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Pandit, J.

Regulations is void or beyond the powers of the Corporation. In sub-section (1) of section 11, there is no bar in the way of the Corporation to make Regulations for such employees pending their categorisation by the Central Government under sub-section (2) of this section.

I would, therefore, hold that the petitioner had a right to file an appeal against the impugned order. In view of the fact that when the petitioner has not availed of an equally efficacious remedy which was available to him under the law, decline to exercise my discretionary powers under Article 226 of the Constitution in this case. This writ petition is liable to be dismissed on this ground alone.

In view of the above finding, it is needless to go into the other matters raised by the learned counsel for the respondents.

The result is that this petition fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs in these proceedings.

Bedi, J.

J. S. BEDI, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before Mehar Singh and Shamsher Bahadur, JJ.

BALKISHAN DASS,—*Appellant*

versus

PARMESHRI DASS AND OTHERS,—*Respondents.*

Regular First Appeal No. 43 of 1955.

1962

October, Ist.

Code of Civil Procedure (Act V of 1908)—S. 11—Res Judicata—*Interlocutory order heard on merits in appeal or*

in revision—Whether becomes res judicata—*S. 92 Dispute between co-trustees—Suit relating to—Whether must only be brought under S. 92 with the sanction of the Advocate-General—Trust—Main property of trust lost—Trustee receiving money on its behalf—Whether liable to account for the same to the other co-trustees—Suit for accounts—Final decree—Whether can be passed without passing a preliminary decree.*

Held, that where an interlocutory order is heard on merits either in appeal or in revision, the matter becomes *res judicata.* The principle of *res judicata* is based on the need of giving a finality to judicial decisions.

Held, that a suit under section 92 of the Code of Civil Procedure, is of a representative character and presupposes three conditions, the first being that it must be suit with regard to the existence of a public trust, secondly it is based on the allegation that there is a breach of trust or the directions from the Court are necessary, and finally, that one of the nine reliefs mentioned in sub-section (1) of section 92 is asked for. In other words, if a suit under section 92 is brought, these three conditions must be present. But it is far from saying that when these three conditions are present, no action, but a suit under section 92 can be brought. A suit by some of the co-trustees against the other co-trustees for accounts of moneys received by them without obtaining the sanction of the Advocate-General under section 92 is maintainable.

Held, that merely because the main property of the trust has been left in Bahawalpur in Pakistan and has ceased to be in the operative control of the trustees, does not mean that the moneys which had been received on behalf of the trust became the private property of those, who received them. They are liable to account for those moneys to the other co-trustees or beneficiaries of the trust.

Held, that the general rule in a suit for accounts is to pass a preliminary decree first, but a final decree may be passed in exceptional cases. In the last analysis, the problem must be resolved by examining the substantial dispute which is raised between the parties. Where explanations have to be given of the various items and no evidence has been led at all by the parties in the belief or

expectation that a preliminary decree will be passed in the first instance, it would not be proper for a Court to pass a final decree.

First Appeal from the decree of the Court of Shri R. S. Bindra, Sub-Judge 1st Class, Amritsar, dated the 24th November, 1954 granting the plaintiffs a final decree for the recovery of Rs. 1,87,123-8-3 with full costs against defendant No. 1 subject to certain conditions.

R. S. NARULA AND T. S. MUNJRAL, ADVOCATES, for the Appellant.

D. C. GUPTA, A. S. MAHAJAN, H. R. MAHAJAN and POORAN CHAND, ADVOCATES, for the Respondents.

JUDGMENT

Shamsher Bahadur, J.

SHAMSHER BAHADUR, J.—This appeal arises out of a suit instituted by the two plaintiffs Parmeshwari Das and Sant Ram as trustees in respect of property known as Mandir Shri Namdev Kalla Dhari Ji Maharaj in Bahawalpur State for rendition of accounts against their co-trustees Bal Kishan Das and Gosain Jamna Das, hereafter referred to as the first and second defendants. In this suit were also impleaded Bhiwani Das who is now dead and Sardul Singh, as defendants Nos. 3 and 4. The fourth defendant in effect supports the plaintiff's suit. The suit has been decreed by the learned Subordinate Judge, Amritsar, and a final decree for recovery of a sum of Rs. 1,87,123-8-3 with full costs has been passed against the first defendant. As the Court did not consider the plaintiff-trustees to be fit enough to receive this sum the defendant has been directed to make a deposit of it in some bank. Interest on the decretal amount has to be charged at the rate of $4\frac{1}{2}$ per cent per annum from the date of the suit till the date of realisation. The second defendant on the other hand has been asked to make restoration of certain articles which he brought from the

