
(1967) 09 DEL CK 0011

In the Delhi High Court

Case No : Second Appeal No. 7-D of 1958

R.S. Shri Ram Pershad and Others

APPELLANT

Vs

Chhano Devi and Others

RESPONDENT

Date of Decision : 05-09-1967

Acts Referred:

Citation : AIR 1969 Delhi 75 : (1968) ILR Delhi 41 Supp : (1968) ILR Delhi 41

Hon'ble Judges : M.K.M Ismail, J

Bench : Single Bench

Advocate : S.L. Sethi and Vijay Kishan, for the Appellant; Bhagwat Dayal, R.L. Tandon and Shyamala Pappu, for the Respondent

Judgement

1. One Shri Bholumal executed a will dated 4-7-1916, In that will, inter alia, he provided for spending a sum of rupees thirty-two thousand and interest thereon in the construction of a Dharamashala, Subsequent to the said will, the said Bholumal himself completed the construction of the Dharmashala. Therefore, by a subsequent will dated 15-7-1921, he revoked his earlier will and provided for the management of the Dharamshala among other things. He appointed Ram Parshad, the first plaintiff in the suit and Ram Sarup, the deceased first defendant in the suit, which has given rise to the present Second Appeal, and two others as executors and managers for the purpose of carrying out the directions contained in the will and for managing the Dharmashala. The will stated that after the death of the testator the said managers should manage the Dharmashala in every way and carry out repairs. The will further provided that Ram Sarup, one of the managers, would be authorised to realise the rents of the shops pertaining to Dharmashala and maintain the accounts of income and expenditure himself. One other clause in the will that has to be noticed is that which provided that in, future whatever amount was to be spent in respect of the Dharmashala, the same shall be spent by Ram Sarup in consultation with the other "receivers". It appears that the testator, namely, the founder of the Trust died in 1921 itself.

2. On 31-10-1951, the plaintiffs filed suit No. 495 of 1951 on the file of the Commercial Sub-Judge, 1st Class, Delhi, against Ram Sarup for

"preliminary decree for rendition of accounts in favor of the plaintiff against the defendant directing him to render accounts of the income of the trust property since Sambhat 1976 and a final decree for such amount as may be found due from the defendant to the trust on rendition of accounts.

Sambhat 1976 corresponds to 1919 A. D."

3. During the pendency of the suit and as a matter of fact immediately after the service of the summons on Ram Sarup and before he could file the written statement. Ram Sarup died on 25-2-1952. On an application dated 5-3-1952 filed by the plaintiffs, the respondents 1-6 herein were brought on record as legal representatives of the deceased Ram Sarup. Out of these respondents, respondent No. 1 is the widow of Ram Sarup and respondents 2-6 are the children of Ram Sarup and of whom respondents 3-6 were minors at that time. Two separate written statements were filed in the suit, one by the widow of Ram Sarup and the other on behalf of the minor defendants. On the basis of the pleadings, the following issues were framed for trial:

- 1) Did Bholumal create a public trust under his will dated 15-7-1921? What are its terms and scope?
- 2) Was Ram Sarup, deceased, one of the Trustees? Was he charged with the maintenance of the trust account? Did he maintain accounts and was accountable to other trustees?
- 3) Were the plaintiffs constituted trustees along with Ram Sarup, deceased, in accordance with the terms of the trust by the founder or subsequently by the other trustees?
- 4) Is the suit maintainable against the present defendants now imp leaded as legal representatives of Ram Sarup, deceased, who died during the pendency of the suit?
- 5) Is the suit within limitation?

By a judgment and decree dated 4-1-1955 the Commercial Sub-Judge, 1st Class, Delhi, found all the issues except issue No. 5 in favor of the plaintiffs, but dismissed the suit on account of his finding on issue No. 5. His finding on issue No. 5 was that the obligation to account was personal to the trustee and came to end on his death, and consequently, the suit could not be proceeded against the legal representatives of the deceased trustee. He was further of the opinion that if it was desired to proceed against the legal representatives, then the suit must be for a specific sum. The appeal preferred by the plaintiffs was dismissed by an Additional District Judge, Delhi, on 12-10-1957. On the point on which the trial Court dismissed the suit, the Appellate Court came to a different conclusion and stated that the suit could have been proceeded against the legal representatives.

But for two other reasons, the Appellate Court dismissed the suit.

