
(1962) 10 P&H CK 0014
In the Punjab And Haryana At Chandigarh
Case No : First Appeal No. 43 of 1955

Balkishan Dass

APPELLANT

Vs

Parmeshri Dass deceased substituted by Madhuri Sharan
Sharma and Others

RESPONDENT

Date of Decision : 01-10-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 16, Order 22 Rule 11, Order 22 Rule 3 , Order 41 Rule 2, 11
Evidence Act, 1872 — Section 115
Trusts Act, 1882 — Section 12, 15, 19, 20, 46

Citation : AIR 1963 P&H 187 : (1963) 1 ILR (P&H) 320

Hon'ble Judges : Shamsheer Bahadur, J; Mehar Singh, J

Bench : Division Bench

Advocate : R.S. Narula and T.S. Munjral, for the Appellant; D.C. Gupta, A.S. Mahajan, H.R. Mahajan and Pooran Chand, for the Respondent

Final Decision : Partly Allowed

Judgement

Shamsheer Bahadur, J.—This appeal arises out of a suit instituted by the two plaintiffs Parmeshwari Das and Sant Ram as trustees in respect of property known as Mandir Shri Nanidev Kalla Dhari Ji Maharaj in Bahawal-pur State for rendition of accounts against their co-trustees Bal Kishan Das and Gosain Jamna Das, hereafter referred to as the first and second defendants. In this suit were also impleaded Bhiwani Das who is now dead and Sardul Singh, as defendants Nos. 3 and 4. The fourth defendant in effect supports the plaintiffs' suit.

The suit has been decreed by the learned Sub-ordinate Judge, Amritsar, and a final decree for recovery of a sum of Rs. 1,87,123/8/3 with full costs has been passed against the first defendant. As the Court did not consider the plaintiff-trustees to be fit enough to receive this sum the defendant has been directed to make a deposit of it in some bank. Interest on the decretal amount has to be charged at the rate of 4 1/2% per annum from the date of the suit till the date of realisation. The second defendant on the other hand has been asked to make

restoration of certain articles which he brought from the Mandir at Bahawalpur and in default, to make a payment of Rs. 10,000/-. The second defendant appears to be content with the decree passed against him and has not preferred any appeal. The first defendant alone has come in appeal to this Court.

2. It may be pointed out that instead of the first plaintiff Parmeshwari Das and the third defendant Bhiwani Das who are now dead two new trustees have been appointed and they are impleaded as respondents in this appeal.

3. By a will executed on 14th of May, 1938 and registered a week later on 21st of May, 1938 (Exhibit P. 3), Gosain Brij Mohan Das, gaddi nashin of Mandir Shri Namdev Kalla Dhari Ji Maharaj, at Bahawalpur, then sixty years old, made a testamentary disposition with regard to movable and immovable properties of three Mandirs in Bahawalpur city known as Mandir Kalla Dhari Ji Maharaj, Sanwal Shah Ji and Mandir Gopi Nath Ji, one Mandir known as Kalla Dhari in Multan city and one Mandir known as Mandir Kalla Dhari in Bindra Ban, Mathura district; agricultural lands and shops in Bahawalpur city; agricultural and residential lands in Multan; residential houses situated in Amrit-sar and movable property like ornaments, clothes and utensils relating to Thakar Ji Maharaj.

During his life-time the testator was to remain the exclusive owner of this property. In case the testator was unable to liquidate the debt due from him, Rai Sahib Bishan Das, Sub-Registrar, Parmeshwari Das, plaintiff No. 1, Sant Ram, plaintiff No. 2, Mool Chand and the second defendant Gosain Jamna Dass were appointed trustees to alienate any property to liquidate the liability. The trustees were also left the option of taking any other proceedings with the object of paying off the debt due from the testator. The properties were to vest in Shri Thakar Ji Maharaj of the Kalla Dhari Mandir, situated at Bahawalpur, who was to be regarded as the full owner of the property, and were to remain as waqf Dharmarth in perpetuity. The income of the property was to be spent in connection with the ceremonies and festivals relating to the said Shri Thakar Ji Mahafaj.

The second defendant Gosain Jamna Dass was declared to be the successor as gaddi nashin of the testator but he was not given any right to alienate the property. The five persons named as trustees were directed not only to pay the debts but to take charge of the future management of the property left and owned by the testator. The income of the property was to be utilised for the benefit and improvement of the temples. Out of the five trustees, Rai Sahib Bishan Dass was to act as President during his lifetime and after his death the surviving trustees could appoint a President by a majority of votes. Likewise, the surviving trustees by a majority could appoint trustees in place of those who died or those who could not fulfil their duties as such. The choice of trustees was limited to persons who were "Vishnu Dharmi Hindus". The trustees were also given the power to appoint additional trustees. All the trustees, except the second defendant, were not to get any remuneration for their work.

