

(2007) 03 SC CK 0101

In the Supreme Court Of India

Case No : Civil Appeal No. 1320 of 2007 (Arising out of SLP (Civil) No. 8611 of 2006)

Ashok Kumar Kapur and Others

APPELLANT

Vs

Ashok Khanna and Others

RESPONDENT

Date of Decision : 13-03-2007

Acts Referred:

Calcutta High Court Rules, 1914 — Rule 1
Charitable and Religious Trusts Act, 1920 — Section 7
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 90
Companies Act, 1956 — Section 3(1)
Constitutio

Citation : (2007) 2 AWC 2091 Supp : (2007) 2 CHN 222 Supp : (2007) 4 JT 362 : (2007) 4 SCALE 265 : (2007) 5 SCC 189 : (2007) 75 SCL 193 : (2007) 3 SCR 957

Hon'ble Judges : S. B. Sinha, J;Markandey Katju, J

Bench : Division Bench

Advocate : R.F. Nariman and U.U. Lalit, C. Kukund, Ashok Jain, Pankaj Jain and Bijoy Kumar Jain, for the Appellant; Ranjit Kumar and Rakesh Dwivedi, Senthil Jagadeesan, Swati Sinha and Jaysree Singh for Fox Mandal and Co., Shashank Sharma, Kailash Chand and Anu Gupta, for the Respondent

Final Decision : Disposed Of

Judgement

S.B. Sinha, J.—Leave granted.

INTRODUCTION:

2. Interpretation of Section 34 of the Indian Trusts Act, 1882 (for short, 'the Act') is involved in this appeal which arises out of a judgment and order dated 06.02.2006 passed by a Division Bench of the Calcutta High Court in APOT No. 584 of 2005, affirming a judgment and order of a learned Single Judge of the said Court.

BACKGROUND FACTS:

3. M/s Dunlop India Ltd. (for short, 'the Company') is an existing company within the meaning of Section 3(1)(ii) of the Companies Act, 1956. The Company floated a Fund known as 'Dunlop Executive Staff Pension Fund' for providing pension and annuities to the members of the executive management staff of the Company. Clause (3) of the said deed reads as under:

These presents shall constitute a trust upon and subject to the Rules and to the law for the time being in force in India relating to Pension Funds which trust irrevocable and no moneys belonging to the Fund in hand of the trustees shall be recoverable by the Company or shall the Company have any lien or charge of any description on the same.

Part I of the said deed provides for the 'Rules of Dunlop Executive Staff Pension Fund.

"Member" has been defined in Rule 2(k) to mean:

'Member' shall mean a member of the executive staff or of the management staff of the employers who has been admitted as a member of the Fund in accordance with the Rules but shall not include an employee who having been admitted as a member has subsequently retired or whose service has otherwise been terminated by reason of dismissal, resignation, retrenchment or otherwise.

Part-II of the said deed provides for administration of the Trust. Whereas part III provides for membership, part IV provides for contributions. Rule 11(a) of the said deed reads as under:

The employers may at their absolute discretion pay to the trustees in respect of each member an initial contribution of such sum and in such instalments as they may think fit in respect of the past services of a member subject to the provision of Rule 88 of the Income Tax Rules, 1962 and to any condition that the Central Board of Direct Taxes may think fit to specify in that regard.

The terms of said deed were amended from time to time. Although in terms of the original deed a member would have been entitled to pension on completion of ten years' of service, Rule 14(b)(iii) was introduced in terms whereof the eligibility period was reduced to two years. The said provision reads as under:

14(b) (iii) In case of whole time Directors, Senior Vice Presidents and Vice Presidents who retire at or after attaining the normal age of retirement or on completion of the stipulated period of service/contract, a pension shall be payable calculated as per Rules 14(a). The pension so calculated shall not however be less than 50% of his last drawn salary nor shall it exceed 100% of such salary PROVIDED that in the event of early separation from the services of the Company, a pension may be granted at the sole discretion of the Company calculated at such rate as may be decided by the Company.

Provided further in the event of such employee leaving the service of the Company after completion of two years of service with mutual consent and does

not have any adverse records of his performance shall be paid a monthly pension which shall be not less than 50% of his last drawn salary nor shall it exceed 100% of such salary.

The said amendment was made with retrospective effect. However, it was sought to be deleted by a deed of variation dated 25.09.2000 from 01.04.1997, which again in terms of another deed of variation dated 28.03.2001 was sought to be given a retrospective effect from 01.04.1995.

