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grounds mentioned in paragraph 15(*1*); but where no such application is made, and where the Court does not remit the award to the reconsideration of the arbitrators, there is no option in the Court but "to pronounce judgment according to the award." The defendants indeed presented an application for setting aside the award, but they were not present to prosecute their application, and the Court dismissed their application for default. Their application having been dismissed, the Court was bound to pronounce judgment according to the award. What happened was, not that an *ex parte* decree was passed against them, but that their application was dismissed for default.

For all these reasons I am of opinion that no appeal lies, and I must dismiss this appeal with costs.

ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

DEO SARAN BHARTHI

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April, 24.

v.

DEOKI BHARTHI.*

Trust, suit for a declaration of, whether maintainable under section 92, *Civil Procedure Code*, 1908 (*Act V of* 1908) *—Transfer of Property Act*, (*Act IV of* 1882), *sections* 122 *and* 123—*Essentials of a valid gift.*

Where the plaintiffs brought a suit under section 92, Code of Civil Procedure, 1908, for a declaration that the defendant was acting adversely to the trust and was setting up a title of his own and consequently had committed a breach of the trust and was liable to be removed:

* Appeal from Original Decree no. 129 of 1921, from a decision of F. G. Rowland, Esq., I.C.S., District Judge of Gaya, dated the 11th March, 1921.

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Held, that where a trustee not only mismanages the trust property but sets up a title adverse to the trust, the suit falls within the purview of section 92 under clause (*h*) of which power is given to the Court to grant any relief the nature of the case may require.

Jamaluddin v. *Mujtaba Husain*(1), distinguished.

Budh Singh Duhuria v. *Nirabaran Ray*(2) *and Jafar Khan Jatbarkhan Patnan* v. *Daudshah Mohomedshah Fako* (3), approved.

Held also, (*i*) that section 123, Transfer of Property Act, 1882 does not affect the essential ingredients of a complete gift set forth in section 122 of that Act, but only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument;

(*ii*) that acceptance of a gift by a donee who is incapable of signifying his acceptance by reason of age or of his being an impersonal being recognized by law as capable of being a donee, such as a deity, is valid if made on his behalf by somebody else competent to act as an agent;

(*iii*) that actual delivery of possession is not essential to the validity of a gift in all cases for it is only one of the modes of indicating acceptance.

Kisto Soondery Dabea v. *Ranee Kishtomati*(4), *Dagai Dobee* v. *Mothura Nath Chattopadhya*(5), *Kalidas Mullick* v. *Kanhaya Lal Pundit*(6), *Watson and Company* v. *Ramchan Dutt*(7), *Lakshimoni Dasi* v. *Nittyanala Day*(8), *Abaji Gongadhar* v. *Muktakom Raghu*(9), *Upendra Lal Boral* v. *Hem Chandra Boral* (10), *Ganpati Ayyan* v. *Savithri Ammal*(11), *Ramchandra Mukerjee* v. *Ranjit Singh*(12), *Babajirao Gambhirsingh* v. *Laxmandas Guru Raghunath Das*(13), *Jagindra Nath Roy* v. *Hemanta Kumari Debi*(14), *Parthasarathy Pillai* v. *Thiruvengada Pillai*(15), *and Gurdit Singh* v. *Sher Singh* (16), referred to.

(1) (1903) I. L. R. 25 All. 631.
(2) (1905) 2 Cal. L. J. 431.
(3) (1911) 9 Ind. Cas. 358 (Bom.).
(4) (1863) Marshall's Reports, 367.
(5) (1883) I. L. R. 9 Cal. 854.
(6) (1885) I. L. R. 11 Cal. 121.
(7) (1891) I. L. R. 18 Cal. 18 (18), P. C.
(8) (1893) I. L. R. 20 Cal. 464.
(9) (1894) I. L. R. 18 Bom. 688.
(10) (1898) I. L. R. 25 Cal. 405.
(11) (1898) I. L. R. 21 Mad. 10(15).
(12) (1900) I. L. R. 27 Cal. 242.
(13) (1904) I. L. R. 28 Bom. 215.
(14) (1905) I. L. R. 32 Cal. 129.
(15) (1903) I. L. R. 30 Cal. 340.
(16) (1912) 14 Ind. Cas. 247 (Punjab).