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

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

By a will executed on 14th of May, 1938 and registered a week later on 21st of May, 1938 (Exhibit P.3), Gosain Brij Mohan Das, *gaddi nashin* of Mandir Shri Namdev Kalla Dhari Ji Maharaj, at Bahawalpur, then sixty years old, made a testamentary disposition with regard to movable and immovable properties of three Mandirs in Bahawalpur city, known as Mandir Kalla Dhari Ji Maharaj, Sanwal Shah Ji and Mandir Gopi Nath Ji, one Mandir known as Kalla Dhari in Multan city and one Mandir known as Mandir Kalla Dhari in Bindra Ban, Mahura District, agricultural lands and shops in Bahawalpur city; agricultural and residential lands in Multan; residential houses situated in Amritsar and movable property like ornaments, clothes and utensils relating to Thakar Ji Maharaj. During his life-time the testator was to remain the exclusive owner of this property. In case the testator was unable to liquidate the debt due from him, Rai Sahib Bishan Das, Sub-Registrar, Parmeshwari Das, plaintiff No. 1, Sant Ram plaintiff No. 2, Mool Chand and the second defendant Gosain Jamna Dass were appointed trustees to alienate any property to liquidate the liability. The trustees were also left the option of taking any other proceedings with the object of paying off the debt due from the testator. The properties were to vest in Shri Thakar Ji Maharaj

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of the Kalla Dhari Mandir, situated at Bahawalpur, who was to be regarded as the full owner of the property, and were to remain as Waqf Dharam Arth in perpetuity. The income of the property was to be spent in connection with the ceremonies and festivals relating to the said Shri Thakar Ji Maharaj. The second defendant Gosain Jamna Dass was declared to be the successor as *gaddi nashin* of the testator but he was not given any right to alienate the property. The five persons named as trustees were directed not only to pay the debts but to take charge of the future management of the property left and owned by the testator. The income of the property was to be utilised for the benefit and improvement of the temples. Out of the five trustees, Rai Sahib Bishan Dass was to act as President during his lifetime and after his death the surviving trustees could appoint a President by a majority of votes. Likewise, the surviving trustees by a majority could appoint trustees in place of those who died or those who could not fulfil their duties as such. The choice of trustees was limited to persons who were "Vishnu Dharmi Hindus". The trustees were also given the power to appoint additional trustees. All the trustees, except the second defendant, were not to get any remuneration for their work.

The testator did not long survive the execution of his will and died a few days later. On 14th of April, 1939, the five trusteees executed a power of attorney in favour of Pandit Ram Parshad, Bulaqi Ram, and Ram Chand, who were to act as Mukhtar-i-ams for conducting pending suits and taking all other steps necessary for that purpose. By another power of attorney executed by the same trustees on 29th of February, 1940 (Exhibit P. 49) the second defendant was appointed manager of the properties : he was to remain in charge of

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litigation and was empowered to make realisation of dues . On 3rd of August, 1941, Rai Sahib Bishan Dass died and in his stead the first defendant, the brother of the deceased, was appointed a trustee. Nothing of importance was done by the trust till 1944 when the Bahawalpur Durbar acquired certain lands belonging to the temple. In the acquisition proceedings it is admitted that the following sums were paid to the first defendant by the Government of Bahawalpur:—

	Rs.	
(1)	608-1-0	in respect of 2 *kanals* 18 *marlas* on 19.2.1945,—*vide* receipt Exhibit P. 52.
(2)	94,743-0-0	in respect of 51 *acres*, 6 *kanals* and 6 *marlas* of land on 19.2.45,—*vide* receipt Exhibit P. 53.
(3)	1,118-15-0	in respect of 3 *kanals* and 10 *marlas* of land, and
(4)	70,953-11-0	in respect of 31 *acres*, 5 *kanals* and 5 *marlas* of land,—*vide* receipt Exhibit P.54, executed on 19.2.1945.
Total	1,67,423-11-0	

It may be pointed out at this stage that the first defendant asserts that the compensation at first was fixed at a low figure and it was as a result of his intercession that the authorities raised the compensation money. It is the case of the first defendant also that he was asked to act as President by a resolution of the Board of Trust passed on 17th of June, 1944 (Exhibit P. 50) authorising him to receive the compensation moneys from the Town Planning Committee, Bahawalpur, in respect of Bindra and Ridda Villages. The receipts for all payments were executed by the first defendant. Out of the amounts so realised a sum of one lakh was expended for the purchase of victory bonds. The cheques in this connection were paid by the first defendant, and the last one of

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Rs. 16,288 (Exhibit P. 77 at page 155 of the printed paper book) was drawn in favour of the Imperial Bank of India, Bahawalpur, on 24th March, 1945. To complete this aspect of the case, it may be mentioned that another payment of Rs. 13,502 was received in respect of compensation on 24th of June, 1947.