4. Respondent No. 3 herein was the Managing Director of the Company. Admittedly, he has filed a suit for realization of an amount of pension quantified at Rs. 45 lacs. Two other suits by two other members of the Fund are also admittedly pending. The Company became sick. It was declared as such by the Board of Industrial Financial Reconstruction on or about 22.01.1988. Allegedly, three other funds were created by the Company in the year 2001, known as (i) 'Dunlop Administrative Executive Staff Pension Fund', (ii) 'Dunlop Sahagunj Executive Staff Pension Fund', and (iii) Dunlop Ambattur Executive Staff Pension Fund'. The details whereof or the purpose for which the same were constituted is not known.

PROCEEDINGS:

5. An application was filed by the trustees of the said trust before the High Court of Calcutta purported to be u/s 34 of the Act, alleging, inter alia, that the purpose of the trust has been completely fulfilled and/or trust has been completely executed without exhaustion of the trust property to the extent of Rs. 3,99,55,682/-. In the said application, inter alia, the following prayer was made:

a) Appropriate direction and/or advise and/or opinion be given by this Hon'ble Court with regard to the sum of Rs. 20,83,95,690/- and accrued interest lying in Special Deposit Account No. 3/76.

6. In the said proceeding, only Respondent No. 1 herein was made a party in a representative capacity. It was contended that out of 186 employees who were eligible to receive pension fund, 140 employees consented that the surplus amount be refunded to the Company. In the said proceeding, an application seeking leave was filed under Order 1 Rule 8 of the Code of Civil Procedure, which was allowed by an order dated 19.10.2001. Respondent No. 3 herein filed an application for getting himself impleaded as a party which was allowed. By a judgment and order dated 23.12.2004, a learned Single Judge of the Calcutta High Court while holding that the said application u/s 34 of the Act was maintainable, opined that the payment of pension was to be made not only to the existing members but also to the widow and dependents in terms of the extant rules. It was held that only because in terms of the advertisement issued in two newspapers, namely, a Bengali Daily - 'Aaj Kal' and an English Daily - 'Financial Express', consent of all the members could not be held to have been impliedly obtained only because numerous dependents had not appeared. Inter alia, on the aforementioned premise, the application was dismissed.

7. On an intra-court appeal, a Division Bench of the said Court by reason of the impugned judgment although opining that a Letters Patent appeal was not maintainable, went into the merit of the matter and dismissed the same, holding:

After analysing those clauses in our opinion, the trust shall be irrevocable one and no moneys belonging to the funds in the hands of the trustees shall be recoverable by the company nor shall the company have any lien or charge of any description to the same. Therefore, we are sure that the purpose of the trust exists and/or remains valid until the last surviving employees receive its benefit out of the trust fund and furthermore, under Clause 3 of the said Trust Deed funds lying in the hands of the said trustees are not coverable by the company nor the company shall have any lien or charge of any description on the said trust fund. Therefore, we do not have any hesitation to hold that no opinion can be expressed by the Court that the amount so lying in the hands of the trustees can be recoverable by the company or may be transferred in any manner to the company. Therefore, we are not in a position to accept the contention of Mr. Sarkar that during the financial stringency they shall have the right to utilize the said fund and the amount lying in the said trust fund can be transferred to the company for meeting its liabilities. After scrutinizing the Clauses of the said Trust Deed we have come to the conclusion that the purpose of the trust exists and remains valid until the last surviving employees receive its benefits out of the said trust fund. We do not have any hesitation also to express our opinion as His Lordship expressed in His Lordship's decision that the trust exists and we also have to accept the contention of Learned Counsel appearing on behalf of the respondent in the instant case that the instance case is squarely covered under the Illustration (b) of Section 56 of the Indian Trust Act and the trustees are bound to fulfil the purpose of the trust and to obey the directions of the author of the trust, except if any modification is made by consent of all the beneficiaries, being competent to contract. It appears to us that in the guise of getting an opinion from the court, the company thought it fit to extinguish the trust in question and the amount lying in the hands of the trustees in respect of the said fund to have a lien over the same to utilize the same which is totally barred under Clause 3 of the said Trust Deed....