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Under the Hindu Law, the essential ingredients which constitute a gift, whether of moveable or immoveable property, are the *sankals* and the *samarpan* whereby by property is completely given away and the owner completely divests himself of the ownership in the property.

Appeal by the plaintiffs.

The plaintiff no. 1 was the *chela* of Mahanth Sheosharan Bharthi. Plaintiff no. 2 alleged himself to be a *pujari* of the temple of Shiva to whom the properties in suit were said to have been dedicated.

The plaintiffs' case was that Sheosharan Bharthi, defendant no. 2, on 31st October, 1912, executed a deed of trust dedicating the properties in suit to the god Shiva and appointing defendant no. 1 as manager and trustee of the endowment, and that the defendant no. 1 acted as such for some years. In 1917 he and Mussammat Punia acting in collusion got defendant no. 2 to execute two registered sale deeds, dated the 23rd and 25th November, 1917, selling to defendant no. 1 the properties already dedicated to the god Shiva except one-fourth share in certain *jagir* lands which was given to Mussammat Punia under a sale deed, dated the 25th November, 1917. It was alleged that defendant no. 1 was acting adversely to the trust and was setting up a title of his own and that, consequently, he had committed a breach of the trust and was liable to be removed. The suit was instituted under section 92 of the Civil Procedure Code after obtaining the sanction of the Legal Remembrancer.

The defendant no. 2, Sheosharan Bharthi, did not appear. The suit was resisted by defendant no. 1, Deoki Bharthi alone. He repudiated the allegation that there was any trust or dedication of properties to the god Shiva as alleged by the plaintiffs and he set up his own absolute title to the properties based upon the sale deeds executed by Sheosharan Bharthi in his favour and in favour of Mussammat Punia. He also took certain pleas in bar. Upon the pleadings a number of issues were raised in the Court below, but

for the purposes of this appeal the following only need be mentioned. The findings on the other issues were not challenged :

1. Can the suit proceed under section 92 of the Code of Civil Procedure?
2. Can the plaintiffs maintain this suit?
5. Whether the properties in suit were dedicated to the god Shiva as alleged in the plaint?
6. Whether the defendant no. 1 is a trustee in respect of the properties in suit?

The Court below decided issue no. 1 in favour of the plaintiffs and issues nos. 5 and 6 against them. In the result it dismissed the suit.

C. C. Das (with him *Nawal Kishore Prasad*), for the plaintiffs.

Susil Madhab Mullick and *Shiva Nandan Roy*, for the respondents.

JWALA PRASAD AND KULWANT SAHAY, J.J. (after stating the facts, as set out above, proceeded as follows) :—

The learned Vakil for the respondents says that the Court below was wrong in deciding issue no. 1 in favour of the plaintiffs and that it ought to have held that the suit is not maintainable under section 92 of the Civil Procedure Code.

The learned Vakil contends that section 92 has no application to the present suit wherein the plaintiffs want a declaration that the properties in suit were dedicated to the god Shiva. His contention is that the section is confined only to a case where the prayer is merely to remove a trustee and to give necessary direction for the administration and management of the trust property. He relies upon the wording of section 92, which is 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, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the sanction in writing of the Advocate-General, may institute a suit, whether contentious or not,

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in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(*a*) removing any trustee;

(*b*) appointing a new trustee;

(*c*) vesting any property in a trustee;

(*d*) directing accounts and enquiries, *etc*.....;

(*h*) granting such further or other relief as the nature of the case may require."

This section, according to Mr. *Mullick*, assumes that there is no dispute as to there being a trust express or constructive, and that the only question involved is as to the conduct of the trustee in the administration of the trust property. In support of his contention he relies upon *Jamaluddin* v. *Mujtaba Husain* (1). There the suit was brought as an ordinary suit cognizable by a Subordinate Judge for the purpose of a declaration that the property was endowed property and for removal of the *muttawalli* on account of mismanagement of the trust. Upon the plea taken by the defendants the Subordinate Judge dismissed the plaintiff's case upon the ground that section 539 of the old Civil Procedure Code, which corresponds to section 92 of the present Code, was a bar to the suit, no consent of the proper officer to the institution of the suit having been obtained. On appeal the High Court of Allahabad held that the Court could only return the plaint to the plaintiff to be presented to a Court having jurisdiction to try the suit and ought not to have dismissed the suit. The decision virtually supports the view opposite to that contended for by Mr. *Mullick*. The case was considered and explained in *Budh Singh Dudhuria* v. *Niradbaran Roy* (2). In that case, upon facts similar to those in the present case, it was held that, in order to make section 539 applicable, it is not necessary that the existence of the trust for public charitable or religious purpose alleged by the plaintiff should be admitted by the defendant. If the trust is disputed, the question is decided by the Court upon

