

**(1960) 12 CAL CK 0009**

**In the Calcutta High Court**

**Case No :** Appeal from Appellate Decree No. 701 of 1956

Sachindra Nath Chatterjee

APPELLANT

Vs

The Official Trustee

RESPONDENT

**Date of Decision :** 22-12-1960

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 13  
Companies Act, 1913 — Section 109, 109A, 120, 120(2), 3  
Companies Act, 1956 — Section 141  
Official Trustees Act, 1913 — Section 10  
Trusts Act, 1882 — Section 34, 71, 73, 78

**Citation :** (1961) 1 CALLT 133 : 65 CWN 649 : (1962) 1 ILR (Cal) 159

**Hon'ble Judges :** Niyogi, J; Banerjee, J

**Bench :** Division Bench

**Advocate :** P.K. Roy, Ranjit Kumar Banerjee and Samarendra Nath Banerjee, for the Appellant; R.C. Deb, Somendra Chandra Basil and Sovendra Madhab Basu, for the Respondent

**Final Decision :** Allowed

## Judgement

Banerjee, J.—This appeal is directed against an appellate decree reversing the decree passed by a learned Subordinate Judge.

2. There is no dispute as to the facts hereinafter stated. One Aswini Kumar Chatterjee, since deceased (hereinafter referred, to as the settlor), created a trust, for the purpose of making provision for the maintenance of himself, his third wife Santimoyee, his sons Sachiridra, Sudhir and Panehugopal and also such other sons as might be born to him, by a registered deed, bearing the date December 6, 1930. The trust property consisted of certain securities and stocks and shares, valued in the deed of trust at Rs. 1,98,764. The main provisions in the aforementioned deed were as follows:

The settlor doth hereby as settlor transfer and assign unto himself as trustee the said stocks, shares and securities \* \* to the succession uses and trust following,

viz., (a) to the use and for the benefit of the settlor during his life time the whole of the income and profits of the said trust estate (b) from and after the death of the said settlor his widow the said Santimoyee Debi and/or his sons as soon as they or any of them attain the age of majority shall be and act as the sole trustee or joint trustees \* \* \* \* (c) from after the death of the settlor the said trust estate shall be held to the use and for the benefit of the said Santimoyee Debi and the said sons namely to pay to the said Santimoyee Debi from the income and profits of the said trust estate Rs. 50 monthly and every month and hold the balance of the income and profits of the said trust estate for the use and benefit of each of the sons in equal shares and after the death of the said Santimoyee Debi to make over the whole of the said trust estate to each of my sons in equal shares if he has attained or as he attains majority \*\*\*\*\* Provided nevertheless and it is hereby expressly declared that the settlor reserves to himself the, right to vary the terms and conditions hereof so far as they relate to the quantum of interest given to each of the beneficiaries after the death of the settlor by his instrument of will alone and in no other way or act.

3. The settlor administered the trust property for some time and thereafter conceived the idea, of effecting, by a deed *intervivos*, certain charges in the trust, contrary to the express provisions of the trust deed. With the object of enabling him so to do, the settlor took out an originating summons, under chap. XIII of the Original Side Rules of this Court, *inter alia*, asking for reliefs of the nature or kind hereinafter indicated. He asked for revocation of the provisions contained in the deed of trust whereby the persons therein named, were appointed trustees of the trust properties and whereby power was reserved in himself, as the settlor to alter the quantum of interest of the beneficiaries by Will and in no other way; further he asked for liberty to alter the said, quantum of interest in such manner as he may think proper by deed *intervivos* and not by Will; also he asked for his Own discharge and for appointment of the Official Trustee of Bengal as the sole trustee of the said trust.

4. The originating summons was entitled as "In the matter of "the Indian Trusts Act (II of 1882) and In the matter of the "Official Trustees Act (II of 1913) and In the matter of the "Trust created by the Deed of Trust dated December 6, 1930, "by Aswini Kumar Chatterjee."