SUBMISSIONS:

8. Mr. R.F. Nariman, the learned Senior Counsel appearing on behalf of the appellants, principally raised the following contentions in support of this appeal:

(i) The power of the principal Civil Court of original jurisdiction being not only limited to opinion or advice, but also to issue directions, the High Court wrongly refused to exercise its jurisdiction, although Section 83 of the Act was squarely attracted.

(ii) The expression 'principal Civil Court of original jurisdiction' contained in Section 34 would also attract the principles of res judicata.

(iii) Such direction can be issued, inter alia, in terms of Section 83 of the Act, as

it would come within the purview of the term 'administration of trust property';

(iv) The terminology 'detail, difficulty or importance' contained in Section 34 of the Act refers to the power of the court for summary disposal and not for exercising its discretionary jurisdiction of the court.

(v) Such opinion, advice or direction if issued would be a judgment within the meaning of Clause 15 of the Letters Patent of the Calcutta High Court and, thus, a Letters Patent appeal would be maintainable.

(v) Respondent No. 3 being not a member of the Fund had no locus standi to main the application.

9. Mr. Rakesh Dwivedi, the learned Senior Counsel appearing on behalf of Respondent No. 3, on the other hand, would submit:

(i) Operation of Section 34 being related to the 'management' or 'administration' of the trust property; matters which come within the purview of extinction of the trust as contained in Chapters VIII of the Act, would not come with the purview thereof.

(ii) Section 34 has a limited application keeping in view the exclusionary clause contained in the expression "other than questions of detail, difficulty or importance, not proper in the opinion of the court for summary disposal" and, thus, the courts below rightly refused to exercise their jurisdiction in the matter.

(iii) The learned Single Judge as also the Division Bench of the High Court having found difficulties in the matter as also in view of the importance of the question having refused to exercise the discretionary jurisdiction, this Court should not interfere therewith.

(iv) The term 'opinion, advice or direction' would not confer a jurisdiction to finally decide the rights of the persons interested in the trust.

RELEVANT STATUTORY PROVISIONS:

10. Sections 11, 56, 77 and 83, which are relevant for the purpose of this appeal, read as under:

11. Trustee to execute trust. The trustees is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal civil court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation. - Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (a) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (b) in the case of debts not bearing interest, to make such payment without interest."

56. Right to specific execution. - The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interests.

Right to transfer of possession. - And, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them or to such person as he or they may direct.

When property has been transferred to bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage."

77.-Trust how extinguished. - A trust is extinguished -

(a) When its purpose is completely fulfilled; or

(b) When its purpose becomes unlawful; or

(c) When the fulfillment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(d) When the trust, being revocable, is expressly revoked.

83. Trust incapable of execution or executed without exhausting trust-property. - Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

APPLICATION OF LAW:

11. The jurisdiction of the court u/s 34 admittedly is confined to opinion, advice or direction. An application would be maintainable on any present questions. Such questions must arise "respecting the management or administration of the trust property". The questions should not be of any 'detail, difficulty or importance or otherwise not proper in the opinion of the court for summary disposal'. Copy of the application must be served upon the persons interested in the application. If an opinion is rendered, or advice is given, or a direction is issued, the same shall be deemed, so far the trustee is concerned, in regard to his own responsibility to have discharged his duty as such trustee in the subject-matter of the application. It may be that such an application may be filed without

instituting a suit but maintainability of such an application would mainly depend upon the nature and purport thereof. Merely an option has been conferred on a trustee to file either a suit or to move the court for its opinion, advice or direction in terms of Section 34 of the Act. Such an option can be exercised only when recourse to both the remedies are available.

12. We may proceed on the basis that the jurisdiction of the court is not only confined to opinion or advice but also extends to issuance of direction, but such opinion rendered, or advice given or direction issued only to a trustee. Consequence of issuance of such a direction is also stated in paragraph 3 of Section 34 in terms whereof a legal fiction is created by reason whereof the trustee would be deemed to have discharged his obligation in regard to his own responsibility in the subject-matter of the application. It does not envisage an adjudication. It does not ordinarily envisage determination of the right, title or interest of a member of the trust or a beneficiary in relation to the trust property, although such a question may have to be incidentally dealt with.

The provisions of Section 34 of the Act must be given its literal meaning. The court cannot exercise a jurisdiction which is not vested in it. A court can exercise jurisdiction, provided it is vested therewith. An order without jurisdiction over the subject-matter would render the decision a nullity.