(1) (1903) I. L. R. 25 All. 631. (2) (1905) 2 Cal. L. J. 431.

evidence. To the same effect is the decision in the case of *Jafarkhan Jatbarkhan Pathan* v. *Daudshah Mohomedshah Fakir* (1).

It appears that where a trustee not only mismanages the trust property but sets up a title adverse to the trust, there is no reason why section 92 cannot be invoked. That section is wide enough, and in clause (*h*), which I have quoted above, power is given to the Court to grant any relief as the nature of the case may require. The primary object of the provision in the section is the administration of a trust property by removing the trustee, appointing a new trustee or making such directions as may be necessary for the protection and management of the trust property. In order to secure that object it may be necessary for the plaintiff as a member of the public interested in the preservation and management of the trust property to seek for reliefs, such as a relief of a declaratory nature like the one in the present case. We, therefore, overrule this contention of Mr. *Mullick*.

The case really depends upon the decision of issues nos. 5 and 6. The Court below has held that there was no real dedication of the properties in suit to the god Shiva, nor was defendant no. 1 a trustee in respect of the properties in suit. The plaintiffs appellants impugn the finding of the Court below and on their behalf it has been urged by Mr. *Das* that the trust deed, dated the 31st October, 1912, is conclusive as regards the creation of the trust and dedication of the properties to the god Shiva. The learned Counsel goes so far as to contend that the deed being a registered document purporting to effect complete dedication of the properties to Shiva, no subsequent act or conduct of the dedicator, Mahanth Sheosharan Bharthi, defendant no. 2, is admissible to show that there was no real dedication. No authority has been cited in support of this proposition. A faint reliance has, however, been placed upon section 123 of the Transfer of Property Act under which a registered instrument and a gift of movable

(1) (1911) 9 Ind. Cas. 358 (Bom.).

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property may be effected either by registered instrument or by delivery. The provision in this section does not purport to legislate that the registration of a deed of gift in respect of an immovable property is a sufficient transfer of the property. It follows section 122 of the Act which lays down the requisite essentials of a complete gift, namely, (*1*) the transfer of property, (*2*) made voluntarily and without consideration by one person called the donor to another called the donee, and (*3*) accepted by or on behalf of the donee. There must be, therefore, a voluntary giving by the donor and an acceptance by the donee. In the case of the donee being incapable of signifying his acceptance by reason of age or of his being an impersonal being recognized by law as capable of being a donee, such as a deity, the acceptance required by the section may be done on his behalf by somebody else competent to act as an agent. The acceptance may again be signified by an overt act such as the actual taking possession of the property, or such acts by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. Thus actual delivery of possession is not essential in all cases, for it is only one of the modes indicating acceptance. This will explain the seeming contradiction in some of the authorities cited before us. These authorities are as follows: *Kishto Soondery Dabea* v. *Ranee Kishtomati* (1), *Dagai Dabee* v. *Mothura Nath Chattopadhya* (2), *Kalidas Mullick* v. *Kanhaya Lal Pundit*(3), *Watson and Company* v. *Ramchand Dutt*(4), *Lakshimoni Dasi* v. *Nittyananda Day* (5), *Abaji Gangadhar* v. *Muktakom Raghu* (6), *Upendra Lal Boral* v. *Hem Chandra Boral* (7), *Ganpati Ayyan* v. *Savithri Ammal* (8), *Ram Chandra Mukerjee* v. *Ranjit Singh* (9), *Babajirao Gambhirsingh* v. *Laxmandas Guru Raghunath Das* (10), *Jagindra Nath Roy* v.

