy Iyer that if we confirm the finding recorded by the Courts below against defendant 12 on the first point that itself would invalidate the transfer in his favour. He has, however, argued that the said finding is erroneous. Having carefully considered the relevant material we see no reason to interfere with the finding in question. In this connection it would be enough if we briefly refer to the relevant evidence bearing on this point. Defendant 12 wrote to Pichu Ayyar Avergal, defendant 15, who was a clerk of the trust estate on August 20, 1936, in these words: "I request you that Pathai properties may be checked, that Piramanayakam Pillai coming (there) may be consulted with regard to all matters and settlement made and that you may also come here on Monday morning and render necessary assistance". The tone of the communication and its contents are significant. It is not the language of a person who is merely assisting the trustee. He is issuing directions to the clerk of the trust. Defendant 12 was a creditor of defendants 1 to 6. It is, however, common-ground that when sale deed (Ex. B-12) was executed in favour of defendant 13 on December 19, 1936, defendant 13 who is no other than the brother of defendant 12 had undertaken to satisfy defendant 12's debt and so as from that date defendant 12 had ceased to be a creditor of the estate. Even so, he was intermeddling with the estate throughout. On October 14, 1938, he wrote to the Agent of the Travancore National and Quilon Bank suggesting that he would pay a sum of Rs. 10,000 for the entire amount payable to the bank by the debtors and he requested the Bank to have the debt discharged in that manner. Then he added that "as the price of the lands have gone down very much owing to conditions at the present time" he requested that the sum of Rs. 10,000 may

be received and that the entire debt should thus be discharged. It would be noticed that at this date defendant 12 was not a creditor of the estate and he had, therefore, no business to write to the Bank. This letter, like the earlier one which we have already seen, clearly indicates that defendant 12 had taken it upon himself to administer the tsust. To the same effect is another letter written by him to the Official Liquidator of the said Bank on January 9, 1939. In this letter defendant 12 says that "the trustees are arranging for several settlements in deference to the wishes of Mr. Ayyah Sastri, but owing to the nature of time the matter stands unsettled even though both are agreed willingly". Then he refers to the proposal to settle all the debts and promises that "the matter will be finally settled if the trustees meet you personally". "I, therefore, request you", says defendant 12, to kindly excuse the little delay and pray to fulfil the great task", and he adds " I am also coming there". Then followed a suit by the Bank, No. 12 of 1939, to which defendants 12 and 13 were impleaded; and in this suit defendants 12 and 13 entered into a compromise with the plaintiff Bank and obtained a compromise decree. It is unnecessary to refer to the terms of the compromise decree. What is material is the conduct of defendant 12 in entering into compromise with the Bank. Defendant 13 may have been justified in entering into the compromise but defendant 12 could have done so only as an intermeddler. This decree was passed on February 14, 1941. Ex. P-7 is also relevant on this point. This is a notice issued to defendant 12 by one of the creditors of the estate. It appears that this creditor had given to defendant 12 a receipt signed by him in order to enable defendant 12 to draw the amount from defendant 14 to be paid to the said creditor. The notice further recites that "it now transpires that about the middle of July, 1937, you drew the said amount of Rs.425 from the said Janakirama Iyer and have

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failed till now to account for the same to my client". In other words, this notice shows that defendant 12 had promised to pay to the creditor Rs.425 due to him from the estate and had failed to do so. The result was the suit by the creditor (Small Cause Suit No. 58 of 1940). This suit again was compromised by defendant 12.

There is yet another document Ex-121 which shows how defendant 12 was intermeddling with the estate. This is a receipt passed by the clerk of the estate to one Subbayyar Avergal on March 9, 1937. It reads thus: "According to the order directed by defendant 12 I have received from you on this date Rs. 400 from the sale of the current Pisanam paddy produce from the estate of M. R. Ry. P.S. Krishnaswami Ayyar Avergal vagaira, Kalakkadu Pannai". It is clear that the clerk of the estate Pichandi Ayyar who passed the receipt had been directed by defendant 12 to receive Rs.400 from Subbayyar Avergal. He had accordingly recived that amount and passed a receipt in that behalf. Now, if defendant 12 directed the clerk of the estate to receive a certain amount for and on behalf of the estate it clearly amounts to intermedding with the estate and it makes him trustee *de son tort*. Defendant 12 had given evidence in the earlier litigation in which he had stated that he, defendant 13 and Veerabahu Pillai were members of an undivided family. In the present proceedings defendant 12 has gone back upon his admission that he and his brothers constituted an undivided family. The trial court has accepted this latter plea and the High Court has not differed from it; but that apart, the several statements made by defendant 12 in the said evidence clearly show that he was taking as much active part in the affairs of the trust as his brother Veerabahu.