13. Construction of the aforementioned provision which is in *pari materia* with Section 10(1) of the Official Trustees Act, 1930 came up for consideration before this Court in *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*,]. Therein, it was clearly held that in terms of Section 33 of the Act, the rate of interest cannot be directed to be altered, stating:

21. It was then said that the order in question could have been made by Ramfry, J., in the exercise of his inherent powers as a Judge sitting on the original side of the Calcutta High Court. It was argued that a Judge sitting on the original side of the High Court of Judicature at Calcutta has all the powers of a Chancery Judge in England as that power has been conferred on him by the Letters Patent granted to that High Court. We shall assume it to be so. We may note that the settler did not invoke the inherent jurisdiction of the High Court nor did the Judge purport to exercise that power. But, still, that cannot invalidate the order made if the Court had the inherent jurisdiction to make that order. Hence the real question is had he that inherent jurisdiction? Chapter XIII of the Calcutta High Court Rules prescribes what orders can be obtained in an originating summons proceedings. The jurisdiction of the Judge acting under that Chapter is a summary jurisdiction. Rule 1 of that Chapter empowers the Judge to entertain an application in respect of matters enumerated in Clauses (a) to (g) of that rule. Admittedly Clauses (a), (b), (f) and (g) are not relevant for our present purpose. Under Clause (c) the Court could only decide about furnishing of any particular accounts by trustees and vouching (where necessary) of such accounts. Under Clause (c) it could direct the trustees to pay into Court any monies in his hands and under Clause (e) direct him to file an account and vouch the same to do or

abstain from doing any particular act in his character as a trustee. The orders under Chapter XIII are made in chambers. As mentioned earlier the proceedings under that Chapter are summary proceedings. No rule in that Chapter was brought to our notice under which the order in question could have been made.

xxx xxx xxx 25. It will be noticed that the powers given under those four heads are those relating to management and administration of trust property. That power is similar to the power conferred in Courts by Section 34 of the Trusts Act and Section 43 of the Trustees and Mortgagees Powers Act, 1866. In fact in this country we have codified the very powers that were exercised by the Chancery Courts in England under their equitable jurisdiction. The Court of Appeal in Chapman's case 1953 1 Ch 218 Evershed M.R. and Romer, JJ., Denning L. J. dissenting stated the law on the point thus:

The inherent jurisdiction of the Court of Chancery is of a limited character. It is a jurisdiction to confer upon the trustee, quoad items of trust property vested in them, administrative powers to be exercised by them where a situation has arisen in regard to the property creating what may be fairly called an "emergency". The inherent jurisdiction does not extend to sanctioning generally the modification or remoulding of the beneficial trusts of a settlement.

xxx xxx xxx 27. From whatever angle we may examine the validity of the order made by Ramfry, J., it appears clear to us, that the said order was outside the jurisdiction of the learned Judge. It was not merely a wrong order, or an illegal order, it was an order which he had no competence to make. It is not merely an order that he should have not passed but it is an order that he could not have passed and therefore a void order.

14. Section 34 occurs in Chapter IV titled "Of the rights and powers of trustees" beginning from Section 31 relating to 'right to title deed' to Section 45 relating to "Suspension of trustee's powers by decree". Chapter VIII, on the other hand, provides for extinction of trusts. Chapter IX relates to matters pertaining to certain obligations in the nature of trusts. The right of a member of a trust to receive pension poses a difficult question. It may also pose a question of importance, keeping in view the fact that by reason thereof, the obligation of the trustee would come to an end. It is one thing to say that an advice, opinion or direction can be made respecting the administration of the trust; but what that means would evidently depend upon the terms of the trust deed.

15. We have noticed hereinbefore that Part II of the trust deed lays down the mode and manner in which the trust properties are to be administered. It does not lay down a right on the part of the trustee to put an end his right to get himself discharged from his obligation. If for some reason or the other, it is contended by the trustee that the trust stand extinguished, any remedy in respect thereof must be found within Chapter VIII of the Act and not otherwise. Similar provisions exist in the Official Trustees Act, 1930, Section 302 of the Indian Succession Act, 1925 and Section 7 of the Charitable and Religious Trusts

Act, 1920.

The courts of India have all along held that their jurisdiction, in this behalf, is limited. In any event, it is for the court concerned to arrive at an opinion as to whether the questions posed are matters of detail, difficulty or importance. Summary jurisdiction would not be exercised in the event the exclusionary clause comes into operation.