(1) (1863) Marshall's Report, 367.
(2) (1883) I. L. R. 9 Cal. 854.
(3) (1885) I. L. R. 11 Cal. 121.
(4) (1891) I. L. R. 18 Cal. 10.
(5) (1893) I. L. R. 20 Cal. 464.
(6) (1894) I. L. R. 18 Bom. 688.
(7) (1898) I. L. R. 25 Cal. 405.
(8) (1898) I. L. R. 21 Mad. 10 (15)
(9) (1900) I. L. R. 27 Cal. 242.
(10) (1904) I. L. R. 28 Bom. 215.

Hemanta Kumari Debi (1), *Parthasarathy Pillai* v. *Thiruvengada Pillai* (2) and *Gurdit Singh* v. *Sher Singh* (3).

In some cases actual delivery of the properties gifted was insisted upon and in others it was condoned. But there has been no real difference as regards the principle that there must be something shown to indicate an acceptance on the part of the donee, and as to whether there has been an acceptance and what constitutes acceptance depends upon the circumstances of each case. In this light I have read the authorities cited before me and I do not want to refer to them in detail. This disposes of the part the donee is required to play in a completed gift. On behalf of the donor the essential ingredient as adverted to above is that he should voluntarily and without consideration transfer the property to the donee. The giving away of the property as the essential ingredient for a valid gift implies a complete divesting of the ownership in the property by the donor. Section 123 only provides a further safeguard by requiring a gift of immovable properties to be effected by a registered instrument. It cannot in any way affect the essential ingredients of a completed gift set forth in section 122 and referred to above. A registered deed of gift cannot take the place of those essentials among which is the complete divesting of the ownership by the donor. Therefore it must be proved in each case, apart from the registration of the document, that there was a complete divesting of the ownership. A registered deed of gift, as any other such document, may be merely a nominal transaction, without any intention on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document. In the cases referred to above in spite of the documents in question being registered ones the question as to whether there was a complete gift was determined upon the proof or otherwise of there being a complete divesting of the ownership by the donor. Reference has been made in

(1) (1905) I. L. R. 32 Cal. 129. (2) (1907) I. L. R. 30 Cal. 340.
(3) (1912) 14 Ind. Cas. 247 (Punjab).

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some of those cases to the Hindu gifts and more particularly to the dedication of a property to a deity by a Hindu. The Transfer of Property Act lays down general provisions governing gifts and dedications, and I have in vain ransacked the provision in the texts to find out any real distinction in principles between the essential ingredients requisite for a valid gift or dedication in Hindu Law and those laid down in the Transfer of Property Act. The dedication to a deity and the creation of a trust for religious purposes no doubt finds favour in the Hindu Law just in the same way as it does in other communities and the essential ingredient that constitutes a gift whether of movable of immovable property in the Hindu Law is the *Sankalp* and the *Samarpan* whereby the property is completely given away and the owner completely divests himself of the ownership in the property. In the Hindu Law as elsewhere there must be a real and true *Sankalp* and *Samarpan*. This view seems to have been entertained by the parties themselves in this case who are Hindus. The plaintiffs and their witnesses, apart from proving the registered deed, try to prove that there was a general meeting where the dedication of the property was effected by Sheosharan Bharthi in favour of the god Shiva. The plaintiffs being Hindus could not rest their case, as the learned Counsel on their behalf tried to do in this Court, simply upon the execution of a registered deed of gift as if it was an ordinary transfer of property by way of mortgage or sale. I could understand the contention of Mr. *Das* based upon the registration of the document if he had urged that the registration thereof shifted the onus upon the opposite party to prove that there was no gift or that it lightened the burden of proof that rested upon the plaintiffs to show that there was a true and real dedication. For my own part I would say that a registration of the document will only affect the onus so far as the execution thereof is concerned but will in itself be no proof of the real dedication of the property or the divesting of the ownership therein by the donor. The onus, therefore, according to my view