The first reason was that the account-books of the Trust were handed over by the deceased Ram Sarup to the Auditor and the Auditor Secretary of the Trust, who was no other than the third plaintiff in the suit. Consequently, all the accounts of the Trust properties were fully known to the plaintiffs and they could not be allowed to file a suit for rendition of accounts when they could certainly, after calculation, file a suit for the amount which was actually due to them particularly when the legal representatives were after all only under an obligation to hand over the books of the deceased father to the persons asking for the accounts. The second reason given by the Lower Appellate Court was that the first plaintiff had contended that he and the deceased Ram Sarup had co-opted plaintiffs Nos. 2 and 3 as trustees and in the view of the lower Appellate Court, it was not possible to say definitely if Ram Sarup had ever concurred in the appointment of plaintiffs Nos. 2 and 3 as trustees. Further pending the appeal admittedly the first plaintiff had resigned his trusteeship. Consequently, there was nobody to whom the respondents herein could be called upon to render accounts.

4. The plaintiffs herein, thereafter, preferred the present Second Appeal to the High Court of Punjab, Circuit Bench at Delhi. The appeal was disposed of by R. S. Narula, J. by an order dated 30-3-1966. However, by an order dated 26-5-1966, the learned Judge set aside his order dated 30-3-1966 on the ground that the appeal was disposed of without proper service of notice on some of the respondents. It is how the present Appeal has come up before me. This time, all the minor defendants had attained majority and all of them are represented before me by counsel.

5. Elaborate arguments were advanced before me by counsel on both the sides and the points that arise for determination are:

- 1) Whether a trustee can maintain a suit for rendition of accounts against co-trustee?
- 2) Whether the first defendant Ram Sarup was under an obligation to render accounts to his co-trustees in view of the powers conferred on him under the Trust-deed?
- 3) Whether the suit filed by the plaintiffs was not really a suit coming within the scope of Section 92, Civil Procedure Code, and consequently, was not maintainable for non-compliance with the provisions of that Section?
- 4) Whether the suit for rendition of accounts could be proceeded against the legal representatives?
- 5) Whether the suit for rendition of accounts was not maintainable for the reason that the plaintiffs had in their possession the books of accounts maintained by the deceased Ram Sarup?

6) Whether the suit was maintainable, and any decree could be passed, against the respondents in view of the finding of the Lower Appellate Court that plaintiffs Nos. 2 and 3 were not proved to have been appointed as trustees and the first plaintiff had resigned his trusteeship?

6. A number of authorities were cited by counsel on both the sides with regard to these points and I deal with them Serialtim. With reference to the first point, I am of the view that a suit by a trustee against his co-trustees for rendition of accounts is maintainable. The trial Court in its judgment dealt with this point and referred to the authorities which held that such a suit was maintainable. The contention of Shri S. L. Sethi, the learned counsel for the appellant, was that all the trustees as a body are in-charge of the management of the Trust, and consequently, each trustee is entitled to know the position of the accounts relating to the income and expenditure of the Trust properties and if any one of the trustees is in charge of such income and expenditure, the other trustees are entitled to call upon him to render an account. On the other hand, Shri Bhagwat Dayal, appearing for respondents Nos. 3 and 4 contended that the only right of the co-trustees is to be made aware of the state of the accounts and not to call upon the other trustee to render an account. I am of the opinion that if the right of a trustee to be made aware of the state of the accounts relating to the trust is to be an effective right, the said trustee must have the right to call upon the other trustee who is In charge of the income and expenditure to render an account of the same. As pointed by Kumar-swami Sastri, J. in Appanna Poricha Vs. Narasinga Poricha and Others, .

"Co-trustees are co-owners of trust properties and are in law entitled to be in joint possession of all trust properties, whether it be in the form of immoveables, moveables or cash. It would ordinarily render a trustee personally liable, if he allowed the cash or moveables, to be in the exclusive possession and management of a co-trustee and there was misappropriation,"

Therefore, in my opinion. Ram Sarurj was liable to render an account of his management of the trust properties to his co-trustees. This conclusion is really supported by a decision of the Full Bench of the Madras High Court in Appanna Poricha Vs. Narasinga Poricha and Others, and a decision of the Calcutta High Court in Indu Bhusan Sen and Another Vs. Kiron Chandra Sen and Others, . Those two decisions concerned themselves with the scope of Section 92. Civil Procedure Code. Still, they dealt with the question of a suit by a trustee against co-trustees for rendition of accounts and held that such suit was maintainable.

