APPELLATE CIVIL.

Before Fazl Ali and Rowland, JJ.

1934.

October, 29, 30, 31.
November, 1, 2, 5, 23.

MAHANT KESHO DAS

v.

AMAR DASJI.*

Hindu Law—Math—Mahanth, whether a trustee in English sense of the term—office, incidents of—general trust for pious or religious purposes, existence of—usage and custom—trust, notion of—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 92—*form of final order, what should be—interest of the institution.*

The head of a *math* is not a trustee in the sense in which that term is understood in English law.

The conception of a trust in the English legal sense is unknown in the Hindu system pure and simple.

Vidya Varuthi Thirtha v. *Balusami Ayyar*(1), followed.

Observation on the incidents attaching to the tenure of office as a Mohunt.

Greedharee Doss v. *Nundkissire Doss*(2) and *Ram Parkash Das* v. *Anand Das*(3), referred to.

The head of a religious institution ordinarily holds the property subject to certain obligations. Though not a trustee in English sense of the term, he is nevertheless, in view of the obligations and duties resting on him, answerable as a trustee in the general sense for proper administration.

There may be a trust in the general sense, as distinguished from a specific trust, for pious or religious purposes under the Hindu law, and its existence or otherwise is a matter for determination on the evidence as to the usage and custom of the *math*.

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* Appeal from Original Decree no. 64 of 1932, from a decision of S. K. Das, Esq., I.C.S., District Judge of Shahabad, dated the 23rd December 1931.

(1) (1921) I. L. R. 44 Mad. 831, P. C.
(2) (1867) 11 Moo. I. A. 405.
(3) (1916) I. L. R. 43 Cal. 707, P. C.

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Ram Parkash Das v. *Anand Das*(1), *Vidya Varuthi Thirth v. Balusami Ayyar*(2) and *Nelliappa Achari* v. *Punnaivanam Achari*(3), followed.

The existence of a very wide discretion in the Mahant as to the application of the income of an *asthal* is by no means inconsistent with a fiduciary obligation so to manage the property that the objects for which the institution exists shall be effectively served. The fact that income of the property has all along been applied to religious and charitable purposes is strong reason for holding that those purposes are the purposes for which the institution exists.

Once a clear case is made out for the court's interference under section 92, Code of Civil Procedure, 1908, the form of the final order should be governed by what appears to be in the interest of the institution.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Rowland, J.

Mahabir Prasad and *Tarkeshwar Nath*, for the appellant.

Baldeo Sahay (with him *G. P. Singh*, *Ratneshwar Prasad Singh* and *B. B. Saran*), for the respondents.

ROWLAND, J.—This appeal arises out of a suit brought under the provisions of section 92 of the Civil Procedure Code. The first defendant Kesho Das was Mahant of a *sanghat* situated at Amawan and having Sanghats at other places subordinate to it. The second defendant Swarup Das is a person stated by defendant no. 1 to be his Chela to whom defendant no. 1 has transferred the mahantship and all the properties of the *sanghats*. The plaintiffs allege that the *sanghats* constitute a religious foundation of the sect or order of Udasi Nanakshahi Sadhus, that the properties have been endowed and dedicated

(1) (1916) I. L. R. 43 Cal. 707, P. C.
(2) (1921) I. L. R. 44 Mad. 831, P. C.
(3) (1926) I. L. R. 50 Mad. 567.

from time to time in trust for religious purposes of charitable nature. The suit was instituted after obtaining sanction of the Legal Remembrancer, Bihar and Orissa, who performs the functions of the Advocate-General for the purposes of section 92 of the Civil Procedure Code.

It was alleged that the office of the Mahant could only be held by a celibate ascetic and that Mahant Kesho Das became disqualified for holding the office by reason of marriage, that Swarup Das was also married, that Mahant Kesho Das was incompetent to transfer the mahantship and properties to Swarup Das and that both of the defendants had committed breach of trust and neglect of duty, mismanagement and waste. The substantial reliefs claimed were the removal of Kesho Das from mahantship, appointment of another Mahant, declaration that Swarup Das was not eligible for appointment and was not duly appointed and an order for rendering accounts and for settling a scheme.

The principal defence taken was that there is no trust, express or implied, of a public nature, that the properties have always been held as the personal properties of the Mahant for the time being, that celibacy was not an essential qualification of a Mahant, that Kesho Das had not in fact married but that he having retired in favour of defendant no. 2 no longer claims to be Mahant, that defendant no. 2 had been managing the affairs of the estate faithfully and diligently and the allegation of misfeasance and mismanagements were false.