5. After the service of usual summons, the matter came up for hearing before Remfry, J. (sitting in Chambers). The order passed by his Lordship, in so far is material for the purpose of this appeal, is set out below:

It is ordered that the provisions contained in the said Deed of Trust whereby the persons therein named were appointed Trustees of the said Trust Estate and whereby power was reserved to the said applicant to alter the quantum of interest of the beneficiaries by Will and in no other way be and they are hereby revoked and it is further ordered that the said applicant as such settlor as aforesaid be at liberty to alter the said quantum of interest in such manner as he may think proper by deed *intervivos* and not by Will. And it is further ordered

that the said applicant the present sole trustee under the said Deed of Trust be and he is hereby discharged from further acting as such Trustee and the Official Trustee of Bengal be and he is hereby appointed the sole trustee of the said Deed of Trust And it is further ordered that the stocks and shares and securities (both moveable and immoveable) now comprised in the Trust Estate \* \* do vest in the said Official Trustee of Bengal as such Trustee as aforesaid.

6. The order bears the date August 25, 1937.

7. Acting under the liberties given by the order quoted above, the settlor made and executed a Second Trust Deed on March 22, 1938. Under the Second Trust Deed, in place of the Trustees named in the original deed, the Official Trustee alone was made the sole Trustee; Sachindra, the Plaintiff, was deprived of all his interest, as a beneficiary, in the corpus of the trust properties, as in the original deed, and he was given a fixed allowance of Rs. 20 per month only, for life after the death of the settlor, thus depriving him of his proportionate share in the income and profits of the Trust Estate, as in the original deed. With the other provisions in the second deed we are not concerned in this appeal. The settlor enjoyed the income of the Trust Estate during his life and died on December 21, 1946, leaving him surviving his widow Santimoyee and his sons Sachindra, Sudhir, Panohugopal and Amiya Kumar. The Trust Estate is being administered, by the Official Trustee in terms of the Second Deed of Trust aforementioned.

8. Before his death, Aswini, the settlor, executed his "Will and last testament concerning other properties owned and possessed by him and appointed the Official Trustee as the executor. In the said Will there was no mention of or reference to the Trust or the trust properties. The Official Trustee duly took out probate of the said Will.

9. On December 18, 1950, Sachindra, as Plaintiff-filed the suit, out of which this appeal arises, alleging: (a) that the power reserved by the settlor of altering the quantum of interest of the beneficiaries by Will alone and by no other means, as in the original trust deed, was irrevocable, (b) that the order, dated August 25, 1937, passed by the High Court, in its Original Jurisdiction, was null and void and without jurisdiction. The effect of it was making a new trust deed for the settlor for which there was no warrant in law, (c) that the original trust deed, therefore, stood unaffected by the Second Deed of Trust and Plaintiff was entitled to the benefits under the said original deed in spite of the changes sought to be effected by the Second Deed of Trust (d) that the Official Trustee, as the sole trustee of the trust, was bound to pay one-fourth of the income of Trust Estate, so long as Santimoyee Debi was alive and on her death to make over one-fourth of the corpus of the Trust Estate to him, (e) the Official Trust was liable to render accounts to the Plaintiff of the profits of the Trust Estate since the time of the death of the settlor.

10. On the aforesaid allegations the Plaintiff, inter alia, prayed for declaration of his right to one-fourth of the corpus of the Trust Estate created by the deed

dated December 6, 1930, for accounts and for a decree for the amount found due to him on taking of accounts.

11. The main contest to the claim made by the Plaintiff was by the Official Trustee, the Defendant No. 1. Sudhir (Defendant No. 5) did not contest. The other Defendants, the widow and the other sons of the settlor (Defendants No. 2 to 4), filed a joint Written Statement, supporting the Official Trustee.

12. The stand taken by the Official Trustee in his Written Statement, inter alia, was (a) that the restrictive clause in the trust deed of 1930 regarding the manner of altering the quantum of interest of the beneficiaries was sufficiently and effectively revoked by the order of the High Court, dated August 25, 1937 and the subsequent trust deed, dated March 3, 1938, executed by the settlor in pursuance of the said order. The trust deed, dated December 6, 1930, was, therefore, no longer operative, (b) the order by the High Court, so long as it stood as also the subsequent trust deed of 1938, until rescinded were binding upon all concerned. The Plaintiffs claim for a declaration that the rights given to him under the trust deed of December 6, 1930, were still available to him and that the Official Trustee was liable to accounts to him, on the said basis, were unfounded and unsustainable.