7. With regard to the second point. I am of the opinion that there is nothing in the trust-deed which prevented deceased Ram Sarup being liable to render accounts to the other trustees. Shri Bhagwat Dayal laid emphasis on the provision of the trust-deed that Ram Sarup, one of the managers, will be authorised to realise the rents of the shops pertaining to Dbarmashala and maintain the accounts of income and expenditure himself. I am of the view that this clause in the trust-deed does not support the contention of the learned

counsel. Having named four persons as trustees of the trust, the author of the trust named one of them to be in day-to-day charge of the income and expenditure from the shops in question. That does not in any way affect the joint responsibility of all the four trustees in respect of the management and administration of the trust. As a matter of fact, the clause in the trust-deed providing that the managers will manage the Dharmashala in every way and carry out the repairs and Ram Sarup will incur the future expenditure in consultation with the other "receivers" (obviously, there is no other receiver contemplated and, Therefore, the expression "receivers" used in the trust-deed must refer only to the other trustees described as managers and all the counsel appearing for the parties agreed on this), will emphasize the joint responsibility of all the trustees and negative any independent status for Ram Sarup, which will be destructive of such joint responsibility.

8. With regard to the third point whether the suit by the plaintiff has to fail for failure to comply with the provisions of Section 92, Civil Procedure Code, it was urged by the learned counsel for the appellants that Section 92 governs only suits for vindication of the rights of the public in public charitable trusts, that is it governs only representative suits and has no application to suits for the vindication of any private right of any individual including a co-trustee. In other words, the suit contemplated by Section 92, Civil Procedure Code, is a suit instituted on behalf of the public by the Advocate-General or two members of the public with the consent of the Advocate-General for vindication of the rights of the public in relation to a public trust against the entire body of the trustees of such trust. On the other hand, the contention of the learned counsel for the respondents was that in this particular case, the appellants had no individual right as trustees, and consequently, when they filed the suit for rendition of accounts against Ram Sarup, they were really seeking to vindicate the right of the trust as such or the right of the public in the trust, and Therefore, the suit fell within the scope of S. 92, Civil Procedure Code. This argument is really the same as the argument that was advanced in relation to the contention that Ram Sarup had no obligation to render accounts to his co-trustees in view of the express powers conferred on him by the trust-deed itself.

I have already held that the co-trustees had a right to call upon Ram Sarup to render an account of the trust properties which he was in day-to-day charge of. It is this right which the co-trustees had, they were seeking to vindicate when they filed the present suit for rendition of accounts against Ram Sarup. Shri Bhagwat Dayal, appearing for respondents Nos. 3 and 4, relied upon a decision of the High Court of Travancore-Cochin in *Mathevan Pillai v. Muthia Pillai* Air 1952 Trav Co 323. In that case, a Bench of the Travancore-Cochin High Court held that the suit in that case came within the scope of Section 92, Civil Procedure Code. There, three plaintiffs claiming to be joint owners and trustees of a trust known as Gurupooja Dharmam instituted the suit for the removal of the first defendant from the trusteeship and for a settlement of the accounts for the period during which he was in charge of the affairs of the trust.

The allegation in the plaint was that by a resolution passed at a meeting of the representatives of the founders of the trust, the plaintiffs were appointed as trustees and were authorised to institute the suit against the defendant for getting the necessary reliefs. The claim of the plaintiffs was that the trust in question was really a private trust. It is on these facts, the High Court held that the suit was within the scope of Section 72 of the Travancore-Cochin CPC corresponding to S. 92, CPC of India. The learned Judges pointed out that the plaintiffs filed their suit on the strength of the authorisation granted by the representatives of the founders of the trust and in that situation, it could not be said that the suit was for vindication of the personal or individual rights of the plaintiffs and on the other hand, the facts clearly showed that the plaintiffs had brought the suit in a representative capacity and for the advancement of the interest of the trust in question and the fact that the plaintiffs claimed to be trustees entitled to be in the management of the affairs of the trust did not alter the situation and did not take the suit outside the scope of Section 92, Civil Procedure Code. In my opinion, this decision has no application to the facts in the case before me and does not support the case of the respondents. Therefore, I hold that the suit instituted by the appellants did not come within the scope of Section 92, Civil Procedure Code.

9. The question that was very strenuously and strongly argued before me related to the fourth point whether the suit for rendition of accounts originally filed against the deceased first defendant could be proceeded against the legal representatives. The contention of the counsel appearing on behalf of the respondents was that a suit for recovery of a specific sum of money from the estate of the deceased first defendant can be proceeded against the respondents on the basis that the first defendant misappropriated the trust money and the said misappropriated amount formed part of the estate of the deceased in the hands of the legal representatives; but a suit for rendition of accounts simplicities cannot be continued against the legal representatives of the deceased first defendant; the reason for this is that the obligation to render accounts is personal to the deceased first defendant and after his death that obligation came to an end and the legal representatives cannot be called upon to render accounts.

