For the above reasons we accept this appeal and restore the decree of the trial court with costs to the appellant.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

1929 *March,* 6.

MAHADEO BHARTHI (PLAINTIFF) *v.* MAHADEO RAI AND ANOTHER (DEFENDANTS).*

Act No. XIV of 1920 (*Charitable and Religious Trusts Act*), *sections* 5 *and* 6—*Denial of trust—Order holding that trust exists and calling for accounts—Decision whether conclusive as to existence of trust—Subsequent suit for declaration that the property is not held in trust—Jurisdiction.*

On an application under section 3 of the Charitable and Religious Trusts Act, 1920, the opposite party denied the existence of the alleged trust. He, however, did not give the undertaking, mentioned in section 5(3), to institute within three months a suit for declaration. The District Judge, after making an inquiry, passed an order holding that there was a trust to which the Act was applicable and directing the opposite party to render accounts. About a month later, the opposite party filed a regular suit for a declaration that the property was his personal property and not subject to any trust to which the Act could apply. On the question whether the suit was maintainable, *held*—

Per NIAMAT-ULLAH, J:—Act XIV of 1920 nowhere provides expressly or impliedly that the order of the District Judge passed under section 5 is conclusive as to the existence of a trust falling within the scope of the Act, and cannot be challenged in a regular suit before a court of competent jurisdiction; nor does the order fulfil all the requirements of the rule of *res judicata*, so as to be a bar to the subsequent suit.

If the alleged trustee fails to avail himself of the opportunity given by section 5(3) of the Act to bring a suit before the order is passed by the District Judge, he no doubt subjects himself to two disadvantages, namely (1) that a suit under section 92 of the Civil Procedure Code can be brought against him without the permission of the Advocate-General, and (2) that he becomes bound to submit accounts for the last three

*First Appeal No. 133 of 1926, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 16th of January, 1926.

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years; but it remains open to him to invoke the jurisdiction of a competent court to decide the question of title as to whether he holds the property in his own right or as a trustee of a trust within the scope of the Act.

Per MUKERJI, J.:—The maintenance of a suit so as to nullify the effect of section 6 of the Act is not permissible.

The Act offers an ample chance, before the order is passed by the District Judge, for a regular suit being instituted for the determination of the question whether the property is or is not trust property; but if this opportunity is not availed of and an adverse order is passed by the District Judge, the result is that a non-compliance with it is, by section 6, deemed to be a breach of trust. If, thereafter, the subsequent suit is successful, the result would be two conflicting positions.

Dr. *K. N. Katju* and Messrs. *P. L. Banerji* and *Shah Zamir Alam*, for the appellant.

Messrs. *B. Malik* and *Shiva Kumar Roy*, for the respondents.

NIAMAT-ULLAH, J.:—The suit out of which the present appeal has arisen was brought by the plaintiff appellant Mahadeo Bharthi in the court of the Subordinate Judge, Ghazipur, for a declaration that the property specified in list A annexed to the plaint is his private property in absolute ownership, and in the alternative for a declaration that it is not held in trust created for public purposes of a charitable or religious nature governed by Act XIV of 1920. It was necessitated by an order, dated the 31st of August, 1925, passed by the District Judge of Ghazipur under section 5 of Act XIV of 1920 (Charitable and Religious Trusts Act), declaring the property in dispute to be held in trust of a charitable and religious nature existing for public purposes. Mahadeo Rai *alias* Mool Bharthi and Sheo Prasad Pandey, the respondents to this appeal, were impleaded as defendants to the action, as the aforesaid order was obtained by them on their application for examination of accounts of the alleged trust property.

The defendants put forward two main defences, viz. (1) that the suit is not maintainable in view of the order of the District Judge, already referred to, and (2) that the properties in question are in fact held by the appellant in trust for public charitable and religious purposes, being dedicated to the Math of Sanyasis at Nasirpur.

The lower court ruled that the suit before it was not barred by the order of the District Judge, but held on the merits that the trust set up by the defendants has been established. The plaintiff's suit was accordingly dismissed.