The District Judge found that the properties in suit appertained to a public trust and that the *sanghats* formed a public and religious institution, that no married person could be or remain a Mahant and that Kesho Das had married, that the transfer of the office and properties to Swarup Das was not valid because the proper method of appointing a new Mahant was by election; and he passed a decree for

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removal of Kesho Das from mahantship and framed a scheme for the management of the *sanghats* including procedure for appointment of a presiding Mahant by election. He refused the prayer for rendition of accounts holding that the plaintiffs had failed to prove misappropriation of monies, etc.

In appeal the substantial contentions are that the properties are not held subject to any trust and, therefore, the suit under section 92 of the Civil Procedure Code is not maintainable. The properties were the private properties of each successive Mahant. The finding of the District Judge that marriage is a disqualification is challenged as also the finding on evidence that Kesho Das has married. On the other hand the respondent is dissatisfied with the finding of the District Judge on the question of misfeasance, misappropriation and waste and raises again the claim for rendition of accounts. Thus the first point to consider will be the nature of the *sanghat* properties and the conditions under which they were held and managed by successive Mahants. The District Judge thought that the grants produced before him were documents creating trust and has passed over somewhat lightly the oral evidence showing how the properties have been dealt with.

Mr. Mahabir Prasad for the appellant has placed before us all the sanads which are on the record and has argued that they would not bear the construction placed upon them by the District Judge. I should mention that the sanads produced mostly cover small areas and in the aggregate only a small proportion of the entire property appertaining to the *sanghats*. The earliest is exhibit A(*12*) dating as far back as 1736 A.D. and covers an area of 5 bighas 15 biswas only. There are successive grants dated 1742, 1746, 1748, 1760, 1761, 1765, 1774, 1776, 1777, 1786, 1788, 1790, 1792 and 1795. There are two *amalnamas* of 1851 and a kabuliyat of 1856. Each of these is expressed as a grant to the grantee by name, the majority of them authorise the grantee to cultivate

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and enjoy the usufruct. The earlier sanads enjoin the grantee to engage himself in prayer for the prosperity of the realm. Several grants are expressed as being given "*wajah khairat*" which has been officially translated "for charitable purposes" but for the appellant it is contended that the words mean no more than "by way of charity" or as a free gift. Again several of the grants beginning with exhibit A(*9*) which is of the year 1742 are expressed to be in favour of Fakirs of the order of Nanak Shah of the Amawan *sanghat*. The District Judge has laid some emphasis on the reference to the *sanghat* as showing that the grants were made for the purposes of the *sanghat* and, therefore, were grants given in trust and creating a public trust. The appellant contends that this is straining the language of the grants and in turn lays emphasis on the constantly repeated expressions in successive sanads permitting the grantees and their children to appropriate the usufruct. Too much stress, in my opinion, should not be laid on particular expressions of this kind; the nature of the institution is rather to be determined not solely on fragmentary expressions in documents covering fragments of the property but on a consideration of the whole history of the institution as disclosed on a general view of the documentary and oral evidence in the case. Mr. Mahabir Prasad, in contending that the power given to the grantee to appropriate the usufruct is fatal to the plaintiffs' case of a public trust, has referred to several cases in which it has been held that the head of a *math* is not a trustee in the sense in which that term is understood in English law. So much may be conceded as settled. The conception of a trust in the English legal sense is, as pointed out by their Lordships in *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(1), unknown in the Hindu system pure and simple. The position of a Mahant has been

(1) (1921) I. L. R. 44 Mad. 831, P. C.

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compared in certain cases of the Madras High Court to that of a bishop, to that of the holder of a benefice and to that of a tenant for life. The decision just cited condemns the vice of this method of analogy. Mr. Mahabir Prasad's contention that not being a trustee in the English sense the Mahant must be held to be a full owner with absolute proprietary right seems to me to be really an example of trying to apply the same reasoning by analogy in another direction. The essence of the argument is that if one of the precise definitions of English law, that of "trustee", is not applicable the case must therefore fall under another equally precise notion, that of full owner. This line of reasoning though ingenious, and superficially attractive, is unsound. The Privy Council have more than once reaffirmed the dictum of Lord Romilly in *Greedharee Doss* v. *Nandkissore Doss*(1) :—

"that the only law as to these *mahants* and their offices, functions, and duties is to be found in custom and practice, which is to be proved by testimony."

Nevertheless their Lordships have in recent decisions mentioned some features which are regarded as the normal incidents attaching to the tenure of office as a Mahant. Thus in *Ram Parkash Das* v. *Anand Das*(2) Lord Shaw says:—

"An *asthal*, commonly known in Northern India as a muth, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas;* the *chelas* are of two classes—celibate and non-celibate. In the *asthal* now being dealt with, the religious brethren were the *bairagi* or celibate *chelas;* the lay brethren were

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girhast or householder *chelas*. The *mahant* must, by the custom of the *muth*, be a bairagi or religious *chela*. The *mahant* is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites, he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates; or if they have ever been married they must prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the *muth*. This practice is ascetic; it involves a separation from all wordly wealth and ties, and a self-dedication to the services and rites of the *asthal*..........................this property is held by the *mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the *muth* or institution itself, and it must not be forgetten that although large administrative powers are undoubtedly vested in the reigning *mahant*, this trust does exist, and that it must be respected."

