

(1964) 01 AP CK 0003
In the Andhra Pradesh High Court
Case No : A.A.O. No. 436 of 1963

Shavax A. Lal and Others

APPELLANT

Vs

Syed Masood Hosain and Others

RESPONDENT

Date of Decision : 17-01-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 40 Rule 1(1), Order 40 Rule 1(2), 12, 151
Specific Relief Act, 1877 — Section 44

Citation : AIR 1965 AP 143

Hon'ble Judges : Satyanarayana Raju, O.C.J.; Anantanarayana Ayyar, J

Bench : Division Bench

Advocate : A. Ramaswamy Iyengar, V.K. Vaidya, S. Ranganathan, V.K. Krishna Menon, D.P. Singh, Anwarulla Pasha and S. Agarwal, for the Appellant; V.B. Sehgal, C.P. Sarathy, H.C. Mahendra, Tej Raj Kapoor and C. Jayashri Sarathy, for the Respondent

Judgement

Satyanarayana Raju, O.C.J.

(1) This appeal arises out of the order made by the Chief Judge, City Civil Court, Hyderabad, in 1 A. No. 447 of 1963, filed by the plaintiffs in O. S. No. 13 of 1963, under Order 40 Rule 1 of the Code of Civil Procedure, for the appointment of a Receiver and a Commissioner to manage and administer the affairs of H. E. H. The Nizam's Charitable Trust and also for interim suspension of the trustees pending suit.

(2) The suit was filed by Sri Syed Massod Hussian and Sri Ram Singh Verma u/s 92 of the Code of Civil Procedure, after obtaining the sanction of the Advocate General. The defendants are: (1) Sri V. P. Menon, (2) Sri Shavax A. Lal; (3) Sir Ahmed Sayeed Khan, Nawab of Chattari; (4) Prince Mukarram Jah Bahadur; (5) Khan Bahadur C. B. Taraporewala; and (6) Sri K. N. Anantharaman, I. C. S. It will be convenient to refer to the parties as they are arrayed in the suit.

(3) Defendants 1 to 4 and 6 are the trustees of the Nizam's Charitable Trust, of

whom the 6th defendant is the nominee of the Government of Andhra Pradesh. The 5th defendant is the Secretary of the Trust Board.

(4) The plaintiff's case, as stated in the plaint is that the 5th defendant, who is the Secretary of the Trust, is in the habit of concluding transactions involving several lakhs of rupees in respect of both purchase and sale of shares without the knowledge, consent or approval of the trustee: that, without confining himself to his legitimate duties as an employee of the trust, he has taken over the control and management of the Trust and is transacting all the important affairs of the Trust and that this is due to the dereliction of duty and negligence on the part of the trustees. It is averred that the 5th defendant has usurped the functions of the trustees and that the trustees have abdicated their functions and duties by merely ratifying the actions of the Secretary without applying their minds. It is also stated that H. E. H. the Nizam has created more than thirty Trusts, involving crores of rupees, most of them being private trusts in favour of his sons and relatives, and that in almost all those trusts, the 2nd defendant, "a friend of the 5th defendant", has also been made a trustee. It is further averred that the 5th defendant was appointed Secretary to all the private trusts and that the administration of all these trusts is practically left in his hands. On the basis of the allegations of breaches of trust and neglect of duty made by them, the plaintiffs prayed for the removal of defendants 1 and 2 from the offices of trustees; for appointing two new trustees in their place; and for a direction to the trustees to remove the 5th defendant from his office of Secretary.

(5) In the plaint submitted to the Advocate General for sanction, there were six defendants. By the date of the institution of the suit, Nawab Zain Yar Jung Bahadur, one of the original trustees, who was shown as the 1st defendant in the draft plaint, had died, and so only five defendants were impleaded as parties.

(6) In their application, I. A. No. 441 of 1963, for amendment of the plaint, the plaintiffs prayed that Sri K. N. Anantaraman, who was appointed as a trustee by the settlor pursuant to the nomination made by the Government of Andhra Pradesh, might be impleaded as the 6th defendant. The petition for amendment elaborated the nature of the interest which the two plaintiffs claimed in the Trust. It was also stated that the Government of Andhra Pradesh filed a charge sheet against the Secretary of the Trust to the effect that he "has also duped the Trust in misusing the funds of the Trust and in the wrongful disposal of the Rights of the TELCO shares, thus creating a huge financial loss to the Trust, and that "for this gross negligent conduct in the affairs of the Trust by the Secretary, the Trustees are equally responsible."

(7) In the counter affidavit filed by the 2nd defendant to the amendment petition, no objection was taken to the impleading of Sri K. N. Anantaraman as a defendant, but he denied the allegation that the 5th defendant was guilty of gross negligent conduct and that the trustees were equally responsible with him.

(8) In the original affidavit filed by him in support of the Receiver petition, the

1st plaintiff has stated that the 5th defendant is being prosecuted by the State Government before the Sixth City Magistrate, Hyderabad, under Sections 120B (criminal conspiracy) 420 (cheating) 468 (forgery for purpose of cheating) 471 ("using" forged documents as genuine knowing them to be forged) and 409 (Criminal breach of trust) of the Indian Penal Code. It is further stated that having regard to the pendency of the criminal case against the 5th defendant, it is necessary that he should be suspended from the office of Secretary of the Trust. He prayed for the appointment of a Receiver to administer the Trust pending disposal of the suit. The material averments are as follows :

"I request the Honourable Court for interim suspension respondents 1 and 2, Sri v. P. Menon and Shavax A. Lal because they are also involved in the mismanagement and misuse of the Trust funds, and from the perusal of the charge sheet filed by the State Government against respondent No. 5 in the Criminal Court, it will be evident that the aforesaid trustees have deliberately entered into a criminal conspiracy with respondent No. 5 in depriving the Trust from the benefits of the right shares of TELCO to which the Trust was lawfully entitled, in support whereof I am also filing the copy of Messers. Ferguson and Co., Chartered Accountants, of Bombay, duly appointed by the Auditor and Comptroller-General of India in pursuance of the directions given by the Supreme Court of India in C. A. No. 109/1960"

(9) In the counter-affidavit filed by him, the 2nd defendant has denied the truth of the various allegations made by the plaintiffs. In paragraph 4 of the counter-affidavit, it is stated as follows :

"Plaintiffs are virtually making this Hon"ble Court to prejudge the grave and highly controversial issues that arise for determination in this case and acting on the interested allegations of the 1st plaintiff to remove me and defendant No. 2 from our office of Trustees, to interfere with the power of the Trustees to appoint the Secretary and to dislocate and even paralyse the administration of the Trust by the appointment of a stranger to discharge the functions of the Trustees. These reliefs, if granted, would so completely alter the situation which has existed for 9 years that little or nothing would be left of the scheme for administration of the Trust as envisaged by the Settlor and as appearing from the terms of the instrument of Trust read as a whole."

He denies that the plaintiffs are persons having an interest in the Trust within the meaning of S. 92 , or that there is "well founded fear that the property in question will be dissipated or other irreparable mischief may be done." It is stated that the institution, and the pendency of the criminal case against the 5th defendant has no relevancy either to the suit or to the application for the appointment of the receiver since the said charges have not been proved and the 5th defendant has not been found guilty of the same. It is further stated that the mere pendency of the criminal case would furnish no ground for the temporary suspension of the 5th defendant; that the 5th defendant's duties are of a purely ministerial, administrative and advisory character and that the respondent for all

decisions affecting the administration of the Trust and its funds is that of the trustees. Referring to the Ferguson report, the counter-affidavit avers that the report, on the whole, disproves the wild and wholesale charges of mismanagement made against the trustees and the 5th defendant and establishes the essential soundness of the policy followed by the trustees in the matter of investments, sales and purchases, and that barring certain technicalities and minor errors, the only matters, on which the auditors could be said to have made observations in the nature of criticism, related to certain transactions and that explanations were offered with regard to these criticisms.