4. The testator did not long survive the execution of his will and died a few days later. On 14th of April, 1939, the five trustees executed a power of attorney in favour of Pandit Ram Parshad, Bulaqi Ram and Ram Chand, who were to act as Mukhtar-i-ams for conducting pending suits and taking all other steps necessary for that purpose. By another power of attorney executed by the same trustees on 29th of February, 1940 (Exhibit P. 49) the second defendant was appointed manager of the properties: he was to remain in charge of litigation and was empowered to make realisation of dues. On 3rd of August, 1941, Rai Sahib Bishan Dass died and in his stead the first defendant, the brother of the deceased, was appointed a trustee. Nothing of importance was done by the trust till 1944 when the Bahawalpur Durbar acquired certain lands belonging to the temple. In the acquisition proceedings it is admitted that the following sums were paid to the first defendant by the Government of Bahawalpur :

Rs.

(1) 608-1-0

in respect of 2 kanals 18 marlas on 19,2.1915, vide receipt Exhibit P.52.

(2) 94,743-0-0

in respect of 51 aa-es, 6 kanals and 6 marlas of land on 19-2-193:6, vide receipt Exhibit P.53

(3) 1,118.15-0

in respect of 3 kanals and 10 marlas of land, and

(4) 70,953-11-0

in respect of 31 acres, 5 kanala and 5 marlas of land, vide receipt Exhibit P.54, executed on 19-2,19-15.

Total : 1,67,423-11-0

It may be pointed out at this stage that the first defendant asserts that the compensation at first was fixed at a low figure and it was as a result of his intercession that the authorities raised the compensation money. It is the case of the first defendant also that he was asked to act as President by a resolution of the Board of Trust passed on 17th of June, 1944 (Exhibit P. 50) authorising him to receive the compensation moneys from the Town Planning Committee, Bahawalpur, in respect of Bindra and Ridda villages. The receipts for all payments were executed by the first defendant. Out of the amounts so realised a sum of one lakh was expended for the purchase of victory bonds. The cheques in this connection were paid by the first defendant, and the last one of Rs. 16,288/- (Exhibit P. 77 at page 155 of the printed paper book) was drawn in favour of the Imperial Bank of India, Bahawalpur, on 24th March, 1945. To complete this aspect of the case, it may be mentioned that another payment of Rs. 13,502/- was received in respect of compensation on 24th of June, 1947.

5. In the year 1945-46 a suit had been filed by one Luddi Bai at Multan for partition of a joint shop in which Mandir Kalla Dhari had a one-third share. The matter was ultimately compromised on 14-3-1946 (Exhibit P. 344) and a sum of Rs. 5,500/- was paid to the first defendant as President of the trust. A sum of Rs. 2,000/- was paid in the first instance on 12th of April 1946 when, according to the first defendant a separate account was opened by him in the Imperial Bank at Multan. Another deposit of Rs. 3,500/- was made in this account on 11th of November, 1946.

6. Presumably because of the heavy realisations made on behalf of the trust a feeling, was created amongst the trustees, other than the first and the second defendants, that full information had been kept back from them about the moneys which had been received and some correspondence was exchanged between the parties.

7. The final payment received by the first defendant was on 23rd of February, 1948, of Rs. 1,02,616/14/3 by the sale of victory bonds in Babawalpur of the nominal value of Rs. 99,800/-. According to the first defendant, the amount so received by him was paid to the second defendant who was the virtual owner and beneficiary of the trust. It is really this payment which set up the remaining trustees against the defendants who after calling upon them to render accounts brought the present suit for this purpose on 25th of October, 1950. In addition to relief for rendition of accounts the plaintiffs further asserted that the second defendant as Mahant of temple at Bahawalpur brought with him ornaments, clothes and utensils of the value of Rs. 15,000/- when he migrated to India after the partition.

8. The suit was originally instituted in the Court of the Senior Subordinate Judge, Amritsar, before whom some preliminary objections were raised by defendants Nos. 1 and 2.

In substance, it was pleaded that the suit should have been instituted u/s 93 of the CPC and could not proceed in its present form in the absence of the sanction of the Advocate General. These objections formulated in two preliminary issues were decided against the defendants by the Senior Subordinate Judge, Amritsar, on the 27th August, 1951. A petition for revision from this order was taken to the High Court where it was decided by the then Chief Justice Sir Eric Weston on the 16th July, 1952. The learned Chief Justice on a consideration of the authorities cited before him especially Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, , Appanna Poricha Vs. Narasinga Poricha and Others, and Shanmukham Chetty v. Govinda Chetty ILR 1938 Mad 39 : (AIR 1938 Mad 92) came to the conclusion that the suit u/s 92 had to be of a representative character and in the present instance the two plaintiffs as co-trustees having instituted a suit only against the other trustees in respect of internal management the provisions of Section 92 were not attracted. In this view of the matter the petition for revision was dismissed.

The suit was thereafter transferred by the District Judge from the Court of the Senior Subordinate Judge to the Court of Shri Onkar Nath, Subordinate Judge, Amritsar, as the valuation for the purposes of court-fee and jurisdiction was Rs. 510/-. Eventually the valuation was changed to Rs. 4,000/- and the suit was transferred to the Court of Shri Ram Singh Bindra, Sub-Judge 1st Class, who framed on 12th November 1953 the following five preliminary issues, two of these related to the question of maintainability of the suit u/s 92, CPC :

1. Whether the plaint has been correctly valued for the purposes of court-fee and jurisdiction ?
2. Whether the objection that the suit is not tenable in view of the provisions of Section 92, Civil Procedure Code, is barred by the principles of res judicata?
3. If issue No. 2 fails whether the suit is hid by the provisions of Section 92, Civil Procedure Code, and as such is not maintainable without compliance with the requirements of that section?
4. Whether the plaintiffs are bound to give in the plaint the particulars of the various movable and immovable properties mentioned in the plaint and if so what is the effect of their having not done that?
5. Whether this Court has no jurisdiction to try the suit even though admittedly defendant No. 1 is residing within the jurisdiction of this Court and qua defendant No. 2 this Court has already granted permission for instituting the suit against him here by its order dated 18-2-1953?