In *Vidya Varuthi Thirtha's* case(1) above cited the High Court had held on a consideration of the decision in *Ram Parkash Das* v. *Anand Das*(2) that a suit to recover possession of certain properties alienated by a former head of the *math* was barred by articles 134 and 144, Indian Limitation Act. It seems that they had applied the observations of their Lordships as if the words 'trust and trustees' had been used in their technical sense. The decision was reversed but I can find nothing in the judgment of their Lordships adverse to the view that the head of

(1) (1921) I. L. R. 44 Mad. 831, P. C.
(2) (1916) I. L. R. 43 Cal. 707, 718, P. C.

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a religious institution ordinarily holds the property subject to certain obligations. It is said:—

"Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system: to *Brahmans*, *Goswamis*, *Sanyasis*, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations.....................In many cases in Southern India especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of *muth* were founded under spiritual teachers of recognized sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage."

It is pointed out that the head of such an institution though not a trustee in English sense of the term is nevertheless, in view of the obligations and duties resting on him, answerable as a trustee in the general sense for proper administration. Later in the judgment their Lordships have referred to "the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Muhammadan Laws". This much is, I think, sufficient to dispose of the contention that if the defendant is not a trustee in the specific sense he must be a full owner and that there can be no trust within the meaning of section 92 of the Civil Procedure Code. It is clear that there may be a trust in the general sense and its existence or otherwise is a matter for determination on the evidence as to the usage and custom of the *math*.

Mr. Mahabir Prasad has further contended in this connection that the words "express or construc-

tive trust created for public purposes for charitable or religious nature " in section 92 of the Civil Procedure Code mean that the section is only applicable when there is definite evidence as to the creation of the trust and of a dedication to purposes of charitable and religious nature. That is to say, that section 92 reinforces his contention that the matter is to be decided on the terms of the grants. To take this narrow view, however, would in my opinion be contrary to the principle laid down by the Privy Council in *Ram Parkash Das* v. *Anand Das*(1) and *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(2) where it is made clear that the courts will have regard particularly to usage and custom. The view which I take is in agreement with that taken by a division Bench of the Madras High Court in *Nelliappa Achari* v. *Punnaivanam Achari*(3).

The history of the Amawan *sanghat* is to a large extent undisputed. The sect of Udasi Nanakshahi Sadhus, an offshoot of the Sikh religion, was founded by Baba Srichand. He was a celibate and founded a celibate sect, though the sect also made disciples who were householders and there have been and are both ascetic and *girhast* disciples of the sect. According to the evidence for the plaintiffs the *sanghat* at Amawan was established in the time of Baba Hari Das whose disciple and successor was Baba Seva Das. Successive Mahants have been Baba Chain Das, Baba Lachhman Das, Baba Ram Prasad Das, Baba Joy Kissun Das, Baba Ram Kissun Das, Baba Narain Das and Baba Jyoti Swarup Das, the last named was the immediate predecessor of Kesho Das, defendant no. 1. The succession in every case was to an ascetic *chela* of the sect. This much is not disputed. It is further undisputed that at the *sanghat* it has been the practice to conduct worship

(1) (1916) I. L. R. 43 Cal. 707, P. C.
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to the Granth Saheb, to feed sadhus, to feed the poor and Brahmans and to give instruction and that money is spent on behalf of the *sanghat* on these objects. It is the case of defendant no. 1 that in his time also the regular worship was all along being done as well as the entertainment of sadhus and education of scholars; but he says this was done

> "from the income of the properties but at the wish of the Mahants."

The extracts which I have given from two decisions of the Judicial Committee of the Privy Council make it quite clear that the existence of a very wide discretion in the Mahants as to the application of the income of an *asthal* is by no means inconsistent with a fiduciary obligation so to manage the property that the objects for which the institution exists shall be effectively served. The fact that income of the properties has all along been applied to the religious and charitable purposes indicated above, is strong reason for holding that those purposes are the purposes for which the institution exists and this view is further supported by expressions in exhibit 17 which is a will of Mahant Narain Das appointing Jyoti Swarup as his successor and in exhibit 18 which is a will by Jyoti Swarup Das similarly appointing Kesho Das. In exhibit 17 there is the recital that the *sanghat* has immoveable properties, that there are a good many moveable properties appertaining to the said *sanghat* and that the executant as Mahant *gaddinashin* has been in possession and enjoyment of the usufruct of these properties. The will in making the appointment in favour of Jyoti Swarup Das declare that he shall be in possession and occupation of the properties, shall manage and administer the duties of Mahant, shall make collection and realisation, etc., and shall spend their income in good and other necessary works appertaining to the said *sanghat*. The other will similarly directs that Kesho Das shall become Mahant