At the hearing of the appeal the plea in bar of the suit was reiterated by the defendants. This, being in the nature of a preliminary objection going to the root of the case, should be first examined and the appeal can be considered on facts if that plea fails.

On a careful consideration of the provisions of Act XIV of 1920, I am of opinion that the plea has no force.

The object of the Act is "to provide a more effectual control for the administration of charitable and religious trusts." The scope of the Act, as stated in the Pre-amble, is "(1) to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature and (2) to enable the trustees of such trusts to obtain the directions of a court on such matters and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts."

Section 3 enables one interested in the trust to obtain from the court an order: "(1) directing the trustee to furnish the petitioner through the court with particulars as to the nature and objects of the trust and of the value, condition, management and application of the subject-matter of the trust, and of

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the income belonging thereto, or as to any of these matters, and (2) directing that the accounts of the trust shall be examined and audited: Provided that no person shall apply for any such direction in respect of the accounts relating to the period more than three years prior to the date of the petition."

The petition shall specify, as far as may be, the particulars of the audit which he seeks to obtain (section 4).

The court, if satisfied *prima facie* that the alleged trust exists, shall fix a date for hearing, calling upon the trustee to show cause [section 5(1).]

Section "5(2). On the date fixed for the hearing of the petition . . . the court shall proceed to hear the petitioner and the trustee, if he appears, ... and shall make such further inquiries, if any, as it thinks fit. The trustee may, and if so required by the court shall, at the time of the first hearing or within such time as the court may permit present a written statement of his case. . . . .

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the court shall order a stay of the proceedings, and if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the court which conflicts with the final decision therein.

(6) Save as provided in this section the court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust."

Section "6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General."

Section 7 enables a trustee to obtain "opinion, advice or direction of the court on any question affecting management or administration of the trust property and the court shall give its opinion, advice or direction, as the case may be, thereon: provided that the court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal." The court is to give opportunity to all interested persons of being heard before giving such opinion, advice or direction [sub-section (3) of section 7.]

Section 8 empowers the court to make appropriate orders for payment of costs etc., from the income of the trust property.

Section 11 makes certain provisions of the Code of Civil Procedure applicable to proceedings under this Act

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and declares that the provisions of that Code relating to execution of decrees shall apply to the execution of orders as to costs etc., under this Act.

Section 12 enacts that "no appeal shall lie from any order passed or against any opinion, advice or direction given under this Act."

I have summarized the entire framework of the Act which consists only of twelve sections and have quoted in full the provisions with which we are immediately concerned. It is quite clear to my mind that it provides a summary remedy to persons interested in public trusts of a religious or charitable nature to obtain, through court, information relating to the disposal of income from trust property. The District Judge can exercise his powers only if he is satisfied that the trust is of such a character as would make the provisions of that Act applicable. It is not the object of the Act to obtain to obtain decision of questions relating to the very existence of such trusts, except in so far as it may be necessary for the District Judge to ascertain if he has jurisdiction under the Act. The provision which entitles a person to obtain determination of the question whether the trust exists is for his benefit; and if the alleged trustee denies the existence of the trust and desires determination of that question by a court of competent jurisdiction, it is imperative that the District Judge should give him a reasonable opportunity of doing so. If he fails to avail of that opportunity, he must abide by the decision of the District Judge on that question passed in a summary proceeding and for a given purpose, viz., that the person applying for inspection and examination of accounts should inspect and examine, through court, the accounts, for a period not exceeding three years, relating to the trust property. By not availing himself of the opportunity which the Act affords him to obtain the determination of such a disputed question by a competent

court the alleged trustee subjects himself to two disadvantages, viz. (1) a suit under section 92 of the Civil Procedure Code can be instituted against him without the formality of the permission of the Advocate-General, —a corresponding advantage conferred upon the person interested in the trust who moved the court and who could not otherwise have instituted a suit under section 92 without the preliminary sanction of the Advocate-General, and (2) the alleged trustee must submit to the examination of his accounts as ordered by the District Judge, without any further objection on the ground that the property in his hands was not held in trust for a public religious or charitable nature. Till such time that he is armed with a declaration by a court of competent jurisdiction that the property is not so held by him, he will continue to be subject to the provisions of Act XIV of 1920. He will also continue liable to be sued under section 92 of the Civil Procedure Code, which suit if instituted may result in his removal or in the court having jurisdiction giving certain directions or imposing conditions on his continuing to hold the office of the trustee if he is found to be one. But it is always open to him to invoke the jurisdiction of a court competent to entertain suits relating to questions of title and obtain a declaration of his right to the property if he is otherwise entitled to it.