Objection had been raised once again before him that Section 92 of the CPC barred the suit altogether. The learned Judge considered that the matter having been decided by Chief Justice Weston in *Balkishan Dass Vs. Parmeshwari Dass* etc., could not be reagi-tated again. The other preliminary issues which are not relevant for purposes of this appeal were also decided against the defendants. The order dealing with the preliminary issues was passed by Shri Bindra on the 18th December 1953, and on the same day the following issues on merits were framed :

1. Whether Gosain Brij Mohan Dass Jee made any will on 14th May, 1938 in respect of the temple Dev Kalla Dhari Tee and the other temples and properties attached thereto? If. so, was he in a disposing mind at the time of making that Will?
2. Whether per Will mentioned in issue No. 1 Gosain Brij Mohan Dass Jee had created any trust for management of the temple Dev Kalla Dhari Jee and the temples and properties attached thereto? If so, whether he was competent to do so?
3. Whether the Will contains the terms mentioned in para 8 of the plaint and whether Gosain Brij Mohan Dass Jee was competent to impose those terms?
4. If issues 1 to 3 are proved then whether the plaintiffs and the defendants are

the present trustees of the trust?

5. Did the defendant No. 2 bring with him any movables belonging to the idol at the time of his migration to India and if so, what were they and what was their value?

6. Whether the plaintiffs have been and still are in possession of any trust property?

7. Whether the defendants Nos. 1 and a cannot raise the objections giving rise to issue No. 2 ?

8. Whether the defendant No. 2 is estopped from raising the objection giving rise to issue No. 3?

9. What was the total compensation received by defendant No. 1 from the Bahawalpur Government?

10. Whether the sum of Rs. 3600/- mentioned in para 22 of the plaint had been received by de-fendant No. 1 from the lessees?

11. If issue No. 10 is proved then whether the amounts mentioned in paras 18, 21 and 22 of the plaint, and otherwise the amounts mentioned in paras 18 and 21 of the plaint have been made over by the defendant No. 1 to the defendant No. 2? If so, was he competent to do that and does he stand discharged from rendering accounts to the trust?

12. Have the plaintiffs resigned from their office as trustees or whether the defendant No. a has dismissed them from that office and whether he was competent to do so?

13. If issue No. 12 is proved whether the plaintiffs have any locus standi to maintain the suit?

14. Whether defendant No. 1 is estopped from challenging the fact that he is President of the trust and the other parties to the suit are members thereof?

15. Whether the suit is within time?

16. Whether the defendant No. 2 is estopped from pleading that Brij Mohan Dass could not have created any trust for the temples and properties in dispute?

17. Relief.

9. The findings of the trial Judge so far as they are relevant for the purposes of this appeal may be briefly summarised.

The testator Gosain Brij Mohan Dass has been found to be in possession of a sound disposing mind when the will was executed. This is the decision on issue No. 1 which no one has challenged in this appeal. The trial Judge has also found that a trust was validly created by Gosain Brij Mohan Dass testator who was fully competent to do so and defendants Nos. 1 and 2 are estopped from raising the

objections with regard to the validity of the trust or the competency of the testator to create it. It has been found against the second defendant in issue No. 5 that he brought movable goods belonging to the idol at the time of migration of the value of Rs. 10,000/-. A decree has been passed against the second defendant for this amount. The quantum of compensation received from the Baha-walpur Durbar has been computed at Rs. 1,80,925/11/- and this figure is not disputed by the parties. The Court has also found that a sum of Rs. 3,600/- had been received by defendant No. 1 (issue No. 10). The conclusion of the trial Judge on issue No 11 is that the amounts received by defendant No. 1 have not been proved to have been made over to the second defendant and is, therefore, accountable for these sums.

On the question of locus standi the conclusion of the learned trial Judge is in favour of the plaintiffs and so also on the question of limitation. In the result, a decree has been passed against the defendants -- for a sum of Rs. 10,000/- against the second defendant and for Rs. 1,87,123/8/3 against the first defendant. The second defendant not having filed any appeal appears to be content with the findings and decree of the trial Judge against him. It is the decree passed against the first defendant with which we are concerned in this appeal which has been argued very fully and forcibly by his learned counsel, Mr. R. S. Narula.

10. The argument addressed by the learned counsel can be conveniently split up into five main divisions.

It is contended, in the first place, that the suit should have been brought under the provisions of Section 92 of the CPC and the plaintiffs having failed to do so it should be dismissed on that score.