of proving real dedication, namely, the *Sankalp* and the *Samarpan* of the properties in favour of the donee, the god Shiva, rests upon the plaintiffs. The question of onus, however, does not arise in this particular case inasmuch as the evidence as summarized by the Court below has been one-sided, *viz.*, that produced on behalf of the defendants. They have proved by overwhelming documentary and oral evidence that ever since the execution of the deed of trust Sheosharan Bharthi the dedicator has been exercising acts of possession and, in fact, has been in actual possession up to the present moment just as he was before the deed in question was executed. The exhibits in the case consists of leases, mortgages and sales executed by Sheosharan Bharthi from 1912 when the deed was executed up to 1918: (*Exhibits A*, *B*, *D*, *E*, *F*, *F-1*, *H*, *H-1* and *H-2*). No such document on behalf of the plaintiffs has been produced showing the dealings of the property by the donee on the footing that the properties were the dedicated properties of the god Shiva; not even the account of the income and expenditure has been produced showing that the donee received any income of the property or spent anything towards the purposes for which the dedication of the trust was created. The actual possession of the properties has been similarly proved to have been continued in Sheosharan Bharthi unaffected in any way by the trust deed of 1912 in question. The rent receipts *C* to *C24* prove that the rents were paid by Sheosharan Bharthi and his name stood recorded in the landlord's *sarishta*: there is nothing to show that any rent was paid by the donee to the landlord.

Now, is there anything to show that an attempt even was made by the donee to have his name mutated in the landlord's *sarishta*? Soon after the alleged deed of dedication of 1912 came the preparation of the survey record-of-rights and the dispute lists (*Exhibits K* and *K-1*) of April 1914; and the finally published record-of-rights of January 1916 (*Exhibit L*) conclusively establishes the actual possession of Sheosharan Bharthi even after the execution of the deed

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of trust. As against the aforesaid unimpeachable evidence of actual and continuous possession of Sheosharan Bharthi from before and after the execution of the deed of gift, the plaintiffs have only two documents, *Exhibits 1* and *3*, the first being a report of the sub-inspector of police, dated the 5th November, 1915, and the second an extract from the register of criminal records sent to the record-room in the aforesaid case in 1917. The Court below has commented adversely upon these documents and has held them to be spurious. It has also shown that the identity of the parties mentioned in those documents has not been satisfactorily established. Their relevancy and admissibility are also questionable. In no case the report can be accepted as evidence of the statement of the complainant and we cannot agree with Mr. *Das* that the statement relied upon by him can in law be used as evidence. The sub-inspector who recorded is dead and no evidence is given that that was the statement actually made by the complainant. Again the aforesaid two documents which constitute simply one transaction, assuming them to be relevant and true, only show an attempt on the part of Deoki Bharthi to take possession of the property and to assert his right under the deed of dedication. But the actual divesting of ownership by Sheosharan Bharthi cannot be established by these documents which relate to an event in 1915 as against the evidence of the defendants that between 1912 after the execution of the deed and 1915 the date of the aforesaid event Sheosharan Bharthi not only asserted his possession but has been in continuous actual possession of the property.

The oral evidence merits the same remark, namely, that the evidence on behalf of the defendants consists of competent witnesses such as the lessees, mortgagees and others having dealings with the property. These witnesses prove the possession of Sheosharan Bharthi uninterrupted in any way by the deed of trust: they prove that the deed was never given effect to and was merely a nominal and sham transaction. The plaintiffs' witnesses cannot claim disinterestedness and indepen-

dence which would merit any consideration of their evidence by the Court. Their evidence has been shown by the Court below to be discrepant and inconsistent with the case of the plaintiffs as laid in the plaint which they want to improve by setting up two events: (*1*) the previous dedication of the property, *Sankalp*, and *Samarpan* in the presence of the people; and (*2*) the subsequent execution of the deed of trust.

We have carefully gone through the oral evidence and considered the comments made on behalf of the parties. In fact, Mr. *Das* did not feel confident of the oral evidence tendered on behalf of the plaintiffs and consequently did not seem to rely upon it. We need not repeat the reasons given in detail by the learned District Judge who appears to us to have carefully and exhaustively gone into the evidence. Suffice it to say that we entirely concur with his estimate of the evidence. We prefer the evidence given on behalf of the defendants to that adduced on behalf of the plaintiffs. Upon the evidence, oral and documentary, therefore, no real dedication of the property has been proved, nor has it been proved that defendant no. 1 was a trustee of the properties in question.

Agreeing, therefore, with the view of the Court below, we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

LILO SONAR

v.

JHAGRU SAHU*

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April, 25.

Civil Procedure Code, 1908, (*Act V of* 1908), *Order XXII, rules 4 and 11—Legal repsesentatives of a deceased respondent, substitution of whether necessary when one of them already on the record as a respondent.*

Where, after the death of one of several respondents, the appellant sought to substitute his legal representatives after

* In the matter of an application in Second Appeal no. 388 of 1923.