On the other hand the learned counsel for the appellants submitted that a right to obtain rendition of accounts against the agent or a trustee or a guardian does not come to an end with the death of the said agent, trustee or guardian but can be enforced against the legal representatives. It may be that the method of accounting will differ because the legal representatives may not have personal knowledge of the affairs, and consequently, may not be called upon to vouch and explain every one of the items in the accounts as the original obligee was under an obligation; but that does not mean that the estate of the deceased can escape liability when the said estate has benefited from the failure of the obligee to render accounts; a suit for rendition of accounts under such circumstances is really a suit for recovery of specific sum of money after taking accounts by the

Court in the presence of the legal representatives of the deceased and the present suit filed by the plaintiffs really falls within this category.

10. I may point out here that the objection to the continuance of a suit for accounts against the legal representatives of a deceased agent, trustee, or guardian is based upon the contention that the obligation to render an account is personal to the person concerned and does not survive his death and upon a confusion between the obligation to render an account and the method of accounting as such. Decisions of the Calcutta High Court in *Brijkishore Singh v. Sm. Nazuk Bai*, Air 1948 Cal 19, in *Profulla Kumar Mullick Vs. Sm. Firoza Sundari Dassi and Others*, and in *Panmal Lodha and Another Vs. Omraomal Lodha and Others*, and the decision of the Allahabad High Court in *Ghulam Rashid Vs. Muhammad Abdul Rab and Others*, and the decision of the Bombay High Court in *Purshottam Vasudeo Vs. Ramkrishna Govind*, and a decision of the Punjab High Court in *Daulat Ram v. Balak Ram* 1950 P Lr 182 :AIR 1950 250, really support the contention that such a suit can be continued against the legal representatives. These decisions emphasize that the liability to account should not be confused with the method of accounting; just as the liability differs, the method of accounting also differs; there cannot be any uniform rule in all cases upon such point as to what books of accounts should be kept, when they should be adjusted and what vouchers should be kept and so forth; the obligation to render account involves duties

- a) to keep accounts,
- b) to keep them ready and deliver them,
- c) to vouch after delivery to the obligee,
- d) to explain them if Explanation, is needed or called for;

and that the legal representatives of an agent or other person holding a fiduciary character cannot be directed by the Court to explain the accounts kept by the agent or other person but there is no inherent impossibility in the performance of other acts by the legal representatives, viz., to deliver the account papers and support them by vouchers left behind by the deceased person; though the legal representatives cannot be called upon to render an account in the technical forensic sense in which the agent himself would be liable in ordinary suit for rendition of accounts, when the suit is continued against the legal representatives, it is really, for the Court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiffs from the deceased agent or the other person in the fiduciary position.

11. The decisions have laid down that principle that the legal representatives may not be aware and may be totally ignorant of what the deceased did with reference to the trust properties and Therefore, the legal representatives cannot be called upon to perform the impossible. At the same tune, to the extent to

which the estate of the deceased is in the hands of the legal representatives, such estate should not be allowed to escape the liability if the said estate has been enriched by any misappropriation committed by the deceased in respect of the trust properties. With the result, a suit for rendition of accounts filed against a trustee cannot be said to abate with the death of the trustee but such suit can be continued against the legal representatives with the change in the obligation necessarily caused by the death of the trustee. The obligation of the legal representatives will be to produce before the Court whatever books and papers and vouchers left behind by the deceased and it is thereafter the duty of the plaintiff to establish what amount was really due from the estate of the deceased trustee. In other words, the burden is on the plaintiff to establish that monies were due by the deceased to the trust and once he succeeds in establishing that, then the estate of the deceased in the hands of the legal representatives will be liable to the extent of the amount so established.

Under these circumstances, I am unable to accept the contention of the learned counsel for the respondents that the suit for rendition of accounts filed by the appellants cannot be proceeded against the legal representatives either on the ground that the obligation to render accounts came to an end with the death of the first defendant or on the ground that it will be impossible for the legal representatives to render accounts. As I pointed out already, the liability of the legal representatives with regard to the mode of accounting will not be the same as that of the original trustee and they cannot be called upon to account in the same sense and in the same manner in which their predecessor could be called upon to account but that does not put an end to the liability to pay any amount that may be found due to the trust on taking accounts by the Court in presence of the plaintiffs as well as the legal representatives of the deceased trustee.