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

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

The final payment received by the first defendant was on 23rd of February, 1948 of Rs. 1,02,616-14-3 by the sale of victory bonds in Bahawalpur of the nominal value of Rs. 99,800. According to the first defendant, the amount so received by him was paid to the second defendant who was the virtual owner and beneficiary of the trust. It is really this payment which set up the remaining trustees against the defendants who after calling upon them to render accounts brought the present suit for this purpose on 25th of

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October, 1950. In addition to relief for rendition of accounts the plaintiffs further asserted that the second defendant as Mahant of temple at Bahawalpur brought with him ornaments, clothes and utensils of the value of Rs. 15,000 when he migrated to India after the partition.

The suit was originally instituted in the Court of the Senior Subordinate Judge, Amritsar, before whom some preliminary objections were raised by defendants Nos. 1 and 2. In substance, it was pleaded that the suit should have been instituted under section 92 of the Code of Civil Procedure and could not proceed in its present form in the absence of the sanction of the Advocate-General. These objections formulated in two preliminary issues were decided against the defendants by the Senior Subordinate Judge, Amritsar, on the 27th August, 1951. A petition for revision from this order was taken to the High Court where it was decided by the then Chief Justice Sir Eric Weston on the 16th July, 1952. The learned Chief Justice on a consideration of the authorities cited before him especially *Mahant Pragdas ji Guru Bhagwandas ji* v. *Patel Ishwar Lalbhai Narsibhai* (1) *Appanna Poricha* v. *Narasing Poricha and others* (2) and *N. Shanmukham Chetty* v. *M. Gobinda Chetty* and *others* (3), came to the conclusion that the suit under section 92 had to be of a representative character and in the present instance the two plaintiffs as co-trustees having instituted a suit only against the other trustees in respect of internal management the provisions of section 92 were not attracted. In this view of the matter the petition for revision was dismissed. The suit was thereafter transferred by the District Judge from the Court of the Senior Subordinate Judge to the

(1) 1952 S.C.A. 281=A.I.R. 1952 S.C. 143.
(2) I.L.R. 45 Mad. 113.
(3) I.L.R. 1938 Mad. 39.

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Court of Shri Onkar Nath, Subordinate Judge, Amritsar, as the valuation for the purposes of court-fee and jurisdiction was Rs. 510. Eventually the valuation was changed to Rs. 4,900 and the suit was transferred to the Court of Shri Ram Singh Bindra, Sub-Judge, 1st Class, who framed on 12th November, 1953, the following five preliminary issues, two of these related to the question of maintainability of the suit under section 92 Civil Procedure Code :—

(1) Whether the plaint has been correctly valued for the purposes of court-fee and jurisdiction ?

(2) Whether the objection that the suit is not tenable in view of the provisions of section 92, Civil Procedure Code, is barred by the principles of *res judicata* ?

(3) If issue No. 2 fails whether the suit is hit by the provisions of section 92, Civil Procedure Code, and as such is not maintainable without compliance with the requirements of that section ?

(4) Whether the plaintiffs are bound to give in the plaint the particulars of the various movable and immovable properties mentioned in the plaint and if so what is the effect of their having not done that ?

(5) Whether this Court has no jurisdiction to try the suit even though admittedly defendant No. 1 is residing within the jurisdiction of this Court and *qua* defendant No. 2, this Court has already granted permission for instituting the suit against him here by its order, dated 18th February, 1953 ?

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nothing to suggest that the business of the trust was ever obstructed with the impediment of such an objection before the suit was filed. The first defendant himself performed the duties of the President after the death of his brother though it is stated by him that he was obliged to take over the office of the President as without such an authority there would have been great difficulty in receiving the compensation moneys from the Bhahawalpur Durbar. Be that as it may, there is abundant evidence to show that the appellant continued to work as the President of the trust right till the end and the second defendant himself was always associated in the working of the trust. The objection, if any, with regard to the competency of the testator to create the trust could have been raised by the second defendant alone. As stated by Mulla in his 'Principles of Hindu Law' (12th edition) at page 583, in discussing the position of *shebait* and *mohunt*:—

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

It was explained by their Lordships of the Privy Council in *A. R. R. M. V. Arunachallam Chetty and others* v. *Venkatachalapathi Guruswamigal* (7) that the properties of a *mutt* or *asthal* may be held by the spiritual head of the institution, or by the "trustees according to the usage and custom of the institution". Thus, there is nothing unusual in the properties of the *shebait* being held by the trustees,

(7) A.I.R. 1919 P.C. 62.