Secondly, while the execution of the will is admitted, the competency of the testator to create a trust is challenged, the property disposed of by Gosain Brij Mohan Dass being shebait which according to Mr. Narula partakes of all the essential characteristics of ancestral property. Allied with this question is the matter of estoppel which is the subject-matter of 7th and 8th issues. It is asserted, this being the third head of Mr. Narula's argument, that the second defendant and also the first defendant are not estopped from raising the question of competency of the testator to create 3 trust.

Fourthly, the locus standi of the plaintiffs to bring the present suit is questioned. Finally, it is urged that if the accountability of the first defendant is otherwise accepted the trial Judge should have passed only a preliminary decree in the first instance and the decree for recovery of a specified sum is unwarrantable.

On the merits of the case, it is submitted that the first defendant had made over whatever moneys he received by way of compensation and otherwise to the second defendant.

The first defendant also challenges the finding of the trial Judge with regard to

certain Items for which he has been made liable. It is emphasised that the defence of the second defendant being inline with the appellant on this vital question, there is no reason to reject the position taken up by the second defendant that he had in fact received the moneys from the first defendant. It is true that in the written statement the second defendant had taken up the same position as that adopted by the first defendant on questions which are now raised In appeal. The trial Judge, however, has found that the second defendant was a "simpleton" and in effect he had to be saved and protected against himself.

In this appeal the second defendant has been represented by Mr. Puran Chand who has supported the judgment of the learned Subordinate Judge in all its aspects even in respect of findings against the first defendant--a position which is in sharp contrast to the one adopted by him in the written statement.

11. The valdity of the first argument of Mr. Narula is countered by Mr. Dalip Chand Gupta, the learned counsel for the respondents, on the ground that it is barred by the principle of res jndicata having been heard and finally decided by Chief Justice Weston in Civil Revision No. 582 of 1951. It is also submitted by counsel that the point has not been specifically taken up in the grounds of appeal.

We have permitted the counsel for the "appellant to argue this matter as the question relates to jurisdiction.

There is however, substance in the other objection of Mr. Gupta and we consider that where an interlocutory order is heard on merits either in appeal or in revision the matter becomes res judi-cata. The matter in substantially the same form had been agitated twice before in the trial Court and a revision was actually taken up to the High Court. In the civil revision. Chief Justice held after consideration of the various authorities including the Supreme Court decision in Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, on which strong reliance has been placed by Mr. Narula, that the suit need not have been brought under the provisions of Section 92 of the Code of Civil Procedure. Precisely on the same ground it has been urged once again by Mr. Narula that the plaintiffs could and should have brought a suit u/s 92 after obtaining the assent of the Advocate General. The principle of res judicata, as held by their Lordships of the Supreme Court in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , is based on the need of giving a finality to judicial decisions.

"When a matter -- whether on a question of fact or a question of law--has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The principle of res indicate is embodied in relation to suits in Section 11 of the Code of Civil Procedure;"

and its principles are applied by Courts for the purpose of achieving finality in

litigation.

It has been held in a Full Bench (Division Bench?) of the Hyderabad High Court in *Laxminarayan v. Sultan Jehan Begum*" AIR 1951 Guj 132, that the provisions of Section 105 of the Code of Civil Procedure, under which the validity of an interlocutory order could be challenged in appeal, do

"not authorise the Appellate Court to reconsider or interfere with the order of a Court whose orders are not liable to be treated in an appeal as orders of a Subordinate Court provided these orders are within the competence of that Court and have the character of being final and conclusive as between the parties. Thus a final decision by a Division Bench of the High Court against an interlocutory order of the lower Court passed in a revision cannot be agitated in an appeal against the decree in the same suit to another Division Bench of the High Court."

12. Even otherwise we do not consider the argument raised for the third time in this suit by Mr. Narula to have any merit in it. On the basis of the decision of their Lordships of the Supreme Court in *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, it is submitted by him that a suit u/s 92 of the CPC presupposes three conditions and three alone; the first being that it must be a suit with regard to the existence of a public trust, secondly, it is based on the allegation that there is a breach of trust or the directions from the Court are necessary, and finally, that one of the nine reliefs mentioned in Sub-section (i) is asked for. The existence of public trust being admitted, Mr. Narula urges that the three conditions are present in the suit brought by the plaintiffs, in which the prayer is for accounts and it should have been brought u/s 92. In his submission, it is not necessary that the suit should be of a representative character.

The plain answer to this argument is that as "two or more persons having an interest in the trust"" can alone file a suit with the consent of the Advocate General it follows as a matter of corollary that it has to be of a representative character. It is no doubt true that Mr. Justice Mukherjea in the Supreme Court authority has mentioned that three conditions have to be present before a suit is brought. This does not, however, mean that the representative nature of the suit is not an essential prerequisite for an action u/s 92. Indeed, as observed by their Lordships of the Supreme Court in *Raje Anandrao Vs. Shamrao and Others*, , "a suit u/s 92 is a representative suit and binds not only the parties thereto but all those who are interested in the trust." The present suit in essence is concerned with a dispute between the co-trustees, the plaintiffs asserting that the first two defendants had not rendered accounts of moneys received by them. Even in *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, all that is said is that a suit u/s 92 presupposes three existing conditions. In other words, if a suit u/s 92 is brought, these three conditions must be present. It is far from saying that when these three conditions are present no action but a suit u/s 92 can be brought. The argument, therefore, fails in all its aspects and we would accordingly repel it.