As a matter of fact, the decision of the Supreme Court in *Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury*, clearly negatives the contention that the obligation to render an account comes to an end with the death of the trustee. In that judgment, the Supreme Court observed as follows:

"But a claim for rendition of account is not a personal claim. It is not extinguished because the party who claims an account or the party who is called upon to account dies. The Maxim, "*actio personalis moritur cum persona*" a personal action dies with the person, has a limited application. It operates in a limited class of actions *ex delicto* such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of the person liable to render an account for property received by him does not Therefore affect the liability of his estate."

Shri Bhagwat Dayal, learned counsel for respondents Nos. 3 and 4 sought to

distinguish the above decision on the ground that it was a suit between the co-owners and a preliminary decree for accounts was passed before the death of the defendant. I have already referred to the observation of Kumaraswami Sastri, J. in Appanna Poricha Vs. Narasinga Poricha and Others, that the co-trustees are in the position of co-owners and consequently, this point of distinction sought to be made out by Shri Bhagwat Dayal fails. The decisions already referred to by me clearly negative any distinction being made between a suit in which a preliminary decree has been passed before the death of the original accounting party and a suit in which no such decree was passed. Two other circumstances may also support the conclusion that such a suit can be continued against the legal representatives.

Section 10 of the Limitation Act expressly contemplates a suit against the legal representatives of the trustee in respect of an express trust, for the purpose of following the trust property or the proceeds thereof, or for an account of such property or proceeds. Section 306 of the Indian Succession Act, 1925, after having provided that all demands and all rights to prosecute or defend any action or special proceeding existing in favor of or against a person at the time of his decease, survive to and against his executors or administrators expressly except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and also cases where, after the death of the party, the relief sought could not be enjoyed " or granting it would be nugatory. It is pertinent to point out that the suit for accounts is not one that has been excepted by this Section.

As a matter of fact, a Bench of the Calcutta High Court in the decision already referred to by me, viz. Brijkishore Singh and Others Vs. Sm. Nazuk Bai and Others, , relied upon this circumstance as a ground for holding that a suit for accounts can be continued against the legal representatives. Therefore, I hold that the suit in the present case can be proceeded against the present respondents before me.

12. In this connection, two further points were made on behalf of the respondents. The first point was that in this suit the plaintiffs had prayed for recovery of a sum of money in their favor and the plaintiffs and the first defendant being co-trustees, all of them were entitled to the custody of the money as the property of the trust, and Therefore, the plaintiffs could not ask for a decree for payment of money to them alone. There are two answers to this point. The first is that the plaintiffs did not ask for payment of money to them. They filed the suit as trustees of the trust in question and all that they wanted was that the money belonging to the trust but in the hands of the first defendant without being accounted for as the money of the trust, should be brought into the account of the trust. In other words, the money should be paid to the trust. The second answer is that this contention will not be open to the respondents after the death of the first defendant. As against the respondents, the plaintiffs will be the trustees and will be entitled to the possession of the money, since the

respondents do not claim to be the trustees of Dharmashala in question. Therefore, I do not see any substance in this point.

The second point is that the suit as framed was not for recovery of money but was simply for rendition of accounts, and Therefore, cannot be proceeded against the respondents. I have already extracted the prayer contained in the plaint and that prayer included a decree for the money due from the first defendant to the trust on rendition of accounts. Further, in paragraph 11 of the plaint, it was alleged that without accounts being rendered, it was not possible for the plaintiffs to estimate the exact amount due to the trust from the defendant but a rough estimate of the said amount due from the defendant to the trust was about Rs. 32,000/-. Thus, the plaint contained a specific averment that money was due from the defendant to the trust and sought a decree for payment of that money. Consequently, I am unable to accept the contention of the learned counsel that the suit as framed could not be proceeded against the respondents.

13. The fifth of the points I had already enumerated relates to the contention that the suit for rendition of accounts was not maintainable since the plaintiffs had in their possession books of accounts maintained by the deceased first defendant. This contention was based upon the evidence of the first plaintiff and the Auditor as PWs 1 and 2 and the report of the Auditor marked "Ex. P 16. The case was that the deceased Ram Sarup had handed over the Bahi Khata maintained by him in relation to the trust to the Auditor who in turn had handed it over to the Secretary of the Trust. The evidence of PW1, viz., the first plaintiff, in this behalf is as follows:

"Mr. Saxena was appointed an Auditor for taking accounts from Ram Sarup. Ram Sarup gave the account books to him but he did not explain the accounts or produce any vouchers to support them.