(10) The 5th defendant was content to file the following counter-affidavit.

"I have read the affidavit filed by the 2nd respondent (Shavax A. Lal) in the above petition. I adopt the allegations and pleas therein and submit that it would be neither lawful nor just to make an order of suspension against me as prayed for."

In a further affidavit filed by the 1st plaintiff in support of the Receiver Petition, it is stated that Prince Mukarram Jah Bahadur, one of the trustees and also the Chairman of the Trust Board, mostly resides in the United Kingdom and other countries; that the Nawab of Chattari is a resident of Aligarh in the Uttar Pradesh; that Shri V. P. Menon resides in Bangalore; and that Sri Shavax A. Lal resides in Bombay; and that all the trustees "on account of their multifarious engagements elsewhere" are unable to manage the affairs of such a big Trust and have deliberately entrusted its management virtually to the control of the 5th defendant, who is the Secretary of the Trust and who is responsible for the mismanagement and embezzlement of the Trust moneys as will be evident from the report of Ferguson and Co. It is stated :

"Their proved inability to meet and hold meetings not more than 4 or 5 times a year is surely calculated to hamper, delay and defeat the discharge of their duties in an effective manner as they are bound to do the terms of the Trust."

It is further stated :

"As a necessary corollary of the trustees' inability to stay at Hyderabad to attend to their duties as trustees, the duties pertaining to the administration of the trust devolve upon their trusted Secretary C. B. Taraporewal, with the result that the Secretary is able to exploit the situation to his own self-aggrandisement and enrichment at a terrible cost to the Trust."

Referring to the 5th defendant, it is averred :

"In the course of his management, the Secretary has not hesitated to commit several acts of bad faith and breaches of trust for which the trustee are also vicariously responsible."

(11) In the counter affidavit filed by him, the second defendant denied the correctness of the allegation that the trustees never met more than four or five

times a year. It is stated :

"The meeting held every year and the advance information supplied to the trustee are quite adequate to enable them to arrive at decisions on all matters enumerated in the agenda or requiring disposal particularly, in view of the fact that pursuant to office orders and rules issued by or at the instance of the trustees, all necessary information is collected and necessary spade work is done by the Committee of Management, the Secretary and other officers concerned. I deny that in the circumstances it was either incumbent upon the trustees or necessary for them to meet offender than they did. Further, where circumstances rendered it necessary or advisable, resolution were some times passed by circulation."

With reference to the allegation that by reason of the inability of the trustees to stay in Hyderabad, the duties pertaining to the administration of the Trust devolved upon the Secretary, it is stated thus :

"I say that the Settlor appointed me and respondents Nos. 1 and 5 knowing full well that we were residing at different places outside Hyderabad and that we had duties and engagements elsewhere, apparently because he considered that the objects which he had in view in creating the trust would be served by such appointments."

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(12) In the counter affidavit filed by him, the 5th defendant attempted to explain how he came to be in possession of his present wealth. In particular, he states that he has been in receipt of salaries and allowances as Financial Adviser and Secretary of the several Trusts created by H. E. H. the Nizam and that the aggregate of the salaries and allowances is Rs. 54,000/- per annum. With reference to the documents filed by the plaintiffs, he states, that the Personal Assistant to the late Nawab Zain Yar Jung Bahadur has gone to the extent of handing over files, papers and correspondence belonging to the Trust to the 1st plaintiff.

(13) The trial Judge has held that the report submitted by Messrs. Ferguson and Co. and the findings reached by him make out a prima facie case "that the trustee have not carried out the desires or the intentions of the settlor by holding and possessing the trust funds in their names, and converting the same to the best advantage of the trust fund by exercising their powers or authority in terms

of clause 8 of the Trust Deed, and that they have helplessly allowed the fifth respondent, the Secretary of the Trust, to operate and manage the funds and assets of Trust as if they belonged to him" He has found that the Secretary "had acted ignoring the basic fact that the Trustee are the sole custodians of the trust funds and that he was only a servant or an employee of the Trust and nothing more and nothing else". He has also found that no allegations were made by the plaintiffs against the 3rd defendant, Sri Ahmed Sayeed Khan (Nawab of Chattari), Prince Mukarram Jah Bahadur and Sri K. N. Anantaraman. On the findings reached by him, the learned Judge has held that, in the interests of the efficient management of the Trust funds and for preserving them without further dissipation or conversion to any individual's advantage, the appointment of a Receiver is not only just but also imperative. He has ordered interim suspension of the Trust Deed and appointed Prince Mukarram Jah Bahadur and Sri K. N. Anantaraman as joint Receivers. Since the Prince is in the United Kingdom. the trial Judge ordered that Sri. K. N. Anantaraman will be in custody of the Trust properties as sole interim Receiver. He has ordered the removal of the 5th defendant from possession and custody of all the Trust funds held or possessed by him as Secretary of the Trust and suspended him with immediate effect from the office of Secretary, and directed the 5th defendant to hand over all moneys, shares, securities and other assets of the Trust, held by him either in his individual name or as Financial Adviser to H. E. H the Nizam, or as Secretary of the Trust, to Sri. K. N. Anantaraman. The Court below has further directed Sri K. N. Anantaraman to take immediate steps for the appointment of a Secretary and also a Treasurer, by requesting the State Government to depute two of its officers, not below the rank of a Collector or District Judge, for filling the posts of Secretary and Treasurer. Pending deputation of officers by the Government, the Interim Receiver is directed to make suitable arrangements for running the day-to-day administration of the Trust by empowering any employee of the Trust, next in rank to the Secretary of the Trust. There is a further direction that the Interim Receiver should request the Accountant General, Andhra Pradesh, to depute an audit party, preferably headed by a Deputy Accountant General, for making a full and complete audit of the accounts of the Trust from its inception up-to-date. The trial Judge has given other incidental directions.

(14) Against the order of the lower Court, defendants 2 and 5 have preferred this appeal. The 1st defendant, who was originally impleaded as the 3rd respondent, has since been transposed as the 3rd appellant on his request. The 3rd defendant, who was originally impleaded as the 4th respondent, has also since been transposed as the 4th appellant.

(15) The contentions raised by Sri A. Ramaswami Ayyangar and Sri V. K. Krishna Menon, who appeared in support of the appeal, cover a wide ground. They may be summarised as follows :

(1) The suit is not maintainable for the reasons (a) that the plaintiffs are not persons having an interest in the Trust: and (b) that the Advocate-General, not

having given notice to the trustees and beard them, the sanction is a nullity.

(2) By reason of the compromise decree passed by the Supreme Court, the remedy of aggrieved beneficiaries is to approach the Government for appropriate redress and they have no right to file a suit for correcting alleged acts of commission and omission.

(3) The order of the lower Court has deprived the settlor of his prior to appoint new and additional trustees.

(4) The plaintiffs have not established a prima facie case under Order 40, Rule 1, Civil Procedure Code.

(5) The order of the lower Court is not valid because (a) the relief sought for against the 5th defendant is opposed to Order 40, Rule 1 (2). C. P. C. and (b) the reliefs granted are beyond the scope of the main suit and the reliefs claimed therein.