16. We will assume for the time being that the application u/s 34 of the Act was maintainable. The court, however, keeping in view the number of persons who would be entitled to oppose the prayer of extinction of trust, would decline to exercise its jurisdiction. Interpretation of the trust deed furthermore is a question of importance. It is also a matter of detail in the proceeding as to whether the trustees have been able to discharge their entire liabilities. The Division Bench of the High Court, as noticed hereinbefore, opined that the trust is an irrevocable one. It may or may not be correct; but the question posed admittedly is a difficult one and if for the said purpose it had refused to exercise its discretionary jurisdiction, in our opinion, no fault can be found therewith.

17. We have also some difficulty in appreciating the submissions of Mr. Nariman that all the members of the trust must be deemed to have consented to the extinction of the trust on the ground that the purpose of the trust had been fulfilled. Admittedly, three suits are pending. It is, thus, not correct to contend that all the beneficiaries of the trust have been paid off. The power of the Company to make rectification of the terms and conditions of the trust vis-a-vis the power of the trustees to revoke the same with retrospective effect is a matter which is pending consideration in a court of law. No final opinion can be rendered in that behalf. If the terms and conditions of the trust are to remain in operation in view of Clause 3 of the Deed of Trust, it is really difficult for us to comprehend as to why three more trusts were created. The purpose for which the same had been created and the trustees had been asked by the Company to pay back the balance amount to the Company for its rehabilitation is a tall tale one. Bona fide of the trustees in moving such an application is suspect. The trustees intended to pay a huge sum of Rs. 20 crores to the Company for its revival. Once it is revived, the employees who are existing would continue and new employees may also be appointed. It is, therefore, difficult for us to comprehend the stand of the trustees that as the Company had been declared sick by the BIFR, the same would lead to an irresistible conclusion that no further employee would be appointed. The contention of the trustees appears to be fallacious. Once the Company had taken recourse to the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, an operating agency must have been appointed and even without aid and assistance of all the trustees scheme(s) might have been framed by the operating agency for revival of the Company. How and in what manner the BIFR or for that matter AIFR intended to proceed the matter is one which falls within the jurisdiction of the authorities created under the SICA. The Civil Court will have no say in the matter.

18. Submission of the learned Counsel that in this case Section 83 is squarely attracted cannot be appreciated for more than one reason. Firstly, because it is a seriously disputed question of fact. Secondly, the court exercising its summary jurisdiction for the purpose of giving advice, opinion or direction cannot finally determine the rights and obligations of the trustees vis-a-vis the State on the one hand and the beneficiary thereof on the other. Thirdly, even if a few persons opposed extinction of the trust, the same itself should be treated to be sufficient for the court to refuse to exercise its summary jurisdiction u/s 34 of the Act.

19. Strong reliance has been placed by Mr. Nariman on *Muffakham Jah Bahadur and Others Vs. H.E.H. Nawab Mir Barkat Ali Khan Bahadur, Mukarram Jah and Others*, . Therein, a Division Bench of the Andhra Pradesh High Court categorically held that there was no opposition. It was found as of fact that the First Respondent would stand to gain if the trust is dissolved which would be beneficial to all the trustees. The court was in the fact situation obtaining therein was not required to go into the question of maintainability of the application u/s 34 of the Act. It is, however, interesting to note that in Para 15, it was noticed:

At Page 514 of Underhill's Law of Trusts Trustee, Twelfth Edition, Article 68 runs as follows:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability (a), the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settler or the trustee.

We think that approval and arrangement is a matter of judicial discretion depending upon the facts of each case. The Court must be satisfied that each beneficiary is getting a substantial advantage. We do not think that there can be any objection for an arrangement when its object is to avoid fiscal burden.

20. The Andhra Pradesh High Court categorically opined that whether approval and arrangement should be granted or not is a matter of judicial discretion depending upon the facts of each case and the court must be satisfied that each beneficiary is getting a substantial advantage. Unfortunately, attention of the High Court was not drawn to this Court's decision in *Sachindra Nath Chatterjee* (supra). It is, therefore, not an authority for the proposition that such a direction can be issued in all situations.

21. Reliance has also been placed on *Sahebzadi Amina Marzia Vs. Syed Mohd. Hussain and Others*, , wherein a direction was issued to sell a portion of the property, having regard to the wealth tax liability which could not be made otherwise. The same was found to be in the interest of the beneficiaries as the said jewellerys were not to be of much use.