13. The trial court decreed the Plaintiff's claim for declaration in terms of the original deed of trust and passed a preliminary decree for accounts in his favour. On appeal the decree was reversed and the Plaintiff's claim was wholly dismissed.

14. The Plaintiff Sachindra now appeals against the decree passed by the lower appellate court.

15. The reasons which weighed with the court of appeal below, in reversing the decree of the trial court, need be referred at this stage.

16. The lower appellate court held that the intention of the settlor was that he had reserved to himself the right to alter the quantum of the interests of the beneficiaries. In the trust deed of 1930, the settlor, expressed his desire that he would do it by a Will only. The right to alter being reserved-the settler indulged only in some variation in the mode of exercising that right. The court of appeal below further held that it was in "the general power of the trustee to dispense with the matter of "form in order to stick to the principal reservation made regarding the alteration of the quantum of benefit \* \* \*

Some contingencies had occurred since the creation of the first "trust dated December 6, 1930, (Ext. 1), namely, birth of one "son Amiya Kumar and one daughter by his third wife Santi "moyee and circumstances had arisen which made it desirable "for him to vary the quantum of interest of his said sons in the "trust properties and for this reason he wanted to make another "trust by making the Official Trustee, the trustee in respect of "the trust properties \* \* \* These changed circumstances and premises have all been elaborately recited in

the Second Trust Deed of Aswini. It was only a matter of "form and not of substance by which he exercised his right to "make alterations in the quantum of" interests of the beneficiaries "\* \* \* In the above view of the matter, "\* \* \* Aswini Kumar"s exercise of the right to "alter the quantum of interests of the beneficiaries by deed "intervivos was properly done and was within his power, the. "mode of exercise of that right being quite immaterial. There "is also no validity in the contention that Aswini Kumar did it "under the direction of the court and did not exercise his free "will in the matter. Aswini Kumar obtained an order of the "Court, but that may be treated as surplusage.

17. The lower appellate court also held that u/s 71 read with Section 73 of the Indian Trust Act and u/s 10 of the Official Trustees Act, reliefs as were claimed in the Originating Summons could only be had. in the ordinary Original Civil Jurisdiction, of the High Court and the said Court was competent to discharge the settlor trustee, co appoint the Official Trustee in his place and to give further direction or opinion that the settlor was at liberty to alter the quantum of interest of the beneficiaries by a deed intervivos.

18. The lower appellate court lastly held that independently of the order of the High Court, the settlor could revoke the trust in the exercise of his power u/s 78(b) of the Indian Trusts Act, because such power was reserved in the deed. The deviation in the mode of exercise of that power was immaterial and did not affect his right.

19. Mr. Prafulla Kumar Roy, learned Advocate for the Plaintiff Appellant, placed strong reliance on the language of Section 78(b) of the Indian Trusts Act, which is as follow:

A trust created by Will may be revoked at the pleasure of the testator. A trust otherwise created can be revoked only-

(a) \* \* \* \*

(b) Where the trust has been declared by a non-testamentary instrument by word of mouth-in exercise of a power of revocation expressly reserved the author of the trust.

20. Mr. Roy contended that in the original trust deed, dated December 6, 1930 (Ext. 1), the language used was: "the settlor "reserves to himself "the right to vary the terms and conditions "thereof so far as they relate to the quantum of interest given to "each of the beneficiaries after the death of the settlor by his "instrument of "Will alone and in no other way or act". The language indicated that in the matter of revocation the settlor had a two-fold limitation on his power namely, (i) a procedural limitation in that he could revoke only by his "Will and by no other manner and (ii) a limitation as to substance, in that he could only vary the quantum of interest given to each of the beneficiaries after his own death but could effect no other alter-" ration in the original deed of trust. Mr. Roy argued that the! two-fold limitation went to the root of the settlor"s power to

evoke alter or vary the terms of the original deed of trust and must not be minimised as mere formalities for the exercise of the (sic)ower, as was sought to be done by the Court below.