(16) Before dealing with these points, it will be convenient to set out the undisputed facts. By a deed, dated June 14, 1954, H. E. H. the Nizam of Hyderabad created a charitable trust, which is popularly known as The Nizam's Charitable Trust. He made over to the Trust debentures and shares and cash, of the aggregate value of Rupees 5,11,00,000/- The deed of trust contains twenty-four clauses. The objects for which the Trust has been created are set out in clause 3 of the deed, as follows :

(i) For the relief of the poor.

(ii) For the maintenance, upkeep and support of public religious institutions.

(iii) For the advancement and propagation of education and learning.

(iv) For giving medical aid and relief.

(v) For the advancement of any other object, particularly in the State of Hyderabad.

(17) The instrument of Trust provides for the appointment by the settlor of a minimum of two and a maximum of five trustees. It assigns to the trustees the shares and securities described in the schedule together with all rights of the settlor incidental or attached to his holding of the said shares and securities. Clause (2) provides that the trustees shall hold the said securities and moneys included in the Trust Fund. Clause (6) provides that the management and administration of the Trust shall be conducted and carried out in and from Hyderabad and the assets comprised in the Trust fund shall be kept in Hyderabad. The trustees are empowered to appoint one of them to act as Chairman of the Board of Trustees. Under clause (11) the trustees are authorised to open or maintain a banking account in their names. Clause (17) provides that the trustees may, from time to time, appoint a Secretary, Treasurer, Supervisor, clerks and other employees as they may deem expedient.

(18) Under the trust deed, the settlor originally appointed the late Nawab Zain Yar Jung Bahadur and the 1st defendant. Sri V. B. Menon, as trustees. Subsequently, on November 15, 1964, the settlor appointed the 2nd defendant, Sri Shavax A. Lal, as a trustee. Sometime later, the Nawab of Chattari, 3rd defendant, was appointed as the 4th trustee. Prince Mukarram Jah Bahadur was appointed as a trustee sometime in 1960 and he is the 4th trustee. Prince Mukarram Jah Bahadur was appointed as a trustee sometime in 1960 and he is the 4th defendant in the suit. At or about the end of 1957 or the beginning of 1958, a series of articles appeared in an Urdu newspaper, by name "Hamara Ikdam", about the administration of the Trust. Two persons, Azizuddin and Subramanya Aiyar, filed a petition O. P. No. 39 of 1958, on the file of the City Civil Court, Hyderabad, under the Charitable and Religious Trusts Act. 1920, asking for certain reliefs against the trustees and the Secretary of the Trust on the grounds of maladministration and misfeasance. The late Nawab Zain Yar Jung Bahadur, defendants 1 and 2 and the 5th defendant, who were impleaded as respondents in the petition, filed their written statements controverting the allegations made by the petitioners. They raised the objection that the petitioners had no interest in the Trust and that the petition was maintainable. The trial Court recorded evidence concerning the locus standi of the petitioners to maintain the petition. The preliminary objection raised by the trustee was upheld by the trial Court in its order dated, November 12, 1958, Aggrieved by the said order, Azizuddin filed a Revision Petition in the High Court in C. R. P. No. 746 of 1959, impugning the correctness of the order of the trial Court. On April 11, 1960 the High Court allowed the revision petition holding that the petitioners were entitled to seek the reliefs which they had prayed for. The trustees obtained special leave to appeal to the Supreme Court. By a judgment, dated April 24, 1963 their Lordships of the Supreme Court allowed the appeal, with the result that the order of the High Court was set aside and that of the trial Court restored.

(19) Meanwhile, on March 2, 1959, the Director of Endowments, Hyderabad, served a notice on the trustees calling upon them inter alia to register the Trust under the Hyderabad Endowments Regulation of 1348 Fasli and to render accounts of the same from the date of its inception to the date of the notice. The trustees disputed the authority of the Director to issue the said notice and urged that the Trust was not governed by the said Regulation. Thereupon the Director issued an order on March 23, 1959, pursuant to which he sealed the Pay Office of the Trust. He called upon the trustees to produce their books of account in order that he might scrutinize them and ascertain all the relevant facts in respect of the Trust as required by Rule 8 of the Rules framed under the Regulation. The trustees were also directed not to operate upon the Banks with which the moneys of the Trust were deposited and not to spend any sum on the objects of the Trust until further orders. The trustees thereupon filed a petition in this Court under Article 226 of the Constitution for the issue of an appropriate writ. They questioned the legality and validity of the action taken by the Director of Endowments. The two contentions which were raised in the writ petition were

that the Hyderabad Endowments Regulation had ceased to be operative in Hyderabad by reason of Section 6 of Part B States (Laws) Act, 1951, and that the Regulation and the rules framed thereunder were ultra vires inasmuch as they were violative of the Fundamental Rights guaranteed by Article 14, 19 and 31 of the Constitution. By a judgment, dated October 20, 1959, a Division Bench of this Court rejected these contentions and dismissed the writ petition.

(20) The trustees unsuccessfully filed a petition for leave to appeal to the Supreme Court against the judgment of this Court. Thereupon they obtained special leave from the Supreme Court .

(21) The events that followed are of some importance for the purpose of this appeal. After obtaining special leave, the trustees applied to the Supreme Court for the issue of an injunction restraining the Director of Endowments and the Government of Andhra Pradesh from enforcing provisions of the Hyderabad Endowments Regulation to the Trust. By an order, dated November 16, 1959, their Lordships of the Supreme Court granted an interim injunction. On December 21, 1959 they passed an order in terms of the memorandum of compromise filed before them, which runs as follows :

"1. That an auditor nominated by the Auditor General of India shall, at the expense of the Trust, audit the accounts, of the Trust from the inception and shall have full powers to inquire into the truth, the propriety and the legality of the various transactions and investments of the Trustees.

2. That the trustees and the Secretary shall give all information on matters relating to the Trust and its management or administration as may be required by the Advocate-General, Andhra Pradesh.

3. That subject to clauses 1 and 2 supra the ex parte stay order of this Court as embodied in clause 6 of its order dated the 16th November 1959 be and is hereby made absolute pending the hearing and final disposal of the appeal arising out of petition for special leave to Appeal No. 663 of 1959 abovementioned and the respondents herein be and are hereby restrained from enforcing the provisions of the Hyderabad Endowment Regulation, 1948 (Fasli) (1939) and the Rules made thereunder against the petitioners herein."

(22) On February 4, 1960, the Auditor General of India nominated Messrs. Ferguson and Co. , Bombay, to audit the accounts of the Trust. On October 22, the auditors submitted their report.

(23) While the appeal filed by the trustees against the judgment of this Court was pending before the Supreme Court, certain developments took place in regard to the Trust. On December 18, 1960, the Muslim Wakf Board, Hyderabad, constituted u/s 9 of the Wakf Act (No. 29 of 1954), registered the Trust as a Muslim Wakf. The registration so made was published in the Andhra Pradesh Official Gazette on January 12, 1961. The Government of Andhra Pradesh then moved this Court in W. P. No. 791 of 1961 for quashing the registration of the

Trust as a Muslim Wakf.

(24) Meanwhile, the parties informed the Supreme Court about these developments and represented that the registration of the Trust had changed the complexion of the dispute which made it necessary that the Supreme Court should consider the nature of the Trust and decide whether its registration u/s 28 of the Wakf Act was valid or not. The Wakf Board intervened in the appeal before the Supreme Court and it was added as a party thereto. It was agreed between all the parties that the question as to whether the Trust was a Muslim Wakf within the meaning of the relevant provisions of the Wakf Act should be decided by the Supreme Court and that that decision should govern the writ petition pending in this Court. By a judgment dated April 9, 1962, their Lordships of the Supreme Court held that the Trust was not a Wakf but a secular comprehensive public charitable trust. On April 16, 1962, the Supreme Court passed a decree in terms of the memorandum of compromise filed by the trustees, the Director of Endowments and the State of Andhra Pradesh. Under this compromise, certain provisions of the Hyderabad Endowments Regulation were made applicable to the Trust and it was provided that the settlor should immediately appoint an additional trustee nominated by the Government of Andhra Pradesh.