13. It is not necessary to linger long over the second submission of the learned counsel for the appellant. Mr. Narula submits that the succession to the Mahantship being from guru to chela, the property of the shebait becomes inalienable. This being so the testator could not have created a trust which bestows authority on the trustees to alienate the Shebait property. As appears from the contents of the will the testator was primarily concerned with the liquidation of the debts which he had incurred. He was anxious that the trustees in whom he had confidence should undertake the task not only of discharging the liability created by his debts but that the future management should be carried on by them. The property of the she bait would have vested in the second defendant who never objected to the appointment of these trustees and in fact there is nothing to suggest that the business of the trust was ever obstructed with the impediment of such an objection before the suit was filed. The first defendant himself performed the duties of the President after the death of his brother though it is stated by him that he was obliged to take over the office of the President as without such an authority there would have been great difficulty in receiving the compensation moneys from the Babawalpur Durbar. Be that as it may, there is abundant evidence to show that the appellant continued to work as the President of the trust right till the end and the second defendant himself was always associated in the working of the trust. The objection, if any, with regard to the competency of the testator to create the trust could have been raised by the second defendant alone.

As stated by Mulla in his "Principles of Hindu Law" (12th edition) at page 583, in discussing the position of shebait and mohunt :

"The property of a math, is held by the mohunt as spiritual head of the institution, but the property may by the usage and custom of the institution vest in trustees other than the spiritual head. In any case the property is held solely in trust for the purposes of the institution."

It was explained by their Lordships of the Privy Council in *Arunachallam Chetty v. Venkata-chalapathi Guruswamigal* AIR 1919 PC 62, that the properties of a mutt or asthal may be held by the spiritual head of the institution, or by the "trustees according to the usage and custom of the institution." Thus, there is nothing unusual in the properties of the shebait being held by the trustees, for the benefit of the institution. The second defendant, Gosain Jamna Dass, was a natural suc-cessor of Gosain Brij Mohan Dass and he had agreed to his powers being trimmed by the managing committee consisting of the trustees. The first defendant who had acted as a trustee cannot now seek to unsettle the position which has obtained for many years by saying that the trust was invalid from its inception, and its terms are now unenforceable. Many and varied acts have been done by the trustees and no case has been made out to invalidate the activities of the trust on such tenuous grounds as have been raised on behalf of the appellant.

14. We also consider that the appellant is clearly estopped from raising an

objection of this kind at this stage. Mr. Narula has emphasised many a time during the course of his argument that the appellant does not question the existence of the trust but only challenges the competency of the testator to create it. On his own showing the appellant since 1944 has been actively associated with the trust, of which he had become a president. He received compensation moneys from the Bahawalpur Durbar, he represented the case of the institution on various occasions, attended meetings of the trust and there is correspondence on the file to show that his advice and assistance were sought on various matters. The appellant, according to him, had been, a *sewak* of the Kala Dhari Mandir like his ancestors. The account of the moneys received on behalf of the Mandir was kept by the appellant and he does not deny having received large amounts for and on behalf of the institution.

As held by a Division Bench of the Bombay High Court of Chief Justice Beaumont and Kania J. in *Fazlhussein Sharafally Vs. Mahomedally Abdulally Sassoor*, .

"A trustee, who enters into possession of property ostensibly on trusts subsequently ascertained to be void cannot however retain the property for himself when the claim of the settlor and his heirs has become statute-barred. A trustee is not entitled when asked to account by his beneficiaries to challenge the trust under which he holds until he has obtained a proper discharge from the trust with which he has clothed himself."

Mr. Narula's argument that it is still open to the first defendant to challenge the validity of the trust in a suit brought by trustees is neither cogent nor convincing. On our part we fail to see why as a matter of principle a trustee who cannot challenge the validity of a trust in a suit brought by a beneficiary should be allowed to do so in an action brought by the co-trustees. In our view, the issues of estoppel have been correctly decided by the trial Judge and it cannot acceptably be urged by the appellant after having participated in the activities of the trust since 1944 to say that Gosain Brij Mohan Dass had no authority to appoint trustees with powers of alienation of *shebait* property.

15. The fourth argument of Mr. Narula relates to the competency of the plaintiffs to bring the present suit. Three different facets of this argument have to be noticed. In pressing the argument under this head, Mr. Narula has emphasised that the appellant is accountable only to the second defendant Gosain Jamna Dasa who is the sole beneficiary of the trust and the successor to the *Mahantship*. It is the case of Mr. Narula that if there was a trust at all it had failed and the right of management had reverted to the second defendant.

Our attention has been invited to the observations of the trial Judge in the penultimate paragraph of the judgment where it is mentioned:

"The affairs of the trust appear to be not running smoothly and I find it quite unsafe to entrust the funds of the trust to any one of the present trustees, at least until I am assured that as a result of certain resolutions or change in the personnel of the trust board the realizations may be given over to some

authorised person."