The argument, that a regular suit instituted after the alleged trustee failed to institute a suit for which permission had been granted to him under section 5 of Act XIV of 1920 is not maintainable, is not based on any rule of law contained either in that Act or in any other enactment. It must be conceded that there is no express provision of law to that effect. There is no implication of bar arising from any part of Act XIV of 1920. The Act nowhere provides expressly or impliedly that

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the order of the District Judge passed under section 5 is conclusive and cannot be challenged in a regular suit before a court of competent jurisdiction. The consequences ensuing from such an order have already been mentioned. It is an elementary rule of law that a plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. The test, in my opinion, is whether the order of the District Judge passed under section 5 of Act XIV of 1920 fulfils all the requirements of the rule of *res judicata* as contained in section 11 of the Code of Civil Procedure. If it does not, the subsequent regular suit is not barred and is maintainable. Assuming that the question whether a trust of a public religious or charitable nature exists as regards the property in dispute was a question not merely incidentally in issue but was directly and substantially in issue before the District Judge exercising his powers under Act XIV of 1920, which I greatly doubt, the proceedings before the District Judge were not proceedings in "suit" in which he could pass any decree in favour of any of the contending parties. His order, as regards *res judicata*, is no better than one passed in any miscellaneous proceedings. The District Judge may well decide under section 5, Act XIV of 1920, that no trust exists and may dismiss the application for examination of accounts relating to the alleged trust property. It seems to me that the applicant may, in that case, institute a declaratory suit or a suit under section 92 of the Code of Civil Procedure with the permission of the Advocate-General, challenging the order of the District Judge, which cannot bar such a suit. It is not logical to maintain that the order is not conclusive against him but is conclusive against the alleged trustee if he is found by the District Judge to be a trustee. Looking to the summary character of the pro-

ceedings, it is not conceivable that the legislature should have intended to give conclusive effect to the order passed by the District Judge under section 5, Act XIV of 1920. It will be observed that he is not obliged to hear all such evidence as the parties may adduce. He is at liberty to hear such evidence as he "thinks fit". The provisions of the Civil Procedure Code regarding the mode of recording evidence have not been made applicable to the proceedings under the Act. Many other provisions of that Code of a salutary nature are not applicable to proceedings under the Act. The District Judge has the last word on the subject. No appeal lies from his orders under it.

I do not think that any embarrassing results would ensue, if the subsequent regular suit is held maintainable, because of two so-called inconsistent positions, viz. (1) the trustee being "deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure" and (2) the decree in the subsequently instituted regular suit, if successful, declaring that the claimant is not a trustee at all. Technically a suit under section 92, Civil Procedure Code, will lie without the permission of the Advocate-General, as provided by section 6 of Act XIV of 1920, in spite of a decree declaring the right of ownership of the claimant alleged to be trustee. If in spite of such a decree any one takes it upon himself to institute a frivolous suit under section 92 of the Civil Procedure Code, he may do so and take the consequences. As pointed out by me already, the effect of a person failing to institute the suit is no more than to relieve a person or persons interested in the trust of the necessity of obtaining the permission of the Advocate-General for instituting a suit under section 92 of the Civil Procedure Code and to subject the alleged trustee to the harrassment of having his accounts inspected, though he is in fact not a trustee. After he has obtain-

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ed a decree of a competent court declaring his right of ownership, any subsequent application under section 3 of Act XIV of 1920 will have to be dismissed on production of a copy of such a decree at the initial stage provided for by section 5 (1) of that Act. It should be borne in mind that the Act does not empower the District Judge to pass any order directing the alleged trustee to do something of a recurring nature. He can order the examination of his accounts for three years. Such an order has to be obtained afresh on every subsequent occasion and the District Judge may or may not pass it according as the circumstances proved before him justify it or not.