In Halsbury's Laws of England (Simonds Edition), vol. 30, (sic). 272, Article 518, the law as to defective execution of deeds, in (sic)espect of matters like the present one, is stated in the following manage:

Equity relieves only against defects which are not of the essence of the power; relief will not be granted so as to defeat anything material to the intention of the donor of the power. Thus mere defects in the mode of execution will be aided and so will an appointment by Will made under a power to appoint only by deed, But no aid will be given to an appointment by irrevocable deed made under a power to appoint only by Will or to an appointment which would result in a fraud on the power or aid a breach of trust. Moreover, no aid will be. given to the exercised by Will of a power of revocation by a deed if it is clear that a deed is of the essence, as where the original power of appointment was by Will or deed and on. its exercise a power to revoke by deed only was reserved and in Hanbury's book on Modern Equity (7th Edition) there is (sic)e following useful restatement of the law (at pp. 55-56);.

If the donee of a power has shown his willingness to execute it, but has adopted an ineffective method of doing so, equity will "take the Will for the deed" and render his attempt effective, by treating it as an execution. But it will do this only for certain favoured objects. In Toilet v. Tollet (1728) 2P. Wms. 1489, creditors, wives and children were expressly mentioned ; we must add purchasers and charities. In all these cases the donor of the power intended the fulfilment of a moral obligation, and the action of equity is really based on the maxim "equity imputes an intention to fulfil an obligation," Where the element of moral obligation is absent equity will do nothing. Thus volunteers can claim no assistance.

21. The case brings out another important point. The power was exercised by Will, whereas it should have been exercised by deed. Now a Will is revocable at any time during the testator's lifetime, as so the defect is treated as one of form, only, and relief will be granted. But" the defect constituted by the converse process, the attempted exercise by irrevocable deed of a power which should save been exercised by Will, is treated as a matter of substance, and, in Reid v. Shergold (1805) 10 Ves. 370 as fatal to the object of the power. (sic) fuller summarisation of the English law on the point is to be and in "Law of Real Property" (2nd Edition) by Megarry and (sic)ade (at pages 460-461):

The general rule is that any condition prescribed for the execution of a power (sic)aust be observed, otherwise the appointment will be void. It is immaterial now absurd or unreasonable the conditions are., But this position has been codified by statute, (a) Wilis. By the Wills Act, 1837, an appointment by will is valid so far as concerns execution and attestation, if it is executed with he

formalities required for Wills (i.e., signed by the testator in the presence (sic) of two witnesses who then sign their names), even if the instrument creating the power requires other formalities, such as ten witnesses. (b) Deeds. By the Law of Property Act, 1925, an appointment by a deed valid as regards execution and attestation if it is signed in the presence of and attested by, two witnesses, even if the instrument creating the power requires other formalities.

22. Deeds and Wills are thus on a similar footing in this respect. But it must be noticed that those provisions apply only to formalities concerning execution and attestation, such as a requirement that the document should be executed in a certain place in the presence of three witnesses. There is nothing in these provisions to make it unnecessary to comply with other requirements (e.g. as to the obtaining of the consent of specified persons), and an appointment not made in accordance with such requirements is void. But in one limited class of cases—equity will intervene and treat the defective appointment as valid. This will be done only if both the following conditions are satisfied:

(i) the defect is merely formal and not one of substance. Thus if under a power to appoint by deed the donee appoints by will, equity will grant relief. But if there is a power exercisable only by will, equity will not aid an appointment by deed, for the power was not intended to be exercised, until the donee's death, and the donee was meant to be free to modify the appointment until then.

(ii) the relief sought by a purchaser, creditor or charity or the wife or the legitimate child of the donee of the power. Cheshire in his book "The Modern Law of Real Property" (8th ed. gives, in his characteristic style, a pithy summary of the law (sic) (at pp. 212-13):

Thus relief will be given, if a power exercisable by deed or will is in fact exercised (sic) by a signed but unattested paper; or if a power exercisable by deed is exercised by will, unless the formality of deed was regarded as essential by the donor, or

if a power exercisable by will is exercised by an irrevocable deed, for the donor intended that the donee should be free throughout his life to revoke (sic) an appointment should he so desire.