The trial Judge considered that the amount decreed against the first defendant should not be made over to the plaintiffs trustees but was to be deposited in a Bank. The trustees no doubt had been at cross purposes for some time but there is no material before us to conclude that the trust had ceased to exist. It is urged that the second defendant has gone over to the temple at Bindraban and the affairs of the trust are practically at a standstill. This is indeed a fallacious argument which has been employed to defeat the purpose of the present suit which is to ask for accounts from the first defendant regarding the moneys which he had received on behalf of the trust. Secondly, it is urged that the property which was placed under the charge of the trustees was the Kala Dhari Mandir at Bahawalpur and this institution having been left behind in Pakistan there is now no property of the trust to be administered by the trustees. It has to be observed that the Kala Dhari Mandir at Bahawalpur was not the only property which was placed in charge of the trustees. Residential houses in Amritsar city and the Mandir Kala Dhari at Bindraban and the lands attached thereto are also the properties which are included in the preamble of the will Exhibit P-3. Even if the Mandir at Bahawalpur has ceased to be in the operative control of the trustees there is no reason to say that the moneys which had been received on behalf of this temple have become the private property of those who received them. In all fairness to the appellant, it must be said that his learned counsel has never disputed the accountability of the first defendant but only the right of the present plaintiffs to ask for accounts. All that need be said at this stage is that the right of the plaintiffs to bring the suit cannot be negated merely on the ground that the main property of the trust has remained behind in Bahawalpur.

16. Mr. Narula has further urged that the two plaintiffs had resigned as trustees in 1944 and they cannot, continue to remain as such and consequentially the suit brought by them should be thrown out. Now, it is true that Parmeshwari Dass as P. W. 13, admitted that he resigned from the trusteeship in 1944. Concededly, this resignation was never accepted in writing. It is the case of the plaintiffs that they were asked to continue in their posts and their resignations ipso facto stood withdrawn. As stated by the trial Judge, the plaintiffs including the other trustees were impleaded in the suit which had been brought by Luddi Bai in Multan in the year 1945. It is also worthy of note that the first defendant secured the power of attorney from the other five trustees and a counsel was engaged to contest this litigation. The letter addressed by the first defendant to S. Sardul Singh defendant No. 4 on 25th of September, 1947 (Exhibit p. 39) shows clearly that the parties regarded each other as trustees, and the same observations apply to the communication addressed by the first defendant to S. Sardul Singh on 9th of July, 1947 (Exhibit P. 40). In another letter addressed by the first defendant to S. Sardul Singh and Parmeshwari Das plaintiff on 11th of September, 1946 (Exhibit P. 41) the affairs of the institution were discussed. It was mentioned that the appellant at that time did not know the address of Bhagat Sant Ram, to whom also he wanted to write a letter. Now, if the plaintiffs were not trustees

what was the point in writing these letters?

17. Mr. Narula asserts that the letter of resignation per se has the effect of bringing about a resignation. Support for this proposition is sought from the provisions of Section 276 of the Companies Act, 1956, under which a person holding office as director in more than twenty companies is required within two months to resign his office as director in the other companies and such a resignation under sub-s. (2) becomes effective on its despatch. We do not think that this is an apt analogy because under the Companies Act the policy of the law is that a person will not be a director of more than twenty companies. His resignation from the companies other than the twenty he has chosen to remain a director of becomes operative from the date when it is despatched. The trustees as a whole could have accepted the resignations and it is an inescapable inference that the co-trustees having been permitted to act as such the resignation was not accepted and consequently became inoperative. We are much impressed by what has been stated by Mr. Gupta in answer to the argument on this aspect of the case.

He has invited our attention to the various provisions of the Indian Trust Act in support of his submission that it was not only the right of plaintiffs to bring the suit but indeed their duty. A trustee, u/s 12, is bound to acquaint himself with the trust property and "get in trust-moneys Invested on insufficient or hazardous security". It is Mr. Gupta's contention that any failure on the part of the plaintiffs to ask for proper accounting and investing of the trust-moneys would have entailed legal liability upon themselves. Admittedly, the appellant had received heavy sums as trust-moneys and the plaintiffs are bound to see that they are properly invested. Reliance has also been placed on illustration (h) in Section 15 of the Act under which a trustee is bound to deal with the trust property as a person of ordinary prudence and it is mentioned in the illustration that if A, a trustee for B, allows the trust to be executed solely by his co-trustee C, and C misapplies the trust property, A becomes personally answerable for the loss resulting to B. It is argued that if the first defendant has handed over the moneys which he received from the Bahawaipur State to one of the co-trustees, the responsibility of the plaintiffs is not in any way lessened. Section 20 requires that the liquid assets of the trust in the form of cash must be applied in securities which are specified in the various clauses. This duty of proper investment must be shared by all the co-trustees. Under Clause (a) of proviso to Section 26, a co-trustee would be liable for any breach of trust committed by the trustee where he has delivered trust-property to his co-trustee without seeing to its proper application. Finally, in Section 46 it is said 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 not disputed that in the trust deed all the trustees are made equally responsible and the plaintiffs cannot be excused for mismanagement or misapplication of the funds by the trustees.