22. We may, however, notice that in *Hasan Bin Mubarak Vs. Chief Judge, City Civil Court, Hyd. and Others*, , the same High Court held:

...Section 34 of the Act contemplates only a summary disposal on non-controversial issues. The mental condition of a person being an important personal problem, the Court cannot dispose of the same in a summary manner. What the Court below has done was to examine 3rd respondent, who is alleged to be an insane person and give the opinion on the basis of her statement. Though Ex.R-1, certificate, alleged to have been given by a psychiatrist, was marked, the Court made no effort to examine the said doctor. Obviously, this could not have been done because the matter has to be disposed of in a summary manner. Thus, it is evident that the advice that was sought for by the trustee required a determination on contentious facts and the jurisdiction of the Court u/s 34 being only in the nature of giving guidelines or directions without entering into the merits, the application ought not to have been entertained by the Court. The trustee might have got a valid and satisfactory opinion had he approached a qualified medical man or the Court in a properly instituted suit.

23. In *Avoch Thevar* case (supra) following the decision in *Armugan Chetty v. Raja Jagaveera* ILR 28 Mad 444, it was clearly held that while providing the trustees a right to apply to the Court for opinion to the Management and the Members, Section 34 embodied at the same time, a limitation governing the questions to be asked viz. that there should not be hypothetical and any questions of details or difficulty or importance, not proper in the opinion of the Court for summary disposal. None of the passages quoted or citations relied upon by the learned Counsel for the respondents came to his assistance.

23. Yet again in *Krishen Kumar Khosa v. Krishen Lal and Ors.* AIR 1979 J&K 13, it was held:

From a bare perusal of the petition it becomes obvious that the petitioner is not in possession of the Trust property but is desirous of getting himself declared a trustee in opposition to respondent No. 1 who according to him, has usurped his functions to which he was entitled to under the Guru Jeer's alleged will. Obviously the petition was not for seeking any advice, opinion or direction from the court. It raised questions of difficulty detail and of importance which not be disposed of in summary proceedings as one at hand. Mr. Gupta has vehemently argued that he was entitled to seek the direction from the court which would according to him include even a declaration to the effect that it was in fact the petitioner who was the trustee and not respondent No. 1. He has cited some authorities such as AIR 1953 Nag 89 , *Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri*, , and *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur* and Another, in support of his contention that the expression "direction" means and includes an order of the court and does not merely mean an advice or opinion. On a perusal of these judgments I am however, of the view that the expression 'direction' as used in the Trusts Act has entirely a different meaning than the meaning that may have been given to it in various other enactments discussed in the above said judgments. Though Mr. Gupta has remarked the interpretation laid down on the expression "opinion,

advice, and direction" appearing in Section 34 of the Trusts Act in Muhmmad Hashim Gazdar AIR 1945 Sind 81 and AIR 1934 Oudh 118 (2) being the interpretation laid down long ago and therefore not applicable to the situation prevailing in 1978, yet I am of the view that the meaning of the expression used in Section 34 of the Trusts Act having been directly at issue in the said judgments, the interpretation placed in the said judgments, on this expression was not only appropriate and correct at the time of the passing of the said judgments but still continue to be the only interpretation that may possibly be given. In AIR 1945 Sind 81 (supra) it has been laid down as follows:

The words "opinion, advice or direction" in Section 34 Trusts Act, must be read together as meaning nothing more than guidance. u/s 34 the Court exercised what may be called its consultative jurisdiction, giving guidance to a trustee who presumably asks for it, because he wants it and intends to follow it, Section 34 is intended to enable a trustee to obtain the Court's guidance in suitable matters for his protection. The advice, opinion or direction given u/s 34 is not an order binding on parties and disobedience to it does not involve committal for contempt....

24. Strong reliance has been place on Smt. Nilima Ghosh and Another Vs. Prakriti Bhusan Mitter, , wherein it was categorically held that when an application was filed u/s 90 of the Code of Civil Procedure, the court would be justified in refusing to answer the question as the matter should have been referred to court specified in Section 34 of the Act, stating the said decision was rendered, inter alia, on the premise that the court of principal Civil Court is a court of superior jurisdiction to that of a Subordinate Judge. We need not pronounce on the correctness or otherwise of the said decision; but we may notice that such observations were made having regard to the development and preservation of the trust property in question and not for any other purpose. Whereas a direction to sell a portion of the trust property may be issued for the benefit of the trust as also the beneficiary thereof and not for preservation of the property, in our opinion, the same test cannot be applied for the purpose of obtaining in truth and substance an order of extinction of the trust. The two reliefs are absolutely different.