Any argument based on analogy drawn from the provisions of sections 199 and 202 of the Agra Tenancy Act of 1901 is unsound. It should not be overlooked that those sections refer to questions of proprietary right arising in suits for ejectment against an alleged tenant. Power has been conferred upon the revenue court to determine questions of proprietary title on failure of a party to institute within three months a suit in a civil court for determination of such question. The decree passed in such a suit operates as *res judicata*. The essential distinction between a decree passed by a revenue court under sections 199 and 202, if conditions giving it the jurisdiction to decide questions of proprietary title exist, and an order of the District Judge under section 5, Act XIV of 1920, is that the former is a decree passed by a court of competent jurisdiction, whereas the latter is only an order passed in summary proceedings, which order has not the force of a decree and has the effect of merely withdrawing certain restrictions imposed on the persons desirous of instituting suits under section 92 of the Code of Civil Procedure.

For the reasons detailed in the foregoing paragraphs I entertain no doubt that the suit out of which the pre-

sent appeal has arisen is maintainable and was rightly tried out on the merits.

As regards the existence of a trust of a religious or charitable character, I have no hesitation in accepting the finding arrived at by the court below. [The judgment then discussed the evidence and continued.]

Considering all the circumstances of the case as they appear from oral and documentary evidence, I am of opinion that the finding of the learned Subordinate Judge that the property in dispute is not held by the plaintiff appellant in private ownership, and that it is property belonging to *math* Nasirpur of which the plaintiff appellant is the mahant, is correct.

In view of my finding stated above, I dismiss this appeal with costs.

MUKERJI, J. :—There are two points in this appeal. The first point is one of law, and is whether the suit is at all maintainable.

The appellant, who was the plaintiff in the court below, was called upon, at the instance of the defendants in the suit, to furnish an account of certain properties which were described by the then applicants as *waqf* property to which Act XIV of 1920 applied, namely, property endowed for public purposes of a charitable or religious nature. The plaintiff appeared in answer to the notice issued by the learned Judge and pleaded that the property in his hands was not at all *waqf*. The learned District Judge allowed an adjournment. The plaintiff did not give an undertaking to institute a suit within three months, as he could do, under sub-section (3), section 5, of Act XIV of 1920. The application was heard and tried on its merits, on such evidence as the learned District Judge had before him. He held that the property was *waqf* and belonged to a *math* and the present plaintiff was bound to render accounts. This

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was on the 31st of August, 1925 (see page 81 of the record). Thereupon, on the 29th of September, 1925, the plaintiff instituted the suit out of which this appeal has arisen, on the allegation that the property was the personal property of his spiritual ancestors through whom he inherited and of himself, and that in any case there was no trust created for public purposes of a charitable or religious nature governed by Act XIV of 1920.

The defence was that the suit was not maintainable and that the property appertained to a *math* and was of a character to which Act XIV of 1920 applied.

The learned Subordinate Judge, on the point of law, held that the suit was maintainable. On the question of fact he held that the property was *math* property held by the defendant as trust property for public religious and charitable purposes. The learned Subordinate Judge did not use the word "public" in the concluding portion of his judgement, but that is, I understand, what he meant.

The first question is whether the suit is maintainable, for if the suit is not maintainable the appeal must fail, whatever may be the finding on the issue of fact.