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for the benefit of the institution. The second defendant, Goshain Jamna Dass, was a natural successor of Gosain Brij Mohan Dass and he had agreed to his powers being trimmed by the managing committee consisting of the trustees. The first defendant who had acted as a trustee cannot now seek to unsettle the position which has obtained for many years by saying that the trust was invalid from its inception, and its terms are now unenforceable. Many and varied acts have been done by the trustees and no case has been made out to invalidate the activities of the trust on such tenuous grounds as have been raised on behalf of the appellant.

We also consider that the appellant is clearly estopped from raising an objection of this kind at this stage. Mr. Narula has emphasised many a time during the course of his argument that the appellant does not question the existence of the trust but only challenges the competency of the testator to create it. On his own showing the appellant since 1944 has been actively associated with the trust of which he had became a president. He received compensation moneys from the Bahawalpur Durbar, he represented the case of the institution on various occasions, attended meetings of the trust and there is correspondence on the file to show that his advice and assistance were sought on various matters. The appellant, according to him, had been a *sewak* of the Kala Dhari Mandir like his ancestors. The account of the moneys received on behalf of the Mandir was kept by the appellant and he does not deny having received large amounts for and on behalf of the institution. As held by a Division Bench of the Bombay High Court of Chief Justice Beaumont and Kania, J., *in Fazlhussein in Sharafally and others* v. *Mahomedally Abdul lally Sassoor and another*

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(8), "A trustee, who enters into possession of property ostensibly on trusts subsequently ascertained to be void cannot, however, retain the property for himself when the claim of the settlor and his heirs has become statute-barred. A trustee is not entitled when asked to account by his beneficiaries to challenge the trust under which he holds until he has obtained a proper discharge from the trust with which he has clothed himself". Mr. Narula's argument that it is still open to the first defendant to challenge the validity of the trust in a suit brought by trustees is neither cogent nor convincing. On our part we fail to see why as a matter of principle a trustee who cannot challenge the validity of a trust in a suit brought by a beneficiary should be allowed to do so in an action brought by the cotrustees. In our view, the issues of estoppel have been correctly decided by the trial Judge and it cannot acceptably be urged by the appellant after having participated in the activities of the trust since 1944 to say that Gosain Brij Mohan Dass had no authority to appoint trustees with powers of alienation of *shebait* property.

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

(8) A.I.R. 1943 Bom. 366.

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paragraph of the judgment where it is mentioned:—

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

The trial Judge considered that the amount decreed against the first defendant should not be made over to the plaintiffs trustees but was to be deposited in a Bank. The trustees no doubt had been at cross purposes for some time but there is no material before us to conclude that the trust had ceased to exist. It is urged that the second defendant has gone over to the temple at Bindraban and the affairs of the trust are practically at a standstill. This is indeed a fallacious argument which has been employed to defeat the purpose of the present suit which is to ask for accounts from the first defendant regarding the moneys which he had received on behalf of the trust. Secondly, it is urged that the property which was placed under the charge of the trustees was the Kala Dhari Mandir at Bahawalpur and this institution having been left behind in Pakistan there is now no property of the trust to be administered by the trustees. It has to be observed that the Kalla Dhari Mandir at Bahawalpur was not the only property which was placed in charge of the trustees. Residential houses in Amritsar City and the Mandir Kalla Dhari at Bindraban and the lands attached thereto are also the properties which are included in the preamble of the will Exhibit P. 3. Even if the Mandir at

Bahawalpur has ceased to be in the operative control of the trustees there is no reason to say that the moneys which had been received on behalf of this temple have become the private property of those who received them. In all fairness to the appellant, it must be said that his learned counsel has never disputed the accountability of the first defendant but only the right of the present plaintiffs to ask for accounts. All that need be said at this stage is that the right of the plaintiffs to bring the suit cannot be negatived merely on the ground that the main property of the trust has remained behind in Bahawalpur.

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

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September, 1946 (Exhibit P. 41), the affairs of the institution were discussed. It was mentioned that the appellant at that time did not know the address of Bhagat Sant Ram, to whom also he wanted to write a letter. Now, if the plaintiffs were not trustees what was the point in writing these letters ?