(25) At this juncture, it may be mentioned that on January 9, 1961, the present plaintiffs submitted a draft plaint, which they proposed to file in the principal Court of civil jurisdiction, to the Advocate-General of Andhra Pradesh for his sanction. A few days after the compromise decree was passed by the Supreme Court on April 26, 1962, the Advocate General gave his sanction to the plaintiffs to institute the proposed suit.

(26) The order of the Advocate General, produced before us, reads :

"Since this application was filed, the Supreme Court has passed a decree in terms of compromise by and under which the Government has been given power to exercise the control and supervision and also to give directions to the Trustees. Further the Government is empowered to nominate 2 Trustees, one of them immediately. In these circumstances it is for the petitioners to decide whether they will file the suit with or without amendments. I do not propose to say anything about the same. As the requirements of Section 92, C. P. C. are satisfied, sanction is granted."

(27) The plaintiffs instituted the suit on June 9, 1963, in the Court of the Chief Judge, City Civil Court, Hyderabad, at Secunderabad.

(28) We have heard arguments at considerable length on the several aspects of the law and the facts involved in the case. We may observe that the majority of the issues raised before us will require consideration at the trial of the suit. The observations made by their Lordships of the Privy Council in *Benoy Krishna Mukherjee v. Satish Chandra Giri* ILR Cal 720 : AIR 1928 PC 49 are pertinent in the present context. They said :

"It is obviously undesirable that their Lordships should say anything at this stage, which could be quoted hereafter so as to prejudice either side at the trial in any way, and as it is impossible to discuss in detail the evidence which was given on these interlocutory applications, or to criticise closely the inference and the observations of the Trial Judge without running some risk of a misapplication hereafter of what may be said now, which would be contrary to their Lordships' meaning and desire"

(29) It is needless to add that most of the issues raised in this appeal would require for their decision a careful investigation of the facts which might be established by the evidence/, in the light of the principles of law applicable to the case. Having regard, however, to the elaborate arguments addressed before us, we are obliged to deal with the contentions raised in this appeal and record our findings thereon to the extent possible.

(30) The first of the contentions raised by the learned counsel for the appellants is as regards the competency of the suit. It is contended that the plaintiffs are not persons having an interest in the Trust within the meaning of Section 92 of the Code of Civil Procedure. In the second place, it is argued that the sanction granted by the Advocate-General is not valid in law.

(31) Section 92 of the CPC runs as follows :

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree :

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquires ;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments act, 1863, (or by any corresponding law in force in a Part B State) no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

(32) Section 92, as it stands at present, , is a reproduction, with certain changes, of Section 539 of the Civil Procedure Code, 1882. Sub-section (2) clearly lays down that the jurisdiction that is created by the section is a special jurisdiction in regard to a class of cases which the section contemplates ; and to the extent that a special procedure is laid down for such cases, the procedure is compulsory, non-conformity with which would be fatal to the obtaining of any relief in suits of that character. To attract the operation of Section 92, the suit must be of a certain character and pray for certain reliefs. The suit should relate to a trust created for public purposes of a charitable or religious nature. It must proceed on an allegation either of breach of trust or of the necessity of having directions from the Court for the administration of the trust. The reliefs claimed must be one or other of the reliefs specified in the Section, and the suit must be one brought in a representative capacity in the interests of the public or of the trust itself. If these conditions are present, the suit can only be brought in conformity with the provisions of Section 92. Such a suit has got to be instituted by the Advocate-General, and outside the Presidency towns, by the Collector or such other officer as is empowered by the State Government in this respect ; or it can be instituted by two or more persons having an interest in the trust who have got the consent in writing of the Advocate-General. The Court competent to try such suits is the principal Civil Court of original jurisdiction or any other Court empowered in this behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate.

(33) The first condition necessary to bring a case within the purview of the section is the existence of a trust, whether express or constructive, for public purposes of a religious or charitable nature. It has been decided by their Lordships of the Supreme Court that the Trust in question is "a secular comprehensive public charitable trust". The first of the requirements of the Section is therefore, fulfilled.

(34) It is rightly contended by the learned counsel for the appellants that the Advocate General's written consent will not entitle a party to sue unless he has an interest in the Trust ; in other words, the persons seeking relief under the Section must be persons interested and they should also, obtain the consent in writing of the Advocate-General. It has been laid down by the Privy Council in Vaidyanatha Ayyar v. Swaminatha Ayyar AIR 1924 PC 221 (2) that both the requirements should be satisfied.

(35) The specific objection raised by the appellant is that plaintiffs have no locus standi to institute the suit inasmuch as they are not persons interested in the Trust. When Section 539 was first introduced in the Code of 1877, the words

used were "direct interest in the trust", and the same words were retained in the Code of 1882. There was a conflict of opinion in the several High Courts as to the exact scope and meaning of the expression "direct interest". That section was amended in 1888 and the words "an interest" were substituted for the words "a direct interest". The effect of the amendment has been to widen the class of persons who are entitled to institute a suit under that section. It is not necessary to notice the several decisions which have considered the connotation of expression "interest in the trust" occurring in Section 92 for we have the pronouncement of their Lordships of the Supreme Court in V. P. Menon v. Azizuddin Civil Appeal No. 430 of 1961 on the file of the Supreme Court of India, decided on April 23, 1963 (SC) (unreported). As stated already, this appeal arose out of O. P. No. 39 of 1958, on the file of the City Civil Court, Hyderabad, filed by Syed Azizuddin and another against the trustees under the provisions of the Charitable and Religious Trusts Act, 1920. Their Lordships of the Supreme Court pointed out as follows :

"Subsequently, the word "direct" was deleted and all that is now required to be proved by persons who want to move the Court under S. 92 is that they have an interest in the Trust. It was thought that the adjective "direct" qualifying interest would be construed as a term of limitation and may not be expedient in regard to public charities in India ; so that there is no difficulty in holding that if a person shows that he has an interest in the Trust, he may, subject to the other requirements of S. 92 move the Court for obtaining reliefs prescribed by the said section."

Their Lordships made it clear that the "interest" must not be purely hypothetical or in the nature of a bare possibility but that it must be a subsisting interest, though it need not be direct or substantial.

(36) According to the case pleaded by the 1st plaintiff, he had applied to the Board of Trustees for financial assistance to an industry which he intended to start in Hyderabad, which is one of the objects falling within the scope of sub-clause (v) of Clause 3 of the instrument of Trust, viz. , "for the advancement of any other object of general public utility, particularly in the State of Hyderabad," but that his application was rejected. It is stated that the 2nd plaintiff had applied for financial assistance for the education of his son, which was refused. They submit that they are persons eligible and qualified to derive some benefit from the Trust, in respect of which the suit is filed.

(37) It is contended on behalf of the appellants that neither of the plaintiffs has a subsisting interest in the Trust, that the interest claimed by them is purely hypothetical or in the nature of a bare possibility and, therefore, they are not competent to institute the suit.

(38) The consent in writing required by Section 92 is obviously imposed to prevent reckless and harassing suits against trustees which may involve the Trust in ruinous litigation. Therefore, the consent in writing required by the Section is

made a condition precedent to the institution of the suit, to which such consent relates. The Advocate-General in giving his consent has to exercise his judgment in the matter and see not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the character defined in the section, and whether there are prima facie grounds for thinking that there has been a breach of trust.