If we examine the entire Act XIV of 1920, we shall easily find the whole scheme and object of the Act. The Act starts by saying that it is expedient to provide facilities for obtaining of information regarding trusts created for public purposes of a charitable or religious nature and to enable trustees to obtain directions of the court. Then it says that any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature, may apply by petition to a District Judge for several purposes. Among these purposes is one to call upon the trustee to submit accounts to be examined and audited. Section 5 then says that the court, on receipt of an application,

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may take some preliminary evidence to satisfy itself on certain points, mainly directed towards finding out whether the application is a proper one or not. The court, if it is satisfied as to the *bona fides* of the application, would issue a notice to the other side. The opposite party then might come and either admit the allegations and agree to submit the accounts, or deny the existence of a trust, or, admitting the trust, may deny that it is for public purposes of a charitable or religious nature. The opposite party may, if he likes, either submit to an inquiry by the court or may offer to institute a suit for a declaration in support of his case. If he offers to institute a suit, the court is bound to stay its hand and ultimately dispose of the application in accordance with the result of the suit. If, however, no offer is made to institute a suit, or the offer made is not carried out by the institution of a suit within three months, the court is bound to determine the question before it. As a result of the court's inquiry, the court will either dismiss the application or pass such order as it thinks fit. If the court decides against the opposite party and calls on him to submit an account and if he fails to submit an account, the consequence that would follow would be that the opposite party would "be deemed to have committed a breach of trust affording ground for a suit under section 92 of the Code of Civil Procedure, 1908". The section then further provides that for the institution of such a suit, previous consent of the Advocate-General would not be necessary. We find, therefore, that the result of an adverse order by the District Judge is that the opposite party is, by law, to be deemed to have committed a breach of trust. This charge against the opposite party necessarily involves two findings, namely that the property in respect of which an order for account is passed is trust property of the nature to which Act XIV of 1920 applies, and that the opposite party,

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by failing to submit accounts, has committed a breach of trust so as to justify the maintenance against him of a suit under section 92 of the Civil Procedure Code.

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Now, if no offer is made to institute a suit under section 5, sub-section (3), or if an offer having been made is not complied with, and if as the consequence of an order for furnishing account being disputed the consequences will follow, what would be the result if, in a subsequent suit instituted by the opposite party to the application before the District Judge, he succeeds in his suit? The result would be that there would be two conflicting positions. On the one hand, a justifiable ground has come into existence for the maintenance of a suit against the opposite party and it will be taken as settled that he has committed a breach of trust. On the other hand there is the declaration given, in the subsequent suit, that the opposite party (the plaintiff in the subsequent suit) is not liable to render an account at all and, therefore, no suit can be maintained against him under section 92 of the Civil Procedure Code.

This is a position which is hardly imaginable. On the other hand, the scheme of the Act offers an ample chance for a regular suit being instituted for the determination of the question whether the property is or is not an endowed property for a public purpose of a charitable or religious nature. The District Judge is required to satisfy himself on the points before he issues notice. Then the opposite party is given a chance to have the matter litigated through the proper courts. In the circumstances that have happened in this case, the plaintiff appellant has not availed himself of his opportunity of instituting a suit, and now that an order has been made against him he brings a suit. As I have already pointed out, what would be the position of the plaintiff appellant if his suit succeeds? How will he be able to wipe out

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the consequences which have followed under section 6 of Act XIV of 1920? If the decree in his favour cannot wipe out the consequences provided by section 6 of Act XIV of 1920, the subsequent decree in his favour is useless. I cannot conceive that a party is to have two chances at a regular litigation in the courts, one under section 5, sub-section (3), of Act XIV of 1920 and another, at any time thereafter, as and when he chooses. If one can institute a suit at any time he likes, what is the good of giving three months' time as provided by sub-section (3) of section 5 of the Act?

Sections 199 and 202 of the Agra Tenancy Act of 1901 contained a similar provision as to institution of a suit. It was held that if no suit was instituted within the time allowed, a suit instituted after the three months' time allowed was to be treated as time-barred. The ordinary period of limitation was held to be suspended. See *Banwari Lal* v. *Mst. Gopi* (1), also *Ganga Chamar* v. *Bindeshri Rai* (2).

Without deciding, definitely, the question of limitation, I am decidedly of opinion that the maintenance of a suit so as to nullify the effect of section 6 of Act XIV of 1920 is not permissible.

On the merits I agree with my learned brother that the plaintiff has failed to prove the case set up by him

In the result, I agree in dismissing the appeal with costs.

(1) (1907) I.L.R., 30 All., 44. (2) (1925) I.L.R., 47 All., 904.