Mr. Narula asserts that the letter of resignation *per se* has the effect of bringing about a resignation. Support for this proposition is sought from the provisions of section 276 of the Companies Act, 1956, under which a person holding office as director in more than twenty companies is required within two months to resign his office as director in the other companies and such a resignation under sub-section (2) becomes effective on its despatch. We do not think that this is an apt anology because under the Companies Act the policy of the law is that a person will not be a director of more than twenty companies. His resignation from the companies other than the twenty he has chosen to remain a director of becomes operative from the date when it is despatched. The trustees as a whole could have accepted the resignations and it is an inescapable inference that the co-trustees having been permitted to act as such the resignation was not accepted and consequently became inoperative. We are much impressed by what has been stated by Mr. Gupta in answer to the argument on this aspect of the case. He has invited our attention to the various provisions of the Indian Trust Act in support of his submission that it was not only the right of plaintiffs to bring the suit but indeed their duty. A trustee, under section 12, is bound to acquaint himself with the trust property and "get in trust-moneys invested on insufficient or hazardous security". It is Mr. Gupta's contention

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that any failure on the part of the plaintiffs to ask for proper accounting and investing of the trust-moneys would have entailed legal liability upon themselves. Admittedly, the appellant had received heavy sums as trust-moneys and the plaintiffs are bound to see that they are properly invested. Reliance has also been placed on illustration (h) in section 15 of the Act under which a trustee is bound to deal with the trust property as a person of ordinary prudence and it is mentioned in the illustration that if A, a trustee for B, allows the trust to be executed solely by his co-trustee C, and C misapplies the trust property, A becomes personally answerable for the loss resulting to B. It is argued that if the first defendant has handed over the moneys which he received from the Bahawalpur State to one of the co-trustees, the responsibility of the plaintiffs is not in any way lessened. Section 20 requires that the liquid assets of the trust in the form of cash must be applied in securities which are specified in the various clauses. This duty of proper investment must be shared by all the co-trustees. Under clause (a) of proviso to section 26, a co-trustee would be liable for any breach of trust committed by the trustee where he has delivered trust-property to his co-trustee without seeing to its proper application. Finally, in section 46, it is said that "when there are more trustee than one, all must join in the execution of the trust except where the instrument of trust otherwise provides." It is not disputed that in the trust deed all the trustees are made equally responsible and the plaintiffs cannot be excused for mismanagement or misapplication of the funds by the trustees. Mr. Gupta contends that the dispute between the parties relates to domestic matters between the trustees and the interest in the trust of the plaintiffs is separate and distinct from that of the general public. If it is found by an appropriate

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Court that money have been received by the co-trustee, the duty of the plaintiffs is clearly to ask for accounts. In our opinion, the question of maintainability of the suit by the plaintiffs must be decided in their favour and we would accordingly uphold the finding of the trial Judge on this matter.

The final phase of the agreement on behalf of the appellant is concerned with the question whether the trial Judge should have passed a preliminary decree for accounts in the first instance and assuming that a final decree was within the competence of the Court objections have been raised with regard to certain items which have been disallowed. The gravamen of the plaintiffs' complaint is contained in paragraph 31 of the plaint where it is stated that the first two defendants "are in conspiracy with each other and want to misappropriate the property of the trust. Lala Bal Kishan Dass, defendant No. 1, without consulting other members of the trust, got the victory bonds, purchased with the money of the trust, transferred in his name, sold them and has received the proceeds thereof himself. He has not deposited the same in the account of the trust. Similarly, Gosain, Jamna Dass, too, wants to misappropriate the property and income of the trust." It is true that in paragraph 37, the prayer is that "a decree for rendition of the accounts may be passed with costs of the Court against defendant Nos. 1 and 2" but it is stated further that "a decree for the amount which is found due to the trust from defendants Nos. 1 and 2 on the basis of the accounts, may be passed in favour of the plaintiffs as trustees in the interest of the trust". In the written statement filed by the first defendant a number of pleas which have been disposed of in this judgment were taken but it has to be remembered that save for a comparatively minor item of Rs. 3,600,

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there is no dispute at all about the moneys which had been received by the first defendant. On this aspect of the case it is pleaded by the first defendant that whatever moneys he had received he handed over to the second defendant and in a final account-taking between him and the second defendant the receipt Exhibit D. 1, was executed by the second defendant on 16th of June, 1948. Mr. Narula contends on the basis of the Privy Council authority of *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi* (9), that a preliminary decree should first have been passed by the trial Judge. In that case, the plaintiff-appellant instituted a suit against the defendant who was his Dewan for a period of twenty years, on the allegation that moneys had been taken out of the treasury by the defendant and misappropriated. After discussing some of the items their Lordships of the Privy Council were of the view that this was a suit in which in the first instance a preliminary decree for accounts should have been passed. So far as we understand this is not an authority for the proposition that a final decree can never be passed in a suit for accounts. Indeed, this was made clear by Lord Hobhouse, who delivered the judgment of the Board, at page 133, where it is stated:—

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

It is indisputable that the general rule in a suit for accounts is to pass a preliminary decree first but the possibility of a final decree being passed straighaway cannot be ruled out. In a Division

(9) 13 I.A. 123.