There is yet another fact to which reference may be made. As the High Court has pointed out, the sale in favour of defendant 12 was executed on

November 7, 1941, and yet the properties covered by the said document appear to have been put in his possession as early as 1937. In other words, defendant 12 entered into possession of the properties nearly four years before the sale was executed in his favour. It is in the light of these facts that the Courts below have held that defendant 12 is a trustee *de son tort*. As is observed in "Williams on Executors and Administrators" (1) "a very slight act of intermeddling with the goods of the deceased will make a person executor *de son tort*". In the present case the acts of intermeddling by defendant 12 spread over a fairly long period and cannot in any sense be regarded as minor and insignificant. We would accordingly hold that defendant 12 is in the position of trustee *de son tort* and so the sale deed executed in his favour (Ex.B-90) is bad on that account alone.

In regard to defendant 13 there are two transactions in his favour, Ex. B-37 and Ex.B-79. Ex. B-37, as we have already seen, is invalid for the reason that it has been executed by two out of the three trustees. That leaves Ex. B-79; but before we deal with that transaction it would be relevant to refer to a general consideration which applies to all the transfers in favour of defendants 12, 13 and 16. Defendants 12 and 13 are the step-brothers of Veerabahu and defendant 16 is the son-in-law of defendant 13. It is quite clear that under s. 52 of the Trusts Act "no trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person". This position is thus stated by Lewin on Trust: "A trustee is absolutely and entirely disabled from purchasing the trust property whether it be real estate or a chattel personal, land, or a ground rent, in reversion or possession, whether the purchase be made in the trustee's own name or

(1) Williams of Executars and Administrators, 14th ed., Vol. I, p. 28.

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in the name of a trustee for him, directly or indirectly, as to a purchaser upon a contract or understanding (amounting to more than mere expectation) that the purchaser shall re-sell to the trustee, by private contract or public auction, from himself as the single trustee, or with the sanction of his co-trustees(1)". Thus, the alienations by the trustees in favour of the near-relatives of one of the trustees would be bad for this reason. Besides, under s. 47 of the Indian Trusts Act a trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless the instrument of trust so provides, or the delegation is in the regular course of business, or the delegation is necessary, or the beneficiary, being competent to contract, consents to the delegation. The trust did impose upon the trustees the obligation to sell the properties of the trust at the highest price recoverable and to distribute the sale proceeds amongst the creditors of the authors of the trust. The documents in favour of defendants 13 and 16 seem to leave it to the respective purchasers to pay the debts and that may be another infirmity in the transaction.

Going back to Ex. B-79 which is a transfer in favour of defendant 13 it is evident that this transaction is inevitably conneted with another transaction Ex. B-25. Ex. B-79 has been executed for a consideration of Rs. 2,000 and odd and it relates to 3 acres and 14 cents of schedule VIII property. It appears that defendant 13 had obtained another sale deed Ex. B-25 on April 19, 1937. This sale deed consisted of 51 items of property belonging to the trust which had spread over five villages. These items consisted of house-sites and lands. The sale deed was for Rs. 5,000. Defendant 13 in his turn proceeded to sell the said property by different lots to respective buyers. Amongst the creditors of the estate was Lakshmi

(1) Lewin on Trusts, 15th ed., p. 797.