23. We have not the least doubt, in the instant case, that the power reserved by the settlor to vary the terms and condition of the original Trust Deed (Ext. 1). by a Will and not by a Deed (sic) and the manner of exercise of that power must be regarded as essential because the language used was "by his instrument 'will alone and in no other way or act'. The general law that this essential condition for the exercise of a power, under a deed (sic) must be observed, otherwise the exercise of such power shall be void. This general law, however, admits of an equitable exception (sic) (sic)tion, namely, where the defective exercise of such power is (sic) the fulfilment of some moral obligation. The exercise of the power by a second deed of trust, in the instant case, will not be saved by any equitable consideration, because there is no question of fulfilment of any moral obligation by such change

effected in a defective manner. This is so because in the mat of defective execution, where the prescribed manner of execution is of the essence of the transaction, equity will not aid vol(sic) teeres. This is also so because it is settled law, as will appeal from the quotations above, that the attempted exercised irrevocable deed of a power which" is to be exercised by Will treated as " matter of substance and, as held in Reid v. Sherg (1805) 10 VES 370, as fatal to the objects of the power. We, therefore upheld the first contention of Mr. Roy, that the court of appeal below was wrong in minimising the defects in making changes and alterations in the original deed of trust as formal defects. The Court of appeal below should have held that the defect was a substantial, defect and made the second deed of trust a void document.

24. The next question that arises for our consideration is whether the defects notwithstanding, the Second Deed of Trust will be (sic)aved by virtue of the order passed by Remfry, J., in, the proceeding started by an originating summons. Mr. Roy contended that the said order was made without jurisdiction and must" be seated as a nullity. Elaborating his contention, Mr. Roy argued that in the aforesaid proceeding, the provisions of the Indian Trusts Act were invoked and that was to all intents and purpose Section 34 of the Act. Under that section:

Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for Summary disposal.

\* \* \* \* \*

25. The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in" the subject matter of the application.

26. Proceeding under that section, Mr. Roy argued, no trustee was untitled to ask for an alteration of the provisions in that trust (sic)ed or for permission to revoke the original deed and execute another, in a manner not permissible under the original deed and no court had power to allow such a trustee, although he may the settlor-trustee, to make such changes in the deed or to permit him to revoke the first and execute a Second Deed of his choice, because the section did not provide for such an order, such an order, if made u/s 34 of the Trusts Act, would be without jurisdiction and must be treated as a nullity. In support of this part of his contention Mr. Roy relied on the lowing observation by (1933) ILR 60 670 (Privy Council) .

27. The Act does not contain any provision for making a decree on an award such is contained in schedule II, para. 21 of the Code of Civil Procedure. Such a decree, made, is one without jurisdiction and therefore a nullity.



28. Mr. R.C. Deb, learned Advocate for the Respondent Official (sic)stee, tried to repel this branch of the argument of Mr. Roy contending that the order made by Remfry, J., may have been a wrong order but not an order without jurisdiction. The high Court had all the jurisdictions in the matter, namely, pecuniary jurisdiction, territorial jurisdiction and jurisdiction over the subject matter and any order passed by it, though wrong order, would not be an order without jurisdiction. I support of his contention Mr. Deb referred to Rule 1 of chapter of the Original Side Rules, which is as follows:

Any Judge of the High Court may, subject to any rules of Court, exercise, Court or in Chambers, all or any part of the Jurisdiction vested in the High Court on its Original Side.

He also, relied on two decisions of this Court Hriday Nath, Roy v. Ram Chandra Barua Sarma (1920) ILR 48 Cal. 138 F.B. and Calcutta National Bank ( (sic) Liquidation) v. Abhoy Singh (1959) 63 C.W.N. 467.