(39) The question whether a particular person has an interest in the Trust is one of fact and must be decided with reference to the circumstances of each individual case. Whether the plaintiffs in this case have an interest in the Trust, which would bring them within the scope of Section 92 is one of the issues which must be framed and tried in the suit itself. It is really a matter for the trial Judge to determine in the light of the evidence which might be adduced before him. It is, therefore, undesirable that we should say anything definite on the point at this stage.

(40) It is then argued by the learned counsel for the appellants that in exercising the power vested in him u/s 92, the Advocate-General performs a judicial function and that the rules of natural justice require that he should give notice to the trustees and hear them before deciding to give sanction or not. As supporting this contention, the learned counsel relied upon the decision of Mehar Singh J. of the Pepsu High Court in Sadhu Singh Sunder Singh v. Mangalgir Mohatmim Dera, AIR 1956 Pepsu 65. It is doubtless true that the learned Judge held that the functions of the Advocate-General u/s 92 "are judicial in nature."

(41) It has been held by the Madras High Court, whose decisions are binding on this Court, that there is no compelling statutory obligation on the part of the Advocate-General to hear witnesses, to admit documentary evidence and to hold an enquiry before granting or refusing consent when he is moved u/s 92. In Davular Pitchayya and Another Vs. Divi Venkatakrishnamacharlu and Others, Kumaraswami Sastri, J. observed thus :

"The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. We may in this connexion state that it would be more desirable, before giving the sanction, that notice should be given to the institution or the trustees, "although not obligatory" " (*Italics (here into " ") ours*).

(42) There is a divergence of judicial opinion on the question whether the function of the Advocate-General under this section is quasi-judicial or administrative. The High Court of Allahabad in Swami Shantanand Sarswati Vs. Advocate-General, U.P., Allahabad and Others, the High Court of Madras in Raju and Another Vs. Advocate General H.C. Buildings, Madras and Others, the High Court of Nagpur in Nanhoobeg v. Gulam Hussain AIR 1951 Nag 394, the High Court of Rajasthan in Shrimal Lal v. Advocate General (S) AIR 1955 Raj 166, the High Court of Jammu and Kashmir in Desraj v. Deputy Commissioner, Jammu AIR

1962 J & K 86 and the High Court of Kerala 90 (FB) have held that the act of the Advocate-General in giving his consent is not quasi-judicial but is merely administrative or executive. As already noted; the High Court of Pepsu, has, however, held that the function of the Advocate-General is quasi-judicial in nature and not executive or administrative. There is a preponderance of authority in favour of the view taken by the High Court of Madras that the Advocate-General, in exercising the powers vested in him u/s 92, does not perform a judicial function. We are, therefore, of the opinion that notice by the Advocate-General to the institution or the trustees is not obligatory and that the absence of such notice does not invalidate the sanction granted by the Advocate-General.

(43) The sanction of the Advocate-General is also assailed on the ground that he had not applied his mind to the questions which he ought to decide before granting the sanction. The Advocate-General's order according sanction, as endorsed on the plaint, is as follows :

"As the requirements of Section 92, C. P. C. are satisfied, sanction is granted,"

There is, therefore, a prima facie indication that the Advocate-General had exercised his judgment before he granted the sanction. It is not the function of the Advocate-General, u/s 92, to give a decision on the issues that might arise in the course of a suit u/s 92, and the Court is free to come to its own conclusion of fact and the law. All that he has to be satisfied about before granting a sanction is that there is a prima facie case and that it is worth while that the suit should be tried by a Court in the interests of a public charitable trust. Vide Sayyed Shah Abdul Latif Mohideen Khadiri Sujjatha Shibathullahi Sahib Vs. Mohammad Labbai and Others, .

(44) The second of the contentions raised by Sri Krishna Menon is that the judgment of the Supreme Court in Civil Appeal No. 430 of 1961 (SC) (unreported) precludes the plaintiffs from instituting the present suit. In support of this contention reliance has been placed on the following observations made by their Lordships of the Supreme Court :

"It is, however, necessary to add that the question about the nature of the Trust and the applicability of the provisions of the Charitable and Religious Trusts Act came to be examined by this Court in the case of Nawab Zain Yar Jung and Others Vs. The Director of Endowments and Another, . Subsequent to the preliminary decision of this Court, in that case, the matter was compromised between the Trustees and the Government of Andhra Pradesh and a decree was passed in terms of compromise on the 23rd April 1962. Thus, the Trust in question is now subject to supervision and control in the light of the terms of the compromise decree, and so, if any beneficiary feels aggrieved by the manner in which the Trust is administered, the remedies available to him are clearly indicated in the consent decree."

(45) As already mentioned, after the nature of the Trust was finally settled by the Supreme Court, the trustees and the Government of Andhra Pradesh filed a

memorandum of compromise, in terms of which their Lordships passed a decree. Under this compromise decree, certain provisions of the Hyderabad Endowments Regulation and certain rules framed thereunder were made applicable to the Trust in question. It was also provided under the compromise decree that the Government of Andhra Pradesh would be entitled to exercise supervision and control over the affairs of the Trust.

(46) It is argued by Sri Krishna Menon that their Lordships having pointed out that if any beneficiary felt aggrieved by the manner in which the Trust was managed and administered, he could only seek the reliefs provided under the compromise decree for correcting any mismanagement which he complains of, and that therefore the plaintiffs have no right to approach the Court for correcting the alleged acts of commission and omission in the administration of the Trust. From a reading of the compromise decree, it is plain that it is only certain of the sections of the Regulation and certain of the rules made thereunder that have been made applicable to the Trust. As pointed out by their Lordships of the Supreme Court in *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, , the only provision in the Hyderabad Endowments Regulation which deals with the management of endowed property is to be found in Section 12, and it is only the last part of that section which gives power to the Government to appoint a superintendent for purposes of management. Rule 67 of the rules framed under the Regulations deals with the removal of trustees, Section 12 and Rule 67 have been excluded from the compromise. What is the legal effect of this exclusion? It is argued for the plaintiffs that the significant exclusion of these two provisions makes the approach to the Government for redress an empty formality. The proper scope and effect of the compromise do not fall for determination in the present proceeding, and we can only say that that matter has to be decided on an appropriate occasion.

(47) It is, however, argued that the compromise decree passed by their Lordships of the Supreme Court "is the law of the land" and that so long as the compromise decree stands, the right of a beneficiary is only to approach the Government for appropriate redress. The logical result of accepting this argument would be that at no time hereafter can a relator file a suit u/s 92 of the CPC with regard to the Trust. We are unable to agree that by reason of the compromise decree, a suit u/s 92 - assuming that the conditions therein prescribed are satisfied - is for ever foreclosed.

(48) It is no doubt true that Sri Krishna Menon has invited us to adjudge the question as to the jurisdiction of the lower Court to entertain the suit. But as already indicated, there are obvious difficulties in finally deciding this question at this stage. If this Court should now and here adjudge the questions relating to the legality and the regularity of the institution of the suit, that would have the effect of our deciding the merits of the suit even before the issues are framed and before any evidence is recorded. That is a course which their Lordships of

the Privy Council have deprecated in no uncertain terms when they stated that the appellate Court, in considering the validity of the order of the trial Court appointing a Receiver, should not say anything which would have the direct or indirect result of prejudging the issues which might come up for trial in the suit.