Mr. Gupta contends that the dispute between the parties relates to domestic

matters between the trustees and the interest in the trust of the plaintiffs is separate and distinct from that of the general public. If it is found by an appropriate Court that moneys have been received by the co-trustee the duty of the plaintiffs is clearly to ask for accounts. In our opinion, the question of maintainability of the suit by the plaintiffs must be decided in their favour and we would accordingly uphold the finding of the trial Judge on this matter,

18. The final phase of the argument on behalf of the appellant is concerned with the question whether the trial Judge should have passed a preliminary decree for accounts in the first instance and assuming that a final decree was within the competence of the Court objections have been raised with regard to certain items which have been disallowed.

The gravamen of the plaintiffs' complaint is contained in paragraph 31 of the plaint where it is stated that the first two defendants, "are in conspiracy with each other and want to misappropriate the property of the trust. Lala Bal Kishan Dass defendant No. 1, without consulting other members of the trust, got the victory bonds, purchased with the money of the trust, transferred in his name, sold them and has received the proceeds thereof himself. He has not deposited the same in the account of the trust. Similarly, Gosain Jamna Dass, too, wants to misappropriate the property and income of the trust."

It is true that in paragraph 37 the prayer is that "a decree for rendition of the accounts may be passed with costs of the Court against defendant Nos. 1 and 2" but it is stated further that "a decree for the amount which is found due to the trust from defendants Nos. 1 and 2 on the basis of the accounts, may be passed in favour of the plaintiffs as trustees in the interest of the trust". In the written statement filed by the first defendant a number of pleas which have been disposed of in this judgment were taken but it has to be remembered that save for 3 comparatively minor items of Rs. 3,600/- there is no dispute at all about the moneys which had been received by the first defendant. On this aspect of the case it is pleaded by the first defendant that whatever moneys he had received he handed over to the second defendant and in a final account-taking between him and the second defendant the receipt Exhibit D.1 was executed by the second defendant on 16th of June, 1948.

Mr. Narula contends on the basis of the Privy Council authority of *Hurronath Roy v. Krishna Coomar* 13 Ind App 123 (PC), that a preliminary decree should first have been passed by the trial Judge. In that case, the plaintiff-appellant instituted a suit against the defendant who was his Dewan for a period of twenty years, on the allegation that moneys had been taken out of the treasury by the defendant and misappropriated. After discussing some of the items their Lordships of the Privy Council were of the view that this was a suit in which in the first instance a preliminary decree for accounts should have been passed. So far as we understand this is not an authority for the proposition that a final decree can never be passed in a suit for accounts. Indeed, this was made clear by Lord Hobhouse, who delivered the judgment of the Board, at page 133, where

it is stated:

"Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule."

It is indisputable that the general rule in a suit for accounts is to pass a preliminary decree first but the possibility of a final decree being passed straightaway cannot be ruled out. In a Division Bench judgment of the Madras High Court of Chief Justice Leach and Madhavan Nair, J. in *Palaniappa Chettiar v. Ramanathan* "Chettiar AIR 1939 Mad 671, it was observed that

"the law is well settled that in suits for an account a preliminary decree directing accounts to be taken should be passed before passing a final decree, though in cases where the facts are so simple, either by admission or proof, as to afford a ready decision so that the taking of accounts will be unnecessarily lengthening the proceedings without any benefit to the parties, a final decree may be passed without any preliminary decree."

In a Division Bench of the Nagpur High Court of Chief Justice Stone and Clerke, J. in AIR 1940 207 (Nagpur) , in which reference is made to the decision of the Privy Council in 13 Ind App 123 (PC), it was again reiterated that a final decree may be passed in suitable cases where the passage of a preliminary decree would lead to or have no benefit to the parties.

19. The law appears, therefore, to be settled that a final decree may be passed in exceptional cases in a suit for accounts. In the last analysis, the problem must be resolved by examining the substantial dispute which is raised between the parties. Where explanations have to be given of the various items and no evidence has been led at all by the parties in the belief or expectation that a preliminary decree will be passed in the first instance, it would not be proper for a Court to pass a final decree.

Now, in the present case it is admitted that Rs. 1,67,423/11/- and Rs. 13,502/- were received as compensation moneys, making a total of Rupees 180,925/11/-. Out of this amount, a sum of one lakh was expended by the first defendant in the purchase of victory bonds, leaving a net balance of Rs. 80,025/11/-. Adding to this amount the interest amounting to Rs. 4,111/1/- and Rupees 1,02,616/14/3 received as the proceeds of the sale of the victory bonds on 23rd of February, 1948, the sum in the hands of the first defendant comes to Rs. 1,87,653/10/3. To this have been added two further items of Rs. 5,500/- and the other of Rs. 3,600/- making an aggregate sum of Rupees 1,96,753/10/3 in the hands of the first defendant. The first defendant has only disputed the item of Rs. 3,600/- which will be discussed a little later. It may be mentioned that the receipt of a sum of Rs. 1,02,616/14/3 is mentioned in Exhibit D1 itself which is a document produced by the first defendant. The case of the first defendant is that the second defendant has admitted the receipt on different occasions of three

main items of Rs. 36,231/12/-, Rs. 44,675/- and Rs. 1,05,627/- on 9th April, 1947, 30th July, 1947 and 16th June, 1948 respectively. No doubt the second defendant has admitted both in the written statement and in his oral testimony before the local commissioner on 14th of August, 1954 that the sums mentioned in Exhibit D.1 had been received by him. The learned Judge has rejected the evidence of the second defendant as that of a "simpleton". It is to be observed that in the first written statement filed by the second defendant the receipts of payments were not admitted and even in this Court his learned counsel Mr. Puran Chand has supported the findings of the, trial Court. The position of the first defendant is that he has been serving as a President of the Board of Advisors in a spirit of devotion which he had for the institution generally and for the second defendant in particular. The moneys were paid to the second defendant whom the appellant regarded as the true beneficiary of the trust and something in the nature of a spiritual guru. The wishes of the second defendant were always a command for the first defendant.