In Hriday Nath Ray v. Ravi Chandra Barua Sarma (Supra) Mookerjee, A.C.J., restated the legal position as to court jurisdiction in the following language:

(a) Thus, the jurisdiction may have to be considered with refared to place, value, and nature of the subject matter. The power of tribunal may be exercised within defined territorial limits. Its cognizant may be restricted to subject-matters of prescribed value. It may be compete to deal with,controversies of a specified character, for instance, testaments or matrimonial causes, acquisition of lands for public purposes, record of right as between land lords and tenants. This classification into territorial judication, pecuniary jurisdiction and jurisdiction of the subject-matter is obvition of a fundamental character. Given such jurisdiction, we must be careful distinguish exercise of jurisdiction from existence of jurisdiction; for fund mentally different ara the consequence of failure to comply with statutory quirements in the assumption and in the exercise of jurisdiction. The author to decide a cause at all and not the decision rendered therein is what mal up jurisdiction; and when there is jurisdiction of the person and subject-matter the decision of all other questions arising in the case is but an exercise of the jurisdiction.

(b) The distinction between existence of jurisdiction and exercise of ju-diction has not always been borne in mind and this has sometimes led to confusion (See Mabulla v. Hemangini (1910) 11 C.L.J. 512) and Moser v. Matsden (18 1 Ch. 487) where the term, jurisdiction is used to denote the authority of court to make an order of a particular description. We must not thus overl(sic) the cardinal position that in order that jurisdiction may be exercised, there may be a case legally before the Court and a hearing as well as a determination, judgment pronounced by a Court without jurisdiction is void, subject to well-known reservation that when the jurisdiction of a Court is challenged, Court is competent to determine the question of jurisdiction, though the re of the enquiry may be, that it has no jurisdiction to deal with the matter brou before it.

(c) Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with the power to decide wrongly as well as rightly.

(d) There is a clear distinction between the jurisdiction of the Court to hear and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity,

(e) reference may particularly be made to the judgment of Srinivas Aiyangar in *Tuljaram v. Gopala* (1916) 32 Mad. L.J. 434) where the true rule was stated to be that if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity.

29. The aforesaid Full Bench decision is binding upon us and we respectfully accept the law as enunciated therein and proceed on the same. The result that will follow, proceeding on the aforementioned enunciation of law, we shall indicate hereafter, after examination of the other decision relied upon by Dr. Deb.

30. In *Calcutta National Bank (in Liquidation) v. Abhoy Singh* (Supra) the questions that arose were (i) whether an unsecured creditor of a limited company had any locus standi in a proceeding for extension of time for registration of a mortgage or charge u/s 120 of the Indian Companies Act, 1913 (corresponding to Section 141 of the Companies Act, 1956), the proviso to Section 120(2) being limited to protecting the rights of creditors acquired in respect of the property concerned prior to the time when the mortgage or charge was actually registered, (ii) Whether the Court was competent to attend to the time under that section in a case which came under 109A of the Companies Act, 1913, as was done in that case i) if the answer to the second question was in the negative whether an order of extension of time actually made by the court u/s 120 was a nullity or an illegal order made by regular assumption of jurisdiction. Lahiri, J. (as the Chief Justice then was), sitting with Ray, J., answered the first two questions in the negative. But although holding that the High Court was not competent to make that order, in that case still then relying in the decision in *Hriday Nath Roy's case* (supra) (sic) Lordship held as follows:

In the present case S.B. Sinha, J., being the Company Judge had jurisdiction u/s 3 of the Indian Companies Act over the subject matter of the dispute and there is no dispute that he had territorial as well as pecuniary jurisdiction (sic) in respect of the subject matter of the dispute. Consequently the conclusion (sic) is irresistible that the decision which he actually gave is a decision given in regular exercise of

that jurisdiction. For the foregoing reasons I hold that the order made by S.B. Sinha, J. \*\*\* is not a void but voidable order and it can be revoked only at the instance of litigant who has a interest in the subject matter of that proceeding.

31. The above case, the High Court had jurisdiction to pass an (sic)er for extension of time for registration of mortgages and (sic)rges, of the nature it did, in cases coming u/s 109 of (sic) Companies Act, 1913. In irregular" exercise of that power, (sic)t Court passed an order for extension of time in a case (sic)aing u/s 109A of the Act. It was, therefore, held that the order was not without jurisdiction but merely an avoidable order, liable to be set aside by appeal or review.