(49) As already mentioned by us in an earlier part of this judgment, the suit has been filed with the sanction of the Advocate-General, which is a prima facie indication that the suit satisfies the requirements of Section 92. We are not to be understood as saying that the sanction is conclusive of the question of maintainability. We say so because on an investigation, the trial Court might very well come to the conclusion that there has no breach of trust warranting the exercise of the administrative or inquisitorial jurisdiction of the Court or even that the plaintiffs are not proper relators. But at this stage, we shall be justified in proceeding on the basis, as the trial Court has done, that the suit is prima facie maintainable. It is in that light that we propose to consider the legality, correctness and propriety of the order passed by the lower Court under Order 40, Rule 1 of the Code of Civil Procedure.

(50) This brings us to a consideration of the merits of the order of the lower Court. However, before entering upon the merits, we may notice another contention raised by the learned counsel for the appellant. It is argued that the order of the trial court has virtually deprived the settlor of his right to appoint now or additional trustees, which is not permissible. We have not been shown any binding authority in support of this contention. We are unable to agree that the fact that the instrument of trust reserves a power to the settlor to appoint new or additional trustees, would deprive the Court of the jurisdiction vested in it u/s 92 or under Order 40, Rule 1 of the Code of Civil Procedure.

(51) In support of their petition for the appointment of a Receiver, pendente lite, the plaintiffs have principally relied upon the Ferguson report. It may be recalled that after obtaining special leave to appeal to the Supreme Court, the trustees prayed for an interim injunction restraining the Government of Andhra Pradesh and the Director of Endowments from enforcing the provisions of Endowments Regulation to the Trust. Eventually, a consent order was made by the Supreme Court in the stay petition, one of the terms of which was that the Auditor-General of India might be requested to nominate as auditor to audit the Trust accounts and submit a report on the legality and propriety of the transactions of the Trustees. Pursuant to the consent order, the Auditor-General of India nominated Messrs. A. F. Ferguson and Co, Chartered Accountants, to audit the accounts, the auditors submitted their report on October 22, 1960. That is the genesis of the Ferguson report.

(52-74) (After discussion of the Ferguson Report with regard to various transaction entered into on behalf of the Trust, the judgment proceeds :-).

(75) Sri V. K. Krishna Menon, learned counsel appearing for the 5th defendant, has, after a careful and thorough analysis of the Ferguson Report, submitted that

for the most part, the report contains remarks of a laudatory nature with regard to the majority of the transactions. He has argued that some of the adverse comments made against the administration of the Trust were not justified, and that assuming there were some lapses on the part of the trustees, they were of a technical character, and that if an overall picture is taken of the entirety of the transactions, it would be seen that the trustees conducted themselves with care and prudence required of them.

(76) It is no doubt that trustees, like guardians in charge of the estates of infants, are engaged in what is generally called a "thankless task". A minor, when he comes of age, is willing to take the benefit of what is good for him while disowning what is not in his interest. So too, in the case of a trust, the trustees are very often in the unenviable position of not being complimented for what they do but being found fault with for what they did not do. It is no doubt true that the holders of such offices should be regarded and treated by the public with great consideration and sympathy. The habitual attitude of the members of the public to find petty faults with and throw stones at them on every possible occasion as pointed out by the Madras High Court in *Veeraraghava Achariar v. Parthasarathy Iyengar*, I. R. 1925 Mad 1070 at p. 1078 brings about a state of things in which men of capacity, character and position in society being afraid to accept such offices keep aloof, thereby necessarily making it inevitable that such offices should be scrambled for by less acceptable persons. It is necessary to point out that, the acceptance of places of public trust entails onerous and serious responsibilities. The true spirit in which such offices should be accepted and retained is the spirit of sacrifice in the interests of the public and those of the institutions. The safety of the trust property is the first care of the law, and on this depends every rule which has been made for the conduct of the trustee.

(77) There is the highest authority of the Judicial Committee of the Privy Council in the case *Letterstedt v. Broers* (1884) 9 A. C. 371 for the proposition that even though the evidence in a case against the trustees may not be sufficient to warrant, generally speaking, their removal from offices on the ground of misconduct or negligence, still their removal may be ordered, if, in the opinion of the court, such removal is necessary in the interests of the Trust.

(78) For the purposes of this appeal, we considered it proper to proceed on the assumptions that the comments contained in the Ferguson report, at least with regard to some of the transactions relied upon by the lower Court, are *prima facie* well grounded. Of course, ultimately the matter will have to be thoroughly investigated in the light of the evidence which might be adduced by the parties in the suit. But, at this stage, we may take into consideration the following facts which emerge from the report :-

(1) The National Plan Bonds of the face value of Rs. 32,67,000/- purchased by the Trust and all other investments in Government securities were throughout held in the name of the 5th defendant in his capacity as the Financial Adviser to

H. E. H. the Nizam.

(2) There is no resolution authorising the 5th defendant to hold the Government securities in his name, though they are held by him in his capacity as the Financial Adviser to H. E. H. the Nizam.

(3) The Trustees contravened the provisions of the Trust deed by giving a loan to the Eros Cinema, as they were not authorised to give loans except on mortgage of immovable property.

(4) The subsequent conversions of the loan to the Eros Cinema into A-class Preference Shares, which originally belonged to H. E. H. the Nizam, who done without the knowledge or consent of the trustees, and though the conversion took place in or about the end of October, 1957, the trustees themselves were not informed about this transaction until September 3, 1958.

(5) The Trust was the holder of 3416 ordinary shares of Rs. 100/- each in the Sirpur Paper Mills Limited. The Company announced "r for 1" rights issue. The trustees decided to subscribe for those right shares. The rights were, however, neither subscribed for nor any consideration realised by the sale of the right shares. This has resulted in a loss to the Trust.

(6) The sale proceeds of 10,640 rights (belonging to the Trust) were first credited to the personal account of H. E. H. the Nizam . H. E. H. the Nizam personally made a profit equivalent to about Rs. 1,60,793-10, representing the difference between the price at which the rights belonging to the Trust were sold in the market at Rs. 2,67,193-10 and 1,06,400 paid by him to the Government of Hyderabad for the purchase of the rights. H. E. H. the Nizam would not have earned this profit during a short period of time in the absence of the Trust's holding. There is nothing on record to show that the trustee were aware of the fact that the transactions were carried out in a manner different from that shown in the minutes of the trustees.

On the Auditor's pointing out to the Secretary that any profit made on the sale of unclaimed rights belonged to the Trust and not to H. E. H. the Nizam, a sum of Rs. 18,083/- representing the amount of such profit was paid into the Bank account of the Trust by H. E. H. the Nizam.

(7) By reason of the sale of the Telco shares the share in the managing agency held by the Trust was reduced from annas 4 to annas 2.

(8) The shares held by the Trust in the Hind Tobacco Cigarette Company which were shown in the Trust deed as having a market value of Rs. 5,00,000/-, subsequently lost the whole of their value.

(9) With regard to the "Sarf-e-Khas" , a sum of Rs. 12,14,905/- was paid from the Trusts fund to its ex-employees. Out of this sum payment to the tune of Rs. 1,68,573/- were made without the sanction of the trustees.