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Bench judgment of the Madras High Court of Chief Justice Leach and Madhavan Nair, J., in *P. P. Palaniappa Chettiar and others* v. *S. A. Ramanathan Chettiar and others* (10), it was observed that "the law is well settled that in suits for an account a preliminary decree directing accounts to be taken should be passed before passing a final decree; though in cases where the facts are so simple, either by admission or proof, as to afford a ready decision so that the taking of accounts will be unnecessarily lengthening the proceedings without any benefit to the parties, a final decree may be passed without any preliminary decree." In a Division Bench of the Nagpur High Court of Chief Justice Stone and Clarke, J., in *Hukan Chand Goppulal Parwar and another* v. *Mohammadji Abdulji Musalman and another* (11), in which reference is made to the decision of the Privy Council in *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi* (9), it was again reiterated that a final decree may be passed in suitable cases where the passage of a preliminary decree would lead to or have no benefit to the parties.

The law appears, therefore, to be settled that a final decree may be passed in exceptional cases in a suit for accounts. In the last analysis, the problem must be resolved by examining the substantial dispute which is raised between the parties. Where explanations have to be given of the various items and no evidence has been led at all by the parties in the belief or expectation that a preliminary decree will be passed in the first instance, it would not be proper for a Court to pass a final decree. Now, in the present case it is admitted that Rs. 1,67,423-11-0 and Rs. 13,502 were received as compensation moneys, making a total of Rs. 1,80,925-11-0. Out of this amount, a sum of one

(10) A.I.R. 1939 Mad. 671.
(11) A.I.R. 1940 Nag. 207.

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lakh was expended by the first defendant in the purchase of victory bonds leaving a net balance of Rs. 80,925-11-0. Adding to this amount the interest amounting to Rs. 4,111-1-0 and Rs. 1,02,616-14-3 received as the proceeds of the sale of the victory bonds on 23rd of February, 1948, the sum in the hands of the first defendant comes to Rs. 1,87,653-10-3. To this have been added two further items of Rs. 5,500 and the other of Rs. 3,600 making an aggregate sum of Rs. 1,96,753-10-3 in the hands of the first defendant. The first defendant has only disputed the item of Rs. 3,600 which will be discussed a little later. It may be mentioned that the receipt of a sum of Rs. 1,02,616-14-3 is mentioned in Exhibit D. 1, itself which is a document produced by the first defendant. The case of the first defendant is that the second defendant has admitted the receipt on different occasions of three main items of Rs. 36,231-12-0. Rs. 44,675 and Rs. 1,05,627 on 9th April, 1947, 30th July, 1947 and 16th June, 1948, respectively. No doubt the second defendant has admitted both in the written statement and in his oral testimony before the local commissioner on 14th of August, 1954, that the sums mentioned in Exhibit D. 1, had been received by him. The learned Judge has rejected the evidence of the second defendant as that of a "simpletion". It is to be observed that in the first written statement filed by the second defendant the receipts of payments were not admitted and even in this Court his learned counsel Mr. Puran Chand has supported the findings of the trial Court. The position of the first defendant is that he has been serving as a President of the Board of Advisors in a spirit of devotion which he had for the institution generally and for the second defendant in particular. The moneys were paid to the second defendant whom the appellant regarded as the true beneficiary of the trust and something in the nature of

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a spirtual *guru*. The wishes of the second defendant were always a command for the first defendant. It is worthy of note that in paragraph 23 of the written statement the first defendant had taken up the following position:—

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

All that had to be proved by the first defendant was that he had actually made over the payments of the three items mentioned in the receipt Exhibit D. 1. He made a statement which is reproduced at page 95 of the paper book that he made payments to the second defendant by cheques which were drawn on the Banks at Amritsar, Bahawalpur, Multan, Simla, Dehra Dun, Ambala and Mussorie. The accounts of three of these banks have been produced and the learned Judge has come to the conclusion that only a sum of Rs. 9,630-2-0 consisting of 19 items was paid to the second defendant. On another occasion during his cross-examination the appellant stated that whenever he made payments to the second defendant *kacha* receipts were obtained (page 96 of the paper book). These *kacha* receipts were destroyed soon after the execution of the receipt Exhibit D. 1. He stated categorically that "excepting the said receipts, I have no other document showing that I had given the amounts to defendant No. 2". Now, the trial Judge has considered the documentary evidence

consisting of the receipt Exhibit D. 1 and the various cheques which have been drawn by the first defendant in favour of the second defendant on various banks and no other evidence being available the Court has passed a final decree after deducting the amounts found to have been paid over to the second defendant from the realizations made on behalf of the trust. When the accounting party admits all receipts as the first defendant has done in this case and all payments on the expenditure side for which he claims credit have been made by cheques and no other evidence is said to exist in respect of deductions claimed as deposed by the first defendant, the rule enunicated by Lord Hobhouse in *Hurronath Roy Bahadoor's* (9) case is fully attracted. We are, therefore, inclined to agree with the learned Judge in the circumstances of this case that there was no necessity for the passing of a preliminary decree prior to a final decree for accounts.