XX XX Xx The Bahi Khata given by Ram Sarup must be with the Auditor. I have not seen it. I do not know what accounts it contained because I have not seen them. Nor can I say in whose hand it is."

Shri Saxena mentioned herein refers to Shri H. C. Sirivastava, the Auditor who had given evidence as Pw 2. The relevant evidence of Shri Srivastava as Pw 2 is as follows:

"Bhollu Mal Dharmashala Trust appointed me auditor to check their accounts. Those accounts were maintained by Ram Sarup. Long after my appointment Ram Sarup brought me a bahi. He did not produce any supporting vouchers nor did he show me his own account books from which he stated that the bahi produced before me had been prepared. I put in my report Ex. P 16, the forwarding letter is Ex. P 15. I forwarded these along with the bahi to the Trust Secretary Mr. Premjas Ral.

XX XX Xx Xx He brought the bahi himself with one attendant. I did not record his statement I have no documentary evidence to show that the bahi was

produced by him. That bahi was for 31 years,"

In Ex, P16, which was the report of the Auditor, the same position was reiterated in addition to pointing out a number of defects with regard to the accounts said to have been produced by the deceased Ram Sarup. It is on the basis of this evidence, the respondents contended that the books of accounts having been produced by the deceased Ram Sarup himself and they being in the possession of the plaintiffs themselves, if at all the plaintiffs wanted to proceed against the respondents, the suit must be only for the recovery of a specific sum of money arrived at after going through the said accounts and not for the rendering of accounts as such. It is not disputed before me that the bahi is in the custody of the plaintiffs. On 10-1-1955, an application was filed by the plaintiffs before the Commercial Sub-Judge, Delhi, for the return of the said bahi and the learned Sub-Judge on 11-1-1955 ordered the return of the same on the plaintiffs furnishing an undertaking to produce the same as and when required. However, the evidence pointed out above makes it clear that the deceased Ram Sarup told the Auditor that he prepared the bahi from his own account-books and the deceased Ram Sarup did not produce any supporting vouchers before the Auditor. Consequently, for the purpose of taking accounts correctly, it may be necessary to examine the said personal accounts of Ram Sarup and the vouchers. If the said vouchers and the personal accounts are available, it will be the duty of the respondents to produce them before the Court. Consequently, simply on the ground that the bahi is in the custody of the plaintiffs themselves, it cannot be said that the suit for accounts as filed by the plaintiffs cannot be proceeded against the respondents. Further, the suit is for recovery of any money that may be found due by the first defendant to the trust on taking accounts and that money can come only out of the estate of the deceased first defendant in the hands of the respondents and hence the suit has necessarily to be proceeded against the respondents.

14. Coming to the sixth point, I may mention that this point is based upon a finding of the first Appellate Court which is as follows:

"My attention was also invited by the counsel for the respondents that the plaintiffs 2 and 3 had never been appointed as trustees of the property and could not file the suit or prosecute the appeal. Regarding third plaintiff Ram Parshad, it was stated that he had ceased to be a trustee during the trial of this appeal and had no interest left in demanding the accounts. I have heard the learned counsel on this point and in my opinion it is very difficult to rebut this argument. According to Ram Par-shad, he and Ram Sarup deceased had co-opted the other two trustees who were plaintiffs in the case as laid down in the will of Bholuram. However, there was very little proof if Ram Sarup had subscribed to these appointments. The resolutions Exts. P2 and P3 are merely sought to be proved by the bare statement of Ram Prashad whereas in rebuttal we have the statements of couple of witnesses and the handwriting expert to show that the signatures on these resolutions were not that of Ram Sarup. I am afraid it is not

possible to say definitely if Ram Sarup had ever concurred in the appointment of Rameshwar Sarup and Premjas Rai. The third trustee had gone out of the picture voluntarily and there was Therefore, no question of taking any accounts of the trust property said to have been entrusted to Ram Sarup some more than 30 years ago."