gaddinashin of the Amawan *sanghat* as well as of all the properties moveable or immoveable of the testator, that he shall administer all the affairs and business of the *sanghat* in the manner in which they are performed in the *sanghat*, he shall maintain good character and not do any illegal or indecent act at any time contrary to the usage and custom of the *sanghat*, in case of any bad act coming to light *panchan* or arbitrators of the caste and respectable disciples shall be competent to appoint another *chela* of the testator as head of the *sanghat* and proprietor of the properties. There is a further direction to maintain and provide for the other disciples of the testator and of his *guru* as at present. It is on the above and other materials on the record abundantly clear that the *sanghat* is a religious and charitable foundation corresponding in its general features to the description of similar foundations which I have quoted from the two Privy Council decisions in *Ram Parkash Das* v. *Anand Das*(1) and *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(2). Particular properties do not appear to have been given expressly in trust but there was certainly an implied or constructive trust of a public nature in which the disciples of the sect both religious and lay brethren (sadhus and *girhast*) were interested. I would, therefore, confirm the finding of the District Judge that the properties in suit are properties appertaining to the *sanghat* which is a public trust for religious and charitable purposes and further that the plaintiffs as disciples of the sect are persons interested in the trust and entitled to maintain the suit under section 92. * * *

[After dealing with questions of fact his Lordship proceeded as follows :]

On this state of the facts it remains to consider whether Kesho Das should be removed, whether a new

(1) (1916) I. L. R. 43 Cal. 707, P. C.
(2) (1921) I. L. R. 44 Mad. 831, P. C.

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trustee is required to be appointed, whether a scheme is required to be framed and whether an order ought to be passed for rendition of accounts. On the first question there is no room for hesitation. Kesho Das cannot be allowed to hold the mahantship for the following reasons:—

(1) He being married the whole purpose of the trust the maintenance of an ascetic institution is frustrated if a married man remains at the head of it. (2) He has alienated the entire properties of the *math* by a transfer which he had no power to make in favour of an outsider, his own nephew. (3) According to his own written statement he has given up his office as Mahant. (4) His management of the trust properties on the face of it appears wasteful and extravagant. The savings of his predecessors on his own admission were being rapidly dissipated.

Once a clear case is made out for the court's interference under section 92 the form of the final order should be governed by what appears to be in the interest of the institution. It is necessary in this instance that a new trustee be appointed and that arrangements be made which will prevent such mismanagement as has taken place and will provide for future succession. Such arrangements have been made in the scheme framed which was prepared after consultation with the representatives of the plaintiffs and other persons interested in the endowment. In connection with the scheme the plaintiffs have suggested in their cross-objection that the properties should be held not in the name of the Mahant for the time being but of the managing committee. No sufficient reason has been shown to us for ordering such a modification and to allow it would be a departure from the customary practice followed hitherto in this *math* and ordinarily followed in similar institutions. It is not desirable that the head of the institution should be reduced to the position

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of a nonentity. I would, therefore, refuse amendment of the scheme in this respect. Another objection taken to the scheme by the plaintiffs is that it should provide for removal of the Mahant by the vote of two-thirds of the members of the managing committee whereas the scheme provides that a Mahant or *adhikari* may be removed for misconduct by a meeting of the congregation of disciples and public. It is also suggested that the Mahant or *adhikari* should be liable to removal if negligent, unfaithful and guilty of any misconduct or otherwise undesirable. The proposal seems to me much too wide and likely to make the Mahant a mere puppet holding his office at the good will of a small body liable to be influenced by personal motives. I would, therefore, refuse to modify the scheme in the manner asked for.

It remains to consider the prayer in the cross-objection for rendition of accounts. There are two difficulties in way of passing such an order. One is that the usufruct of the properties has all along been held in the hands of the Mahant for the time being to be applied at his discretion and another is that an order for rendering accounts is likely to be in substance infructuous. The properties were made over in January, 1929, by Kesho Das to Swarup Das and the latter having disappeared and being perhaps dead his dealings with the assets cannot effectively be investigated. Hence it appears that an order for rendering accounts would lead merely to an expensive and laborious inquiry leading to no tangible result. I would, therefore, confirm the District Judge's order in so far as it refused the prayer for rendering accounts. In the result I would dismiss the appeal with costs and would also dismiss the cross-objection parties bearing their own costs of the cross-objection.

FAZL ALI, J.—I agree.

Appeal and cross-objection dismissed.