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

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and while not denying the position that the first defendant must have been put to great trouble and expenditure in realising the compensation moneys from the Bahawalpur Durbar, it is somewhat unfortunate for the appellant that this factor cannot be taken into reckoning in final account-taking.

If the statement of the second defendant were to be accepted that he has received all payments this of course would be an end of the matter. The learned trial Judge has given cogent reasons for rejecting the position taken up by the appellant and supported in the written statement by the second defendant. We are not prepared to say on the evidence that the second defendant was a 'simpleton' unable to understand his business and a tool in the hands of the first defendant and we would prefer to rest our decision on this aspect of the case on the broader consideration that the payments have not been proved. The principal evidence in support of the finding of the learned Judge is the statement of Parmeshwari Dass made as P.W. 13, who stated, *inter alia*, that Gosain Jamna Dass, who was adopted as a *Chela* of the testator on the day when the will was executed, "was of a simple nature and the testator wanted that the management of the Mandir as well as the property attached to it, should go on smoothly after his death". The contents of the will do not support the assertion made by Parmeshwari Dass that the object of the trust was to create a mechanism of efficient and smooth management because of the incapacity of Jamna Dass to carry out his duties. Apart from this statement there is no suggestion either in the oral statements made by the witnesses of the parties or in the documents that the second defendant was in any way a tool in the hands of the others. There is a letter of the 28th of April, 1946 (Exhibit P. 31), on the record addressed by the

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second defendant from Bahawalpur to the appellant. Now, this cannot be said to be a letter from a 'simpleton'. The financial affairs of the institution particularly are discussed fully and intelligently in this letter. He has made suggestions about the investment of moneys lying in the bank at Bahawalpur and is particularly anxious that nothing should be done which "is open to objection". He observed that if the bonds are transferred in the name of Thakar Ji "they will not be assessed to income-tax". The first defendant was accordingly asked to bring the bonds with him to Bahawalpur on his next visit to make the necessary change. A little later, it is stated in this letter:—

> "At present the income of Thakar Ji, is very meagre while its expenses are too heavy. For this reason we are forced to write to you time and again for money . . . we should devise some definite way to stop repeated demand of money from you."

We now approach a consideration of the all important question about the validity of the receipt Exhibit D. 1, which is the sheet-anchor of appellant's case. According to this receipt, a sum of Rs. 1,05,627 was received by the second defendant in presence of the first defendant on 16th of June, 1948. Apart from the statement of the second defendant there is no satisfactory evidence to prove the payment of the sum mentioned in the receipt in cash. The receipt which purports to have been executed by the scribe Hari Chand, D.W. 2, is not entered in his register. The amount of cash mentioned in the receipt was not paid to the second defendant in presence of the scribe. Raghuvansh Chopra, D.W. 3, who is a *sewak* of the second defendant, deposed that the signatures of defendant No. 2 were affixed on Exhibit D. 1, in his

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presence. The payment was, however, not made in his presence. Harnam Singh, D.W. 4, likewise deposed that the signatures of the second defendant were appended on Exhibit D. 1, in his presence. The money was not paid in his presence. Neither Raghuvansh Chopra nor Harnam Singh is a marginal witness of Exhibit D. 1. In the accounts of the various banks there is no suggestion that a heavy sum of Rs. 1,05,627 was obtained by the first defendant on 16th of June, 1948, or even on some date prior to it. Moreover, there is intrinsic evidence in Exhibit D. 1, to show that the entries relating to the receipt of Rs. 36,231-12-0 and Rs. 44,675 by the second defendant are not accurate. It is the case of the appellant that the sums were paid from the moneys which the appellant had transferred in his various accounts. From the detailed statements of the entries in the Imperial Bank of India, Bahawalpur and the Imperial Bank of India, Amritsar, it appears that fairly large transfers were made in the accounts of Ambala and Mussorie in the months of November, 1947, and September, 1949, but these dates are nowhere near the time when the heavy cash payments mentioned in Exhibit D. 1, are stated to have been made to the second defendant. Thus, a mere admission on the part of the second defendant to which he has not adhered in this Court provides a very tenuous support for the case of the appellant. Indeed, no reliance can be placed on the shifting sands of the whims of the second defendant who has twice changed his position in the course of this litigation.