Three factors emerge from the paragraph quoted above. One is the finding of the lower Appellate Court that the plaintiffs 2 and 3 were not validly appointed as trustees of the Dharmashala in question. The second is that the first plaintiff had resigned his trusteeship. The third is that in view of the fact that none of the three plaintiffs is trustee at this moment, there is no liability on the part of the respondents to render any account to anybody. The finding that the plaintiffs 2 and 3 were not validly appointed as trustees was not challenged before me. On the other hand, that was accepted by the first plaintiff since it was represented to me by Shri Sethi, appearing for all the three appellants-plaintiffs that subsequent to the decision of the lower Appellate Court, the first plaintiff purporting to exercise his powers as the sole surviving trustee, had appointed plaintiffs Nos. 2 and 3 as trustees of the Dharmashala. Consequently, plaintiffs Nos. 2 and 3 could not have any cause of action against the first defendant and cannot have any cause of action against the respondents, because, if at all they can be said to be the trustees, they became trustees only by virtue of their appointment as trustees by the first plaintiff after the decision of the lower Appellate Court in this case, and Therefore, the respondents are not under any obligation to render any accounts to the said two plaintiffs, with the result the appeal preferred by them must be dismissed.

15. With reference to the resignation of the first plaintiff as a trustee of the Dharmashala, it is contended by Shri Sethi, the learned counsel, that his resignation will not deprive him of his right to ask for accounts from the first defendant and after his death from the respondents herein. The basis of his contention is two-fold. Firstly, even if he had ceased to be a trustee, for the period during which he was a trustee, as a co-trustee along with the first defendant, he had a right to call upon the first defendant and after his death, the respondents herein, to render accounts to him since his liability to the beneficiaries jointly with the first defendant remained intact. The second aspect was that even though the first defendant resigned his trusteeship, in law there is no effective and valid resignation, and consequently, the first plaintiff continued to be the trustee. He invited my attention to the principles contained in Section 46 of the Indian Trusts Act, which is as follows:

"46. Trustee cannot renounce after acceptance:

A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of original jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust."

The argument of the learned counsel was that even though this Section in terms does not apply to the public charitable trusts, still the principles contained in that Section will be applicable to the case of the public charitable trusts. For this purpose, the learned counsel placed strong reliance on the following passage occurring in the judgment of the Supreme Court in *Sheikh Abdul Kayum Vs. Mulla Alibhai*, :

"It is true that Section 1 of the Indian Trusts Act makes provisions of the Act inapplicable to public or private religious or charitable endowments; and so. these sections may not in terms apply to the trust now in question. These sections however embody nothing more or less than the principles which have been applied to all trusts in all countries. The principle of the rule against delegation with which we are concerned in the present case, is clear: a fiduciary relationship having been created, it is against the interests of society in general that such relationship should be allowed to be terminated unilaterally. That is why the law does not permit delegation by a trustee of his functions, except in cases of necessity or with the consent of the beneficiary or the authority of the trust deed itself, apart from delegation "in the regular course of business," that is, all such functions which a prudent man of business would ordinarily delegate in connection with his own affairs."

It is pertinent to point out that their Lordships of the Supreme Court, made the above observation, after quoting Sections 46 and 47 of the Indian Trusts Act. It is with reference to this. Shri Sethi argued that the mere submission of resignation by the first plaintiff did not amount to his ceasing to be a trustee of the trust in question and as matter of fact, in view of the finding of the lower Appellate Court that plaintiffs Nos. 2 and 3 were not validly appointed as trustees, there would be nobody to accept the resignation of the first plaintiff and there would be none to act on behalf of the trust. Shri Sethi further submitted that notwithstanding the resignation, the first plaintiff continued to act as a trustee even till this day and by virtue of his powers as the sole surviving trustee, he appointed plaintiffs Nos. 2 and 3 as trustees after the decision of the lower Appellate Court. However technical the arguments of Shri Sethi be, I am of the opinion that this suit cannot be dismissed simply on the ground that the first plaintiff had submitted his resignation. Both on the ground that for the period he was the trustee he had a right to call upon the first defendant and after his death the respondents to render accounts of the trust property and on the ground that notwithstanding his resignation, the first plaintiff had not ceased to be a trustee, I hold that the suit was not liable to be dismissed and it can be proceeded against the respondents herein.

16. Lastly, It was urged by Shri Bhagwat Dayal that the decree for accounts is only a discretionary relief and consequently the Court in the exercise of its discretion should refuse to grant accounting for such a long period and restrict it for a reasonable period. In support of this submission of his, the learned counsel relied upon the following passage occurring at page 385, Volume Iv of Halsbury's

Laws of England, 3rd Edition:

"The general rule is that, in the absence of special circumstances, accounts are to be taken against the trustees from the date at which the misapplication commenced. Each case is, however decided on its merits at the discretion of the Court, and Therefore, the dates to which accounts against charity trustees are carried back differ widely. The Court may decline to direct an account where the litigation would be expensive and the benefit to the charity problematical or trifling."

