was in fact the support of *fakirs* of a particular sect and the propagation of the tenets of that sect.

The facts of this case were as follows:—

There was a Nanakshahi *math* in the village of Baksar. The defendant appellant was the *mahant* of the *math* and was the *gaddi-nashin*. A criminal charge under section 466 of the Indian Penal Code was brought against him and he was convicted of the charge by the lower court. During the pendency of an appeal by him against that order to the High Court, the *mahants* of the neighbouring *maths* assembled and deposed him from the *gaddi* as an improper and unfit person. It was admitted that succession to the *gaddi* was by election. The High Court acquitted the defendant on appeal and quashed the sentence. He went back and took possession of the *gaddi*, turning out the plaintiff Darshan Das, whom the neighbouring *mahants* had installed on the *gaddi* in his place.

Darshan Das with certain other persons brought this suit under section 539 of the Code of Civil Procedure, 1882, for the deposition of the defendant. The defence was (1) that the endowed *math* was not in the nature of a public charity and the position of the defendant was not that of a trustee. (2) If the electoral college was competent to depose him, he ceased to be a trustee from the date of his deposition, and as a trespasser the suit was not maintainable against him. (3) There was no breach of trust. The plaintiff himself was not a fit and proper person to be put on the *gaddi*.

The suit was decreed by the court of first instance, and the defendant appealed to the High Court. The appeal came up originally before a bench of the Court, consisting of KARAMAT HUSAIN and CHAMIER, JJ. The former was for allowing the appeal and dismissing the plaintiffs' suit. The latter would have directed further inquiry by the lower court. The result was that the appeal was dismissed. The defendant thereupon appealed under section 10 of the Letters Patent from the judgement of Chamier, J.

Babu *Surendra Nath Sen*, for the appellant:—

Nothing is known about the origin of the *math*. It is not a public charity, but a private institution—the property being endowed in favour of the *mahant* and his successors in office. A *firman* from the Moghal Emperor, dated 1754, is on record. It

1912

MAHANT PURAN ATAL v. DARSHAN DAS.

gave property to one Must Ram, the then *mahant* of the *math*, and his descendants. Descendants meant disciples. There is nothing to show that Must Ram created a trust. The *firman* is in favour of the *sajjada-nashin*. What that meant is explained in *Ishtiaq Ahmad* v. *Saiyid Massaod Ahmad* (1). A Muhammadan Emperor could not have created a public charity in favour of a Nanakshahi *math*. He cited Lewin on Trusts, 12th ed., 18. His mistaken notion of his position is not of itself material; *Annaji Raghunath Gosavi* v. *Narayan Sitaram* (2), *Sammantha Pandara* v. *Sellappa Chetti* (3), *Konwar Doorganath Roy* v. *Ram Chunder Sen* (4).

The *mahant* of a *math* is not a trustee; *Vidyapurna* v. *Vidyanidhi* (5). There is a distinction between the manager of a temple and the *mahant* of a *math*; Tagore Lectures for 1908, page 226. Defendant was deposed and ceased to be a trustee.

The Hon'ble Pandit *Madan Mohan Malaviya* (Pandit *Ramakant Malaviya* with him), for the respondents, was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit purporting to be brought under section 539 of Act No. XIV of 1882. The plaintiffs allege that there was a charitable trust for public purposes; that they were interested in that trust; that the defendant, Puran Atal, had for some time been a *mahant* and *gaddi-nashin* of the trust; that he had been deposed as being unfit for the office and the plaintiff, Darshan Das, had been duly installed in his place, and that the defendant, Puran Atal, had retaken possession of the trust property. Various reliefs of the nature provided for by section 539 were then prayed for.

The first question which arose was whether or not sanction had been given according to the provisions of section 539. The court held in favour of the plaintiffs and that question has not been argued here.

The next question, which is the most important question in the case, was the question whether or not a public charity existed within the meaning of section 539. The learned Judge held that such a trust did exist. He then went on to hold that the defend-

(1) (1909) 6 A. L. J., 632. (3) (1879) I. L. R., 2 Mad., 175.
(2) (1896) I. L. R., 21 Bom., 556. (4) (1876) I. L. R., 2 Calc., 341.
(5) (1903) I. L. R., 27 Mad., 435.

ant, Puran Atal, was not a fit and proper person to be the *gaddi-nashin*, that he had been duly deposed, and that the plaintiff, Darshan Das, had been duly installed in his place and was a fit and proper person to hold the office. The learned Judge accordingly framed a decree removing the defendant, Puran Atal, from the management of the property and directing that the property should be placed under the management of the plaintiff, Darshan Das, who was to render an account, at certain periods, of the trust property.

From this decree the defendant, Puran Atal, appealed. On the case coming before a Bench of this Court the learned Judges were not agreed on the question whether or not a "public charitable trust" existed within the meaning of section 539 of Act XIV of 1882. Hence the present appeal under the Letters Patent.