We need not discuss at length the evidence of the various items which have been taken into consideration by the trial Judge. By and large the learned Judge, in our opinion, has not been unfair to the appellant as he has allowed all the items mentioned in the cheques to have been paid to the second defendant or his nominees. After-all, the

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appellant has not claimed anything more than the payments which have been made by him by cheques to the second defendant. We wish particularly to mention a few items on which arguments have been addressed before us. In the first place, there is an item of Rs. 5,000 which has been disallowed by the trial Judge. This was transferred to the Amritsar Central Co-operative Bank by the first defendant for the purchase of postal certificates. Now, if the postal certificates had been actually purchased they should be in the possession of the first defendant which he has been unable to produce in Court. If they are in his possession then the appellant should be able to have them encashed. This item, in our opinion, has been rightly disallowed. There is next a payment of Rs. 600 to Jamna Dass by cheque Exhibit P. 72. In our opinion, this item should have been allowed and we accordingly do so. The learned Judge has also disallowed an item of Rs. 3,600 to the first defendant. This is the subject-matter of issue No. 10. On the receipt side this is the only item which the appellant does not accept to have been received by him and Mr. Narula argued that when the payments of large sums of money have not been denied by him there was no reason to have told a falsehood regarding a comparatively minor item. This is not an illegitimate argument to urge and on the whole we do not find sufficient evidence to fix the liability to the first defendant for the sum of Rs. 3,600. According to the case of the plaintiffs, a sum of Rs. 3,600 was received by the appellant on account of lease money for a plot of land belonging to the trust for the erection of cinema building at Multan. It is true that the denial in paragraph 22 of the written statement by defendant No. 1 is not unequivocal, the exact words used being, "as far as I remember defendant No. 2 received a sum of Rs. 3,600 approximately, on account of the land under the cinema

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hall. I did not receive any money. If I had received any amount, I had paid the same to defendant No. 2", but he cannot be fastened with this liability on account of weakness in pleadings. In paragraph 22 of the plaint, it was asserted that the first defendant had leased out the land and the sum of Rs. 3,600 was received as advance money. The evidence in support of this aspect of the plaintiff's case is somewhat weak. In his statement made as P.W. 13, Parmeshwari Dass stated that both defendants Nos. 1 and 2 received Rs. 3,600 "by way of rent". The plaintiff Parmeshwari Dass was not certain as to which of the two defendants had received this amount. Thus, the problem is not resolved by the statement of the plaintiff himself and we are unable to say with any degree of certitude that the sum of Rs. 3,600 had been received by the first defendant. The sum of Rs. 3,600 not having been admitted to have been received by the appellant does not find a mention in Exhibit D. 1. So far as defendant No. 2 is concerned, he stated in paragraph 22 of his written statement that he himself had leased out the land belonging to Thakur Jee Maharaj for construction of a cinema and received the advance money. It was asserted further that "Lala Bal Kishan Dass did not receive any money". We, therefore, think that credit should have been given to the first defendant for the item of Rs. 3,600. We further, consider that the item of Rs. 50 (page 123 of the paper book) should also have been allowed. This sum is said to have been paid to Pt. Hans Raj, who was the Mukhtar of defendant No. 2. It appears that the learned Judge was influenced by the consideration that Pt. Hans Raj is shown as the personal Mukhtar of defendant No. 1. Likewise, an item of Rs. 250 paid to Pt. Madan Lal, who is the brother of the second defendant, should have been allowed. Thus, we consider that in

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addition to the sum of Rs. 9,630-2-0, four further items should be credited to the account of the appellant, namely, Rs. 600, Rs. 3,600, Rs. 50 and Rs. 250. The decree against the appellant would, therefore, be reduced to Rs. 1,82,623-8-3.

It may be observed in passing that Mr. Dalip Chand Gupta had submitted that the appeal had abated, the legal representatives of Parmeshwari Dass plaintiff, who died during the pendency of the appeal not having been impleaded as respondents. It is argued that a decree passed against Parmeshwari Dass in his personal capacity would fall on his estate. In our view, there is no force in this contention. Indeed, this objection should fail on the short ground that new appointments have been made in place of the trustees who are dead and the new trustees have been brought on the record.

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

MEHAR SINGH, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before Prem Chand Pandit, J.

RANJIT SINGH,—*Petitioner*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 74 of 1961:

1962

October, 19th.

Land Acquisition Act (I of 1894)—S. 5—A—"after the issue of the notification"—meaning of—S. 6—Notification