(79) Nawab Zain Yar Jung Bahadur, who was originally nominated by the settlor

as one of the trustees, was a resident of Hyderabad. He died before the suit was instituted. Sri V. P. Menon, the 1st defendant, is a resident of Bangalore. He did not file any counter-affidavit to the application for the application of a Receiver made by the plaintiffs in the lower Court. Sri Shavax A. Lal, the 22nd defendant, is a permanent resident of Bombay. The Nawab of Chattari, the 3rd defendant, is a permanent resident of Aligarh. It is alleged by the 1st plaintiff that all these trustees on account of their multifarious engagements elsewhere are unable to manage the affairs of such a big Trust and have deliberately entrusted its management to the control of the 5th defendant, who is the Secretary of the Trust. Traversing this allegation, the 2nd defendant, in his counter-affidavit, has admitted that the trustees have other engagements elsewhere than in Hyderabad, but denied that they are consequently unable to manage the affairs of the Trust. He has stated, that the settlor appointed him and the other trustees knowing full well that they are residing at different places outside Hyderabad and that they have duties and engagements elsewhere. Defendants 1 and 2 are retired civil servants, who, in their time, occupied very high positions. Their rich experience of public affairs should normally be a great asset to the Trust. The plaintiffs may not be justified in making insinuations against their integrity. As already stated, nothing has been alleged against the other trustees, viz. , the Nawab of Chattari and Prince Mukarram Jah Bahadur. What is, however, stated is that by reason of their preoccupations elsewhere, defendants 1 and 2 have not been able to devote the necessary time and attention to the management of the affairs of the institution of such a vast magnitude, like the Nizam's Charitable Trust, and that they have virtually "abdicated" the management of the Trust to the 5th defendant. Whether this alleged inaction amounts to culpable negligence justifying their removal from office can only be determined on the evidence which will have to be adduced at the trial. We, therefore, say nothing to prejudge that question.

(80) Now coming to the 5th defendant, it is to be noted that on his own admission, he is the Financial Adviser to H. E. H. the Nizam and he is also the Secretary of as many as thirty private trusts created by the Nizam. In his counter-affidavit, he admits that he has been in receipt of salaries and allowances aggregating Rs. 54,000/- per annum, as Financial Adviser to the Nizam and as Secretary of the several trusts. Besides, he is a Director of various companies. He has himself stated that his fee as a sitting Director in his own right of various companies amounts to Rs. 1,50,000/- per annum. He has been the Secretary of the Trust from almost its inception. His duties, as specified in the resolution passed by the trustees, are defined to be "managerial and secretarial" in character. He is in receipt of a remuneration of Rs. 500/- per month from the Trust.

(81) In his capacity as Financial Adviser to the Nizam and as Secretary of the various Trusts, the 5th defendant must be discharging very onerous and arduous duties and responsibilities. During the course of the arguments before us, we enquired of the learned counsel, Mr. V. K. Krishna Menon, as to whether the

duties attached to his office as Financial Adviser to H. E. H. the Nizam, do not come into conflict with his duties as Secretary of the Trust. This question was prompted by certain adverse observations made against the 5th defendant by the auditors. The learned counsel has stated that there is no basis for the assumption that there is any conflict between the dual capacities of the 5th defendant quod the Trust and his position as the Financial Adviser to H. E. H. the Nizam. But certain transactions referred to by the auditors, to which we have already adverted, in our opinion, may lead to the possibility of an embarrassment to the 5th defendant due to the conflict between his duties and functions as the Secretary of the Trust and as the Financial Adviser to H. E. H. the Nizam. The learned counsel has, however, argued that even though there might have been such a conflict, the Secretary has not sacrificed the interests of the Trust but, on the other hand, benefited the Trust. This agreement runs counter to the comments made by the auditors with regard at least to one large transaction viz. , his dealings with TELCO shares.

(82) The auditors have pointed out certain acts of commission and omission on the part of the 5th defendant. His learned counsel has offered his explanations in the light of which he has invited us to judge the correctness and the validity of these comments. But this must await a more careful and fuller investigation in the light of the evidence that will be adduced by the parties in the trial court.

(83) It is stated by the 1st plaintiff that the 5th defendant has been prosecuted by the State Government in a criminal case in which he is charged with offences u/s 120B (Criminal conspiracy) 420 (cheating), 468 (forgery for purposes of cheating), and 471 ("using" forged documents as genuine knowing them to be forged). On September, 5, 1963, the Sixth City Magistrate, Hyderabad, framed charges against the 5th defendant of which charge No. 4, reads as follows :

"Fourthly : That you between 21-10-1954 and 31-3-1955, at Hyderabad, having dominion over property, to wit : the Nizam's Charitable Trust, in your capacity as the Secretary of the said Trust committed criminal breach of the trust in respect of that property by selling 22,000 right shares belonging to the Trust in open market and crediting the sale proceeds of the first 10,640 rights (a sum of Rs. 2,67,193-0-0) to the personal account of H. E. H. the Nizam in the Bank of India Limited, Bombay, instead of the Trust Account and that you have subscribed to 10,640 new shares on behalf of the Trust making use of the renunciation forms obtained by you as the Financial Adviser to H. E. H. the Nizam from the Government of Hyderabad, so that the Nizam need not have to invest a single pie, and that a huge amount of Rs. 10,64,000/- of the Trust has to be invested in order to subscribe for these right shares for which 11,360 right shares and 10,640 old shares have to be utilised to finance the subscription and that out of Rs. 2,67,193-10-0 which was transferred to the personal account of the Nizam, a sum of Rs. 1,66,447-8-0 was credited to H. E. H. the Nizam on 5-11-54 and that you misused the funds and properties of the Trust in order to enable the Nizam to make a huge profit, and you disposed of the property of the Trust in violation

of your obligation to Trust contrary to the objects and in utter disregard of the interests of the Trust, and thereby committed an offence punishable u/s 409 of the Indian Penal Code and within my cognizance."

(84) The 5th defendant has since filed a Criminal Revision Case, which is now pending in the High Court, for quashing the charges framed against him. As the matter is sub judice, we have been asked by Sri V. K. Krishna Menon, - and in our view, rightly - not to make any observations which would prejudice the 5th defendant's defence. We, therefore, refrain from making any observations with regards to this matter.

(85) From the material on record, it seems to us that there is considerable force in the contention of the plaintiffs that there has been and is a conflict of capacities of the 5th defendant, and that in discharging his functions as the Financial Adviser to H. E. H. the Nizam, at least on some occasions, he appears to have failed to discharge his fiduciary obligations attaching to his office as the Secretary of the Trust. Therefore, in the interests of the Trust, which are paramount, we have reached the conclusion that the administration of the Trust and its affairs cannot be allowed to continue in the hands of the 5th defendant.

(86) It is argued that the reliefs u/s 92 of the CPC can only be claimed against a trustee and the 5th defendant not obviously being a trustee, the prayer in the plaint for his removal is unsustainable. We do not think that this contention is well founded.

Clause (h) of Section 92 of the CPC provides : -

"granting such further or other relief as the nature of the case may require."

(87) It is true that the expression in this clause must be read as ejusdem generis to the foregoing clauses. Sri Krishna Menon has argued that when so read, the prayer for the removal of the 5th defendant will become untenable because he is not an express trustee. The expression "trustee" used in Section 92 of the Code is, in our opinion, comprehensive enough to include not only trustee but also those who are liable as if they are trustees. It has been held in *Budreedas v. Choonilal* ILR Cal 789 that a suit would lie u/s 92 against a trustee of an express or constructive trust, whether such a trustee is a de jure or de son tort. It cannot be said that as an employee of the Trust, the 5th defendant has no fiduciary obligations to discharge. We have, therefore, reached the conclusion that this contention is untenable.

(88) Even so, it is argued that the relief prayed for in the suit is that defendants 1 and 2 should be removed from their office of trustees, that new trustees should be appointed in their place and that the existing trustee and the new trustees so appointed, should remove the 5th defendant from his office and that therefore the order of the lower Court directing the suspension of the 5th defendant from his office of Secretary, contravenes the provisions of Order 40 Rule 1, sub-rule (2).