Section 539 of Act XIV of 1882 is not very grammatically expressed. The words are :—"In the case of any alleged breach of any express or constructive trust created for public charitable or religious purposes." If we were to read these words according to the ordinary rules of construction it would mean "in the case of a breach of trust created for public purposes, or religious purposes." It would appear, however, that the section has been construed as if the word "public" qualified the word "charitable" and the word "religious." In the new Code the words have been altered as follows :—"In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature." We propose to assume for the purposes of this case that the trusts referred to in section 539 of the old Code are same as those referred to in section 92 of the new Code, and that accordingly it is necessary before the plaintiffs can claim the reliefs they seek, that they should show that a trust created for a public purpose of a charitable or religious nature exists. The evidence has been very fully gone into by the court of first instance and also in the judgements of our learned colleagues. It seems very clear that there exists a certain foundation which is called the "Baksar" foundation. This foundation owns a number of villages, including the village Baksar. For very many generations a *nanakshahi fakir* has occupied the *gaddi* and managed the property. The defendant, Puran Atal, has put

1912

MAHANT PURAN ATAL v. DARSHAN DAS.

in evidence a document which purports to be a grant of one of the villages, namely, the village Kandaha. This document, assuming it to be genuine, is dated some time about the year 1754 A. D., and purports to be a grant from the Emperor Alamgir II in favour of one Must Ram, a *nanakshahi fakir*. With the exception of this document, the original grants, if such there were, are no longer forthcoming. The learned Judge has doubted the genuineness of the document of 1754, and there are grounds for such doubt. In the year 1818 or 1819, in a proceeding to which we shall more fully refer presently, a number of *sanads* connected with the property held by the Baksar *gaddi* are stated to have been filed, and this document was not amongst those *sanads*. A charitable trust might be created by a grant for the express purpose or a grant having been made in favour of an individual or class of individuals, that individual or class might, after obtaining the grant, create a charitable trust. In the present case no evidence of an original grant for a charitable purpose from a ruler, save as before mentioned, is forthcoming, nor is there in evidence any instrument expressly creating a charitable trust. We have it, however, clearly established by evidence that for very many generations the property belonging to the Baksar *gaddi* has been held for the purpose of supporting and maintaining *fakirs*, entertaining visitors and for the giving of alms. There is no evidence that the property has ever been held for any other purpose. In addition to this we have the evidence afforded by the proceeding which took place about the year 1818 or 1819. The document relating to this proceeding is dated the 5th of July 1819. At that time the British Government, through the Collector, was considering what should be done in respect of the revenue and succession to the property belonging to this very *gaddi*. Questions were put to the *mahant* who claimed to be the *gaddi-nashin* at that time. His answers amount to express declarations that the property was held for the purpose of supporting and maintaining *fakirs* and visitors and for charitable purposes. It would appear that on the strength of such declarations as to the purposes for which the property was held, the latter has ever since been held as *muafi*, free from Government revenue. Again, in the year 1851, we have a deposition of the *mahant* for the time being, in which it is declared that the

property has always been held generation after generation for the purposes we have already mentioned. Questions connected with the succession to the property and the rights of *fakirs* have from time to time come before the court, and it has always been assumed that the property was the property of the *gaddi*, managed by the *gaddi-nashin* for the time being and held for charitable purposes.

In our opinion, the Court, on this clear and uncontradicted evidence, not only is entitled to presume, but ought to presume the existence of a charitable or religious trust. The next question is whether this trust was for a "public purpose" within the meaning of the Code. The property was held for the support of *fakirs*, entertaining visitors and giving alms and generally for charitable purposes. Even if we assume that the main purpose of the trust was to support *Nanakshahi fakirs* and to spread the religion founded by *Nanak*, we think that the trust was for a "public purpose" within the meaning of the section. This was the opinion of the learned District Judge and also of one Judge of this Court. In our opinion the case was a case coming under section 539.

The next question which arises is whether or not on the evidence we ought to hold that the conduct of the defendant, Puran Atal, was such as to render him unfit to hold the office of *gaddi-nashin* and to entitle the plaintiffs to relief in this Court. A large amount of evidence was given which went to show that Puran Atal was a man of immoral character. Contrary to the rules of the priesthood, he kept a woman. He had also created a scandal by his intrigues with a *chamar* woman. There was also evidence to show that he had spent the income of the property in building houses for the members of his family and in giving ornaments to his mistress. There was evidence to show that he neglected to devote the income to charitable purposes. The court of first instance believed this evidence. This Court is always reluctant to overrule the decision of the court of first instance on a pure question of fact, particularly where that court has had (as in the present case) the advantage of seeing and hearing the witnesses upon both sides. In the present case there is a strong additional reason why we should hesitate to interfere with the decision of the court below upon this question. It would appear that Puran Atal had been deposed by a large number of the *fakirs* of the *Nanakshahi* sect—not only the

1912

MAHANT PURAN ATAL v. DARSHAN DAS.

fakirs interested in his own particular *gaddi*, but also the *fakirs* of the neighbouring *gaddis* of the same sect. In our opinion we ought to accept the finding of the court of first instance on this question.

It is next said that the *mahants* who purported to depose Puran Atal from the *gaddi* had no power to do so. The learned District Judge was satisfied that there was a usage which entitled the *mahants* to depose a *gaddi-nashin* for misconduct, and that they were entitled in the same way to elect a successor. So far as the election of a successor is concerned, it would appear that Puran Atal owes his seat on the *gaddi* to selection carried out in the very same manner in which the plaintiff, Darshan Das, was selected in the present case, the only difference being that in the case of Puran Atal his immediate predecessor disappeared, it is supposed, in consequence of his being murdered.

Some slight effort has been made to show that Darshan Das is not a fit and proper person to be a *mahant*. This was no part of the defendant's original case. Darshan Das has been selected by the body of *fakirs* as a fit and proper person, and we agree with the learned District Judge that it is well, so far as possible, to accept the selection of the sect as to the person who ought to occupy the *gaddi*.

In our opinion the appeal altogether fails. We accordingly dismiss it with costs.

Appeal dismissed.

FULL BENCH.

1912
April 24.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

RASHID-UN-NISSA (DEFENDANT) *v.* MUHAMMAD ISMAIL KHAN AND ANOTHER (PLAINTIFFS.)*

Mortgage—Decree on mortgage - Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable.

A mortgagor died leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgage from the mortgagee, and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor, and, inasmuch as they were themselves owners of part of the mortgaged property, framed their suit as one

* First Appeal No. 330 of 1910 from a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 16th of June, 1910.