25. We, therefore, are of the opinion that no case has been made out for our interference with the impugned judgment. We need not make our comments with regard to the maintainability of the Letters Patent appeal, as Mr. Dwivedi conceded that such an appeal would be maintainable.

It is well-settled that if the jurisdiction of a court in relation to the subject-matter thereof is limited, any decision rendered by it would be a nullity. In such an event, even the principle of res judicata will have no application [See Official Trustee of West Bengal Vs. Stephen Court Ltd., and Harshad Chiman Lal Modi Vs. DLF Universal and Another,]

26. It is interesting to note that in Sachindra Nath Chatterjee (supra), Hegde, J.

was clearly of the opinion that where the relief cannot be granted keeping in view the limited jurisdiction of the court, in relation thereto the court will have no jurisdiction. But it is of some significance that the jurisdiction of the court must be determined in a case of this nature having to the purport and object for which such jurisdiction is conferred. A wider jurisdiction thereunder is not contemplated.

It is also well-settled that when a court refuses to exercise its discretionary jurisdiction, normally an appellate court shall not interfere therewith. [See Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others,].

27. Article 142 of the Constitution of India in a case of this nature may not be invoked, particularly when this Court is exercising its appellate jurisdiction. If the High Court had no jurisdiction to entertain the application and in any event having regard to the fact that both the learned Single Judge as also the Division Bench of the High Court had not exercised their discretionary jurisdiction, in my opinion, it is not a case where jurisdiction under Article 142 of the Constitution of India should be invoked particularly in view of the fact that the appellant is not remediless. It can file a suit. It can take recourse to other remedies which are available in law.

28. The appeal, therefore, being devoid of any merit is dismissed. In the facts and circumstances, however, there shall be no order as to costs.

Markandey Katju, J.

29. I have perused the judgment of my learned brother S.B. Sinhu, J. in this case and am in respectful disagreement with the same. Hence, I am preparing my own judgment.

30. Leave granted. This appeal is directed against the judgment and order dated 6.2.2006 of the High Court of Calcutta in APOT No. 584 of 2005 in APO No. 508 of 2005.

31. The facts of the case are mentioned in the judgment of my learned brother Sinha, J. and hence I am not repeating the same except where necessary. Admittedly, the object of the Trust in question was to pay pension and annuities to the members of the Trust or dependents, including their widows and children (upto the age of 21 years), in accordance with the rules of the Trust. The entire funds of the Trust were admittedly provided by the Dunlop India Limited (hereinafter referred to as the 'Company'). It is further admitted that all the beneficiaries under the Trust have been paid off and hence the purpose has been completely fulfilled and executed without exhaustion of the funds of the Trust, except to the extent of Rs. 3,88,55,682.00, which amount after one time payment has been transferred to the Life Insurance Corporation of India (hereinafter referred to as 'LIC'). Consequently, the Trust has now no further liability/responsibility towards any of its beneficiaries. The balance sum remaining with the Trust fund being Rs. 20,83,95,690.00 has, in my opinion, therefore, to be returned to the Company in view of Section 83 of the Indian

Trust Act (hereinafter referred to as the 'Act'). After all, the entire money donated to the Trust fund was donated by the Company and hence it has to be returned to the Company.

32. Section 34 of the Act may not be strictly applicable in the present case because that provision enables the principal Civil Court of original jurisdiction to give an opinion, advice or direction on any present questions respecting the management or administration of the trust property. The words 'management or administration of the trust property' would not apply when the object of the Trust itself has been fulfilled and now the only question remains is as to what has to be done about the remaining fund with the Trust. In such a case, in my opinion, a direction should be issued under Article 142 of the Constitution of India to refund the balance money lying with the Trust to the Company which had donated the funds to the Trust. In my opinion, such a direction should be given in view of Section 83 of the Act, and also because the money can now only go back to the Company since all the beneficiaries have been paid off. Any other view would, in my opinion, be unreasonable because the balance amount lying with the Trust cannot obviously remain idle. To direct the Company to file a suit for this purpose would only cause further delay and multiplicity of proceedings.