It is worthy of note that in paragraph 23 of the written statement the first defendant had taken up the following position:

"Whatever amount was realised by me according to the instructions of defendant No. 2, was deposited by me in the Imperial Bank at Multan and Bahawalpur under his instructions. The cheque book and the pass book used to remain in the possession of defendant No. 2. Defendant No. 2 according to his needs, used to get my signatures on the cheque and receive the amount himself."

All that had to be proved by the first defendant was that he had actually made over the payments of the three items mentioned in the receipt Exhibit D.1. He made a statement which is reproduced at page 95 of the paper book that he made payments to the second defendant by cheques which were drawn on the Banks at Amritsar, Bahawalpur, Multan, Simla, Dehra Dun, Ambala and Mussorie. The accounts of three of these banks have been produced and the learned Judge has come to the conclusion that only a sum of Rs. 9,630/2/- consisting of 19 items was paid to the second defendant. On another occasion during his cross-examination the appellant stated that whenever he made payments to the second defendant kacha receipts were obtained (page 96 of the paper book). These kacha receipts were destroyed soon after the execution of the receipt Exhibit D. 1. He stated categorically that "excepting the said receipts, I have no other document showing that I had given the amounts to defendant No. 2".

Now, the trial Judge has considered the documentary evidence consisting of the receipt Exhibit D.1 and the various cheques which have been drawn by the first defendant in favour of the second defendant on various banks and no other evidence being available the Court has passed a final decree after deducting the amounts found to have been paid over to the second defendant from the realizations made on behalf of the trust.

When the accounting party admits all receipts as the first defendant has done in

this case and all payments on the expenditure side for which he claims credit have been made by cheques and no other evidence is said to exist in respect of deductions claimed as deposed by the first defendant, the rule enunciated by Lord Hobhouse in Hurrionath Roy Bahadoor's case 13 Ind App 123 (PC) is fully attracted. We are, therefore, inclined to agree with the learned Judge in the circumstances of this case that there was no necessity for the passing of a preliminary decree prior to a final decree for accounts.

20. It has been faintly suggested during the course of arguments by Mr. Narula that actually the appellant had to incur a lot of expenditure in realising the proceeds of the victory bonds which had been purchased in Bahawalpur, now in Pakistan. That might well be so, but this question was never raised in the pleadings and it is difficult to see how we could ask the Court below now to go into this matter in a final account-taking, no issue having been raised on this question and consequently no evidence having been led. It has also been contended that the appellant had been making various trips to Bahawalpur for which he has not reimbursed himself. Now, it is well to recall that according to the terms of the trust embodied in the will executed by Gosain, Brij Mohan Dass, no trustee except the second defendant was to be paid any remuneration. The appellant himself stated that the work was done by him in a spirit of service and while not denying the position that the firsts defendant must have been put to great trouble and expenditure in realising the compensation moneys from the Bahawalpur Durbar it is somewhat unfortunate for the appellant that this factor cannot be taken into reckoning in final account-taking.

21. If the statement of the second defendant were to be accepted that he has received all payments this of course would be an end of the matter. The learned trial Judge has given cogent reasons for rejecting the position taken up by the appellant and supported in the written statement by the second defendant.

We are not prepared to say on the evidence that the second defendant was a "simpleton" unable to understand his business and a tool in the hands of the first defendant and we would prefer to rest our decision on this aspect of the case on the broader consideration that the payments have not been proved. (His Lordship referred to evidence and continued :)

22-23. We now approach a consideration of the alt important question about the validity of the receipt Exhibit D. 1, which is the sheet-anchor of the appellant's case. According to this receipt, a sum of Rs. 1,05,627/- was received by the second defendant in presence of the first defendant on 16th of June, 1948. (His Lordship discussed the items of disputed heads in the accounting and proceeded:)

24. It may be observed in passing that Mr. Dalip Chand Gupta had submitted that the appeal had abated, the legal representatives of Parmesh-wari Dass plaintiff, who died during the pendency of the appeal, not having been impleaded as respondents. It is argued that a decree passed against Parmeshwari Dass in his personal capacity would fall on his estate. In our view, there is no force in this

contention. Indeed, this objection should fail on the short ground that new appointments have been made in place of the trustees who are dead and the new trustees have been brought on the record.

25. The result is that the appeal is partially allowed, the decree against the first defendant being reduced from Rs. 1,87,123/8/3 to Rs. 1,82,623/8/3. The costs of the appeal would fall on the parties proportionately. In all other respects the decree is upheld. The decree against the second defendant who has not appealed will remain undisturbed.

Mehar Singh, J.

26. I agree.