Sub-rule (2) reads :

"Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

(89) Under Order 40, Civil Procedure Code, a Receiver is an Officer or representative of the Court and he functions under its directions. The Court may, for the purpose of enabling the Receiver to take possession and administer the property , by order, remove any person from the possession or custody of the property. Sub-rule (2) of Rule 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit, the Court can direct the Receiver to remove him from the possession of the property even if the plaintiff has no present right to remove him. In the instant case, the 5th defendant is a party to the suit and the court through the Receiver, can take possession. The Court is legally competent to confer a power on the Receiver under Order 40, Rule 1 (1) (d) of the Code of Civil Procedure, to recover the property from the 5th defendant and to direct the 5th defendant to deliver possession to the Receiver. Vide *Hiralal Patni Vs. Loonkaram Sethiya and Others*, .

(90) In *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, it has been held by their Lordships of the Supreme Court that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. They have further held that section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary for the ends of justice and that therefore it cannot be held that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. Their Lordships add that the inherent power has not been conferred upon the court and that it is a power inherent in the court by virtue of its duty to do justice between the parties before it. Therefore, in the exercise of its inherent power, it is competent to the Court to appoint a Receiver even on the assumption that the contentions of the learned counsel for the appellants as to the limitations of Order 40, Rule 1 sub-rule (2), are sound.

(91) We now come to the question as to whether or not the trial Court was right in suspending all the trustees. It has been strenuously contended before us that the order of suspension is beyond the scope of the main suit and the reliefs prayed for therein.

(92) In a suit u/s 92 of the Code, the trust property is the subject-matter of the suit. The whole aim and object of the suit is to regulate the collection, distribution and preservation of the property of the Trust and even though there is no application for the removal of the trustees, the Court has power to appoint a Receiver pending the appointment of fresh trustees.

(93) Apart from the fact that the entire subject-matter is pendente lite and as such within the jurisdiction of the Court, there are authoritative pronouncements from which it is clear that in the matter of trust properties, the Court has supervisory power over the trustees. The Privy Council held in *Mohomed Ismail Ariff v. Ahmed Molla Dawood* ILR Cal 1085 : (AIR 1916 PC 132) that with respect to public, religious or charitable trusts, the discretion of the Court is very wide. The Court may not depart from the intention of the founder or from any rule fixed by him as to the objects of the benefaction ; but as regards management, which must be governed by circumstances, the court has complete discretion. It may in the exercise of its judicial discretion vary any rule of management which it may find either not practicable or not in the best interests of the institution. There is abundant authority for the proposition that the Court has a wide discretion u/s 92 to take such action as it thinks necessary or desirable for the good of the institution.

(94) In *Kuppuswami Mudaliar v. Subramaniam Chettiar* 41 MLJ 545, a Division Bench of the Madras High Court, consisting of Oldfield and Ramesam J J . , has held that in a suit under S. 92 of Code of Civil Procedure, though there is no prayer to remove the trustee, the Court has power to supersede him and appoint a Receiver during the pendency of the suit. Ramesam J. observed ;

"The reason is, that, in this class of suits, it is not merely the defendants' rights that are the subject of consideration by the Courts but the interests of a public institution of far greater importance than the defendants' rights."

In so holding, the learned Judge followed the decision of another Division Bench of the Madras High Court in *Veeraragava Thathachariar v. Krishnaswami Thathachariar* 20 ML. J. 638. We are in respectful agreement with these observations.

(95) In the case of a trust for public purposes of a charitable and religious nature, as pointed out by the Lordships of the Privy Council in AIR 1934 53 (Privy Council) the primary duty of the court is to consider the interest of the public, or that part of the public, for whose benefit the trust is created.

(96) In the light of the foregoing principles, it seems to us that the proposition contended for by the learned counsel is not tenable.

(97) But this does not relieve us from the duty to decide whether, on the facts of this case, the trustees should be suspended. As stated already, there are no specific charges of breach of trust or misfeasance against the trustees, who certainly are respectable people. The only gravamen of charge against defendants 1 and 2 is perhaps that they have been parties to a situation which has placed the 5th defendant virtually in absolute control of the funds of the Trust. The consequences, if any, of the attitude of the trustees can only be determined in the suit. We find, therefore, no warrant for suspending the trustees from their office at this stage. We are fortified in this conclusion because of the direction given by the trial court that two of the trustees should be

Receivers. Sri Krishna Menon has contended before us that the appointing of two of the trustees as Receivers will ipso jure result in the suspension of the trustees from their offices. We are unable to agree. In the first place, the appointment of Receivers is for the purpose of safeguarding the interests of the Trust which is a duty attaching to a Court exercising charity jurisdiction. Further, the properties and the affairs of the Trust being in custodia legis will not, in our opinion, affect their title to the office as trustees. It can only mean the supersession for time being of their right of management. When in the exercise of its undoubted supervisory jurisdiction over public trusts and charities, the trial court has come to the conclusion that it is "just and convenient" to appoint a Receiver, we think that its finding ought not to be lightly interfered with by this Court in appeal.

(98) Here, it may be observed that u/s 44 of the Specific Relief Act, the appointment of a Receiver pending a suit is a matter resting in the discretion of the court, the mode and effect of his appointment and his rights, powers, duties and liabilities being regulated by Code of Civil Procedure. Thus the jurisdiction vested in the Court is discretionary. It is doubtless true that the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(99) The words "pending a suit" in Section 44 of the Specific Relief Act, are general and not followed or qualified by any limitation. The exercise of the power being discretionary, it would be difficult, even if it were possible, to define with any precision, the limits of that power. The exercise of that discretion in the ultimate analysis must be guided by the circumstances of each particular case. The opinion of the Court of first instance in these matters is of great weight. It is probably the best tribunal to decide whether it is necessary or expedient, having regard to the circumstances of the case, that a Receiver should be appointed, and a party, who, in appeal, attacks the exercise of this discretion, should show that the discretion has been improperly exercised.

(100) The Nizam's Charitable Trust is perhaps one of the biggest charitable endowments in the Country. On June 14, when the trust was created by H. E. H. the Nizam, the aggregate market value of the Trust Fund was Rs. 5,11,00,000/- It is a matter for regret that such a large Trust created out of piety and spirit of service, has been involved in contentious and costly litigation, at any rate, from 1958. It is no part of our duty to enquire into the causes of that litigation and to apportion the blame. But that is a circumstance which we cannot but take notice of in assessment of its present requirements and safeguards.

(101) It is urged on behalf of the appellants that Sri K. N. Anantaraman, the 6th defendant is the First Member of the Board Revenue, that he has multifarious duties to perform in his official capacity and that he can hardly find any time to look after the management of the Trust. This argument does not appeal to us. If the 6th defendant can be one of the trustees and can take part in the management of the Trust, then one fails to see why he cannot function as a Receiver. It is not as if he has to see personally to all the details of the

management. We are sure that under the management of the 6th defendant as Receiver, the Trust will be ably and efficiently administered. Prince Mukarram Jah, who is the grandson of the Nizam and who occupies a high social position, has also been designated a Receiver. Under the order of the lower Court, the two Recurs have been asked to request the Government to depute an officer, not below the rank of a District Judge or District Collector, to be in charge of the day-to-day administration. We have no reason to think that in view of the magnitude of the Trust, the Government will not consider favourably the request for such deputation.

(102) For all the above reasons, we are satisfied that the trial court was right in passing the order which has been strenuously assailed before us, except in so far as it relates to the suspension of the trustees. The appeal, therefore, fails and is dismissed subject to the modification already indicated in regard to the suspension of the trustees, which direction stands vacated.

(103) Then, as to costs, we are of opinion that the modification we have effected is not such as can reasonably be pleaded to deprive the respondents of their costs in the appeal in which they have substantially succeeded.

(104) The appeal is dismissed with costs of the 1st respondent (plaintiffs), The costs will come out of the Trust Estate.

KH/ K. S. B.

(105) Appeal dismissed.