Ammal to whom Rs. 800 was payable on the basis of 50% of return of debt. Defendant sold to Lakshmi Ammal 64 cents out of the lands purchased by him under Ex. B-25. It, however, appears that in respect of the 3 acres and 14 cents which was the subject-matter of Ex. B-25. Original Suit No. 32 of 1941 was instituted by persons who claimed title to the said property. To that suit Lakshmi Ammal was impleaded as to defendant and so was defendant 13. Ultimately the said suit was decreed and the property in question was held to belong to the plaintiffs in that suit and not to the estate of defendants 1 to 6. It was as a result of this decree that Ex. B-79 came to be passed in favour of defendant 13. This document purports to convey 3 acres and 14 cents of another property to make good the loss to him by reason of the decree in Suit No. 32 of 1941. Thus, it would be seen that the transaction evidenced by Ex. B-79 can stand only if the transaction by evidenced by Ex. B-25 is valid and not otherwise. The Courts below have held that this latter transaction is obviously and patently invalid. In our opinion, this conclusion is right. It is true that Ex. B-25 is not directly challenged in the present suit because the properties covered by it have been sold to different purchasers by defendant 13 and they have not been impleaded. Even so, since Ex. B-25 is the very foundation of Ex. B-79 it is open to the plaintiffs to contend that the validity of Ex. B-25 should be considered for determining the validity of Ex. B-79, and that is what the Courts below have done. Now, one has merely to look at the broad features of Ex. B-25 to be satisfied that it is an invalid transaction. It is patent that no attempt was made to value the properties individually. The properties numbering 51 and spread over five villages were all grouped together and sold for Rs. 5,000 without making any serious efforts to determine the value

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of the lot. The purchaser was told to sell the properties to the respective creditors of the estate and thus satisfy them. That in substance is delegation of the functions of the trustees which they could not delegate to defendant 13. The stamp paper for the sale deed Ex. B-25 stands in the name of Veerabahu Pillai and defendant 13 was unable to explain how the stamp paper came to be in that name. Defendant 13 admitted that he did not inspect the property before its purchase and that he had no idea about its value. As the trial court had observed, the transaction cannot be regarded "as a bona fide sale because the property consists of odd assortment of punja lands and house sites in Pathi, Padmaneri and Sivalpuri villages". Therefore, we have no difficulty whatever in agreeing with the conclusion of the Courts below that Ex. B-25 was invalid; if that be so Ex. B-79 must be held to be invalid for that reason alone. Incidentally, we may refer to the fact that defendant 13 admitted in the earlier suit that he had not refunded the purchase money to Lakshmi Ammal and that substantially destroys the basis of Ex. B-79 because defendant 13 not having paid anything to Lakshmi Ammal had no right to retain the property conveyed to him.

The last transactions which have yet to be examined are those in favour of defendant 16. In regard to these transactions the trial court has found that evidence adduced by the plaintiffs shows that the consideration for which properties were sold were grossly inadequate. The vendee, defendant 16, did not care to examine himself. Besides, as we have already pointed out he is a close relation of defendants 12 and 13. The High Court has concurred with the trial court's conclusion. The only point which was attempted to be made by Mr. Pattabhiraman in challenging the correctness of this concurrent conclusion is that the Courts appear to have assumed that the agricultural lands conveyed to defendant 16 were all double crop lands. On this assumption he suggested that

the calculation made about the true value of the said properties errs on the side of overstatement. It is not disputed that of the lands conveyed 3 acres and 24 cents are single crop while approximately $3\frac{1}{2}$ acres are double crop. On looking at the judgments of both the Courts below, however, we are satisfied that the argument is misconceived because neither judgment proceeds on the assumption that the whole of the agricultural property is double crop land. In fact the discussion in the judgment of the trial court on Issue No. 27 quite clearly negatives the assumption made by Mr. Pattabhiraman. that being so, as the Courts below have observed, evidence led by the plaintiffs in support of their case that the transfers were effected for grossly inadequate price has remained unrebutted. The question about the value of the property has been determined on the evidence, documentary and oral, led in the case, and both the Courts have found in favour of the plaintiffs and against the alienees. Incidentally, we may point out that Mr. Viswanatha Sastri appears to be right when he suggests that schedule VII refers to the properties both at Thirukurunkudi as well as Padmaneri though the heading of the schedule refers only to Thirukurunkudi. In the result Civil Appeal No. 77 of 1959 preferred by defendants 12, 13 and 16 fails and is dismissed with costs.

Appeals dismissed.