32. Mr. Deb contended that the High Court possessed the power to make an order, of type made by Remfry, J., hereinbefore referred to, in a suit of the nature of an administration suit. If that power had been exercised in a proceeding started on an originating summons, that would be merely irregular exercise of the jurisdiction but the order passed by such irregular exercise of jurisdiction would not be a nullity. He contended in the above view that order made by Ramfry, J., must remain for from challenge, in the instant case, on the authority of the decision in Calcutta National Bank (in Liquidation) Vs. Abhoy Singh Sahela and Another, .

33. We are unable to accept this contention of Mr. Deb as legal is correct. The object of an administration suit, as held by Mukherjee and S.K. Ghosh, JJ., in Shivaprasad Singh Vs. Prayagkumari Debee and Others, of the estate of a deceased person who left no executor, "is to have the estate administered under a decree o "the Court; in such a suit the whole administration and settlement of the estate are assumed by the Court; the suit in it "essence is one for an account and for application of the estate "of the deceased for the satisfaction of the dues of all the "creditors and for the benefit of all others who are entitled, and "the Court) marshalls the assets and makes such a decree (see 191 "Cal. 883, 1931 Mad. 683). \* \* \* Forms of plaints in such suit "are given in Schedule I Appendix A, forms No. 41 to 43 "Order 21, Rule 13 Code of Civil Procedure, provides that, in a "administration suit, the Court shall pass a preliminary decree "before passing the final decree., directing accounts to be take "and enquiries to be made. Forms for preliminary decree as "given in Appendix D, Forms 17 and 19 and forms for find "decree are given in Appendix D, Forms 18 and 20". If the suit is for administration of a trust, the nature of the suit is the same, with the only difference that instead of the estate of the deceased, a trust estate has to be administered for the purposed of the trust. Even in such a suit, the Court has no power make a new trust, by directing certain alteration to be made the old trust deed by a new deed. Far less does it possess such power in a proceeding started under chapter XIII of the Original Side Rules of this Court, read with Section 34 of the Indian Trust Act.

34. Lacking in power, as it was, to direct alteration of the Trust by a deed, this Court, although possessing all the jurisdiction over the subject matter of the

dispute, was not competent to (sic)ecite itself to power and pass the order that Remfry, J., did. The order was, therefore, a nullity.

35. It is not enough for a Court merely to possess jurisdiction- it must, in addition, have the power to pass an order of a particular kind. Possessing both jurisdiction and power to make a particular order, if it passes the order in a case, where it should not have been done, the order does not become a nullity. This was what was pointed out in ILR 48 Calcutta 138 F.B. as the rue rule.

36. In the case reported in Calcutta National Bank (in Liquidation) Vs. Abhoy Singh Sahela and Another, the Court had both jurisdiction and power to make the order of that particular type but it made the order in a case where it should not have so alone. In the instant case, although possessing the jurisdiction, Remfry, J., had no power to make the order that he did. This is how the present case is distinguishable from the case in Calcutta National Bank (in Liquidation) Vs. Abhoy Singh Sahela and Another, .

37. In the view that we take, we reject the contention made by Mr. Deb and hold that the order made by Remfry, J., did not have the Second Trust Deed, being itself an order passed without authority and power and therefore, a nullity.

38. The Official Trustee Respondent was appointed the trustee under the order of Remfry, J. At that time the Second Trust deed had not been made. When it was made there was no fresh appointment of the Official Trustee as the sole trustee of the second Trust. Nevertheless, he has administered the trust according to the terms of the Second Trust Deed. Since we hold that the Second Trust Deed is a void document, the position of the Official Trustee, who administered a void trust, becomes that of a trustee de son tort. In that capacity he is liable to accounts to the Plaintiff.

39. We have no doubt in our mind that the Official Trustee acted bona fide under the cover made by Remfry, J., hereinbefore referred to. In taking accounts and in passing a decree for the (sic)m found due on accounts against the Official Trustee, the trial court shall consider whether or not to direct that the money due under the decree is to come out of the trust estate and whether or (sic)t to direct the persons who have received more than their (sic)ares under the trust deed, to disgorge the excess amount so received by them.

40. In the result, we allow this appeal, set aside the judgment and decree of the lower appellate court and restore the decree passed by the trial court, with the directions hereinbefore indicated.

41. The parties shall bear their own costs throughout.

Niyogi, J.

42. I agree.