The learned counsel also relied upon a decision of the Andhra Pradesh High Court in *Gutha Hariharabrahman and Others Vs. Doddappaneni Janikiramaiah, Chataparru and Others*, , where the account was asked for a period of 37 years and the Court in exercise of its discretion directed the accounts to be taken for a period of six years from 1938. In this case, as I pointed out already, the plaintiffs had asked for accounts from 1919 onwards. On the very face of it, the plaintiffs cannot ask for accounts from 1919 onwards since the author of the trust died only in 1921 and the first defendant could be said to have taken charge as a trustee under the trust-deed only in 1921 and he was liable to render accounts only from the date he took charge and not earlier. Apart from this, in this case, I do not consider that there is any justification for restricting the period of accounting. After all, the liability of the respondents as legal representatives of the deceased first defendant is not going to be an onerous one in this behalf and their liability is much lighter than the liability of their predecessor, viz., deceased Ram Sarup.

17. Under these circumstances, I allow the present Second Appeal as far as the first appellant is concerned and dismiss the appeal of the appellants 2 and 3 against the respondents. I set aside the judgments and decrees of the Courts below and direct that a preliminary decree for rendition of accounts be passed under Order 20 Rule 16 of the CPC against the estate of the deceased Ram Sarup in the hands of his legal representatives, the respondents in this appeal, for the purpose of ascertaining the amount of money due to or from the deceased to the trust in question. The following directions are given under Order 20 Rule 17 of the Code:

(i) The trial Court shall appoint a Commissioner for taking accounts, fix his remuneration and give him necessary directions in this behalf not inconsistent with the directions herein given.

(ii) The defendants-respondents will be called upon to produce all accounts, papers and vouchers relating to the trust, maintained and left behind by the deceased Ram Sarup as may be available with the defendants-respondents with reference to the period commencing from the date when the deceased Ram Sarup took charge as trustee under the trust-deed and ending with the date of his death. But no adverse inference can be drawn against them for non-production unless it is proved that they are available and the defendants-

respondents are deliberately withholding any of them.

(iii) If the defendants-respondents do not produce the books of accounts, vouchers or documents relating to the trust or produce only a part, the Court will be at liberty to investigate and find out whether they or any one of them are or is withholding the same and in the event of a finding to that effect, draw such inferences as it thinks proper,

(iv) The defendants-respondents will not be under an obligation to explain any entry in the accounts and vouch for any part of the account but if they or any of them, are or is able to so explain or vouch for, they or he may do so.

(v) If books, documents, papers and vouchers are produced, the first plaintiff-appellant will be at liberty to prove that they are not proper books, documents, papers and vouchers or that the contents thereof are not correct or that the items are not true. The onus in this behalf will be on the first plaintiff-appellant. If the first plaintiff-appellant does so, the defendants-respondents can answer the challenge if they so desire.

(vi) If the first plaintiff-appellant claims any particular amount with reference to the accounts from the estate of the deceased Ram Sarup, the burden of proving that any such amount was due to the trust by the deceased Ram Sarup will be on the first plaintiff-appellant and the legal representatives will have the right to adduce evidence and answer.

(vii) It would be open to any of the parties to move the trial Court for such other direction to the Commissioner under Order 20 Rule 17 of the CPC as may become necessary, during the course of the proceedings before the Commissioner, in the circumstances of the case. There will be no order as to costs in this Second Appeal.

18. Before parting with this case, I must make one observation with regard to the conduct of the first appellant-plaintiff. He was one of the trustees appointed under the trust-deed itself. From 1921 till towards the end of 1951, he did not care to take any proceedings for obtaining accounts from the first defendant and practically just before the death of the first defendant, he filed the present suit against the first defendant. Subsequently, he resigned his trusteeship and notwithstanding the resignation, is continuing to act as a trustee. I consider that such a conduct on the part of the first appellant-plaintiff makes him unfit to be a trustee of a public charitable trust. Further, it is admitted by his counsel that he continues to act as a trustee and has appointed plaintiffs Nos. 2 and 3 as co-trustees along with him. Such a situation in which the first appellant-plaintiff and his two nominees are in sole charge of the trust will not be in the interests of the trust and in my view, this is a fit case in which a scheme for proper administration of the trust should be framed u/s 92, Civil Procedure Code. I am making this observation in the interests of the trust which is a public charitable trust and in the light of the facts that emerged in this appeal.

AGJ/D.V.C.

19. Appeal of first appellant allowed, Appeal of second and third appellant dismissed.