33. The Settler (the Company) is admittedly facing severe financial crisis having become sick and proceedings are pending for its revival before the appellate authority for financial reconstruction. Hence, it would be appropriate if the funds are returned to the Company as it may help revive the Company.

34. I am, therefore, of the opinion that the learned Division Bench as well as the Single Bench which passed the impugned judgment erred in holding that the purpose of the Trust still exists and remains valid. Consent letters have been given by 140 employees of the Company and the others concerned have also been paid off. The only one remaining is Shri M.D. Shukla, who was the Managing Director for 38 months and who claims pensionary benefits of over Rs. 45 lakhs after having changed the Trust rules just before his retirement in order to become a beneficiary. His claim is disputed by the company. In my opinion, even if there is a genuine dispute about the claim of Shri M.D. Shukla of about Rs. 45 lakhs, this amount could have been set aside for adjudication in a suit and the balance amount of the Trust fund should have been ordered to be returned to the Company. Admittedly the Company had a total number of 186 Executives and/or Management staff, who were members and/or beneficiaries of the said Fund. Under the Rules of the Fund, the aforesaid 186 members and/or beneficiaries would be entitled to receive a sum of Rs. 3,88,55,682.00, as calculated by the LIC, applying the mode of 'Actuarial Valuation', and the same is also undisputed by any of the beneficiaries.

35. In accordance with the valuation carried out by the LIC, the appellants, out of the funds lying in the Special Deposit Account No. 3/1976 with the United Bank of India, Park Street Branch, Kolkata, transferred a sum of Rs. 3,88,55,682.00 to the LIC and took out policies in favour of the present

members and/or beneficiaries of the Fund w.e.f. 01.4.2001. As a result, full provision has been made for the payment required to be made under the Rules of the Fund to its present members and /or beneficiaries, upon superannuation, and it is again undisputed that as and when the respective members become eligible for the pension, the same will be paid by the LIC to the members/pensioner directly and the Fund/Trust in no way will be responsible or accountable for the same. After transfer of the said sum of Rs. 3,88,55,692.00, which completely protects the beneficiaries, a further sum of Rs. 22,83,95,690.00 with accrued interest as on 12.9.2001, remained in the Special Deposit Account No. 3/1976 to the credit of the Fund/Trust.

36. In view of the aforesaid, the purpose of the Fund/Trust stood completely fulfilled and executed, without exhaustion of the Fund/Trust property, except to the extent of Rs. 3,88,55,682.00 referred to above, which amount, being a one-time payment, has been transferred to the LIC, pursuant whereafter the Trust has got no further liability/responsibility towards any of its beneficiaries. There are no existing beneficiaries of the said Fund nor is there any possibility of any further beneficiaries being created out of the instant Fund/Trust. The sum of Rs. 20,83,95,690.00 with accrued interest is, therefore, being held by the Fund u/s 83 of the Act for the benefit of the Company being the Settler of the Trust/Fund.

37. It is again a matter of record that out of 186 beneficiaries/members, 140 members have given their express consent and the remaining 46 members have raised no objection to the same which, inter alia, means that there is deemed consent on their behalf. It is again an admitted position that in the event of appropriate directions not being given, surplus money will lie redundant and cannot be put to use under any circumstances, which needless to say, does no justice or equity to any of the parties.

Section 83 of the Indian Trust Act states:

Trust incapable of execution or executed without exhausting trust property. - Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Hence, in view of Section 83, the money lying with the Trust fund should be returned to the Company.

38. Three persons who filed Suit No. 551/2001 retired between 1994-97 and as on date are getting their pension from the LIC. Thus, the interest of every beneficiary under the Trust has been taken care of and annuities have been purchased by the Trust in the names of the beneficiaries as per the valuation carried out by the LIC and in terms of the pensioner benefits to be received by the concerned beneficiary. Therefore, there is no employee/beneficiary left who is entitled to get any pension out of the Trust in issue, which material fact has been ignored by the courts below.

39. In view of the above, in my opinion, the appeal deserves to be allowed and the money lying with the Trust fund should be directed to be returned to the Company forthwith. The impugned judgments of the courts below are set aside. There shall be no order as to costs.

ORDER

40. In view of the difference of opinion the matter may be placed before a larger bench. Accordingly, it may be placed before Hon'ble the Chief Justice of India for necessary orders.