OFFICIAL TRUSTEE, WEST BENGAL & ORS.

v.

SACHINDRA NATH CHATTERJEE & ANR.

December 13, 1968

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Trust—Settlor as trustee reserving power to alter terms by will—If trustee could alter by deed inter vivos—*Indian Trusts Act* (2 *of* 1882), *s.* 34, *Official Trustees Act* (2 *of* 1913), *s.* 10(1) *and Trustees and Mortgagees Powers Act* (28 *of* 1866), *s.* 43—*Scope of—Judge of High Court on Original Side of Calcutta High Court—Powers under Chap.* 13 *of the Original Side Rules—Inherent powers—Scope of—Official Trustee—Liability for accounting.*

The father of the first respondent executed a trust deed in 1930, in respect of properties owned by him. The deed provided *inter alia*, that the settlor would be trustee during his life time, that from and after his death, his wife should be paid Rs. 50 per mensem from the profits of the trust estate, that the balance of the income was to be paid in equal shares to the sons of the settlor, and that after the wife's death, the whole estate was to be made over to the settlor's sons in equal shares. The settlor reserved to himself the power to vary the quantum of interest, given to each of the beneficiaries after his death *by will alone and in no other way*. After administering the trust for some time he wanted to make some changes in the trust deed, and for this purpose took out an originating summons on the original side of the Calcutta High Court, under Ch. 13 of the Original Side Rules and prayed for two reliefs, namely, (i) to have the Official Trustee appointed as the trustee in his place, and (ii) to empower the settlor to alter the clause relating to variation of the quantum of interest by a deed *inter vivos*. The first respondent did not appear in those proceedings though notice was served on him. The High Court, in specific terms, granted the prayers. The settlor then executed another trust deed in 1938 under which the first respondent was deprived of all his interest in the corpus of the trust properties and was given a meagre allowance of Rs. 20 per mensem. The Official Trustee carried out the order of the High Court and disbursed the income to the various beneficiaries. In 1950, after the death of the settlor, the first respondent filed a suit and prayed : (i) that the power reserved to the settlor in the original trust deed for altering the quantum of interest *by will alone*, was irrevocable; (ii) that the order on the originating summons was null and void as having been made without jurisdiction; (iii) that the plaintiff was entitled to the benefits provided by the original deed; and (iv) that the Official. Trustee should render accounts since the time of the death of the settlor.

The trial court decreed the suit but the first appellate court reversed the decree. In second appeal, the High Court restored the decree of the trial court.

In appeal to this Court, on the questions : (1) Whether the settlor was entitled to execute the second trust deed; (2) Whether its validity was not open to challenge in view of the order on the originating summons, because, the Judge had jurisdiction to pass the order either under s. 34 of the Indian Trusts Act, 1882, or s. 10(1) of the Official Trustees Act, 1913, or s. 43 of the Trustees and Mortgagees Powers Act, 1866, or in

A exercise of his inherent powers; and (3) Whether the Official trustee was liable to render accounts and if so for what period.

HELD : (1) The stipulation in the trust deed that the variation can only be made *by will and not otherwise* is a binding condition. Being a material condition the settlor had no power to vary it and therefore had no power to execute the second trust deed. [98 F]

B *Re : Anstis* [1886] 31 Ch. D. 596; *Reid* V. *Shergold* (1805) 10 Ves. 370 and *Molineux* v. *Evered*, (1910) 2 Ch. 147, applied.

Halsbury 3rd Edn. Vol. 30 p. 272, para. 518 and *Hanbury Modern Equity* (7 Edn. p. 56), referred to.

(2) Before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try it but must also have
C the authority to decide the questions at issue and pass appropriate orders. It is not sufficient that it has some jurisdiction in relation to the subject-matter under the various provisions of law or under its inherent power. If the High Court had the power under those provisions of law or in its inherent jurisdiction the fact that they were not invoked by the petitioner in the originating summons would not invalidate the order even if it was wrong. But the order on the originating summons in the present case was outside the jurisdiction of the Judge. It was not merely
D a wrong order, or an illegal order; it was an order which he had no competence to make and was therefore a void order. [101 B—D; 106 C—D]

Ittavira Mathai v. *Varkey Varkey*, [1964] 1 S.C.R. 495, referred to.

Hirday Nath Roy v. *Ramchandra Barna Sarma*, I.L.R. LXVIII Cal. 138, approved.

E (a) The facts stated and the nature of relief asked for in the originating summons, show that the matter did not come within the scope of s. 34 of the Trusts Act. The jurisdiction of the Court under the section is a limited jurisdiction. The statute has prescribed what the Court can do and inferentially what it cannot do. Under the provision, the Court could only give 'opinion, advice or direction on any presented question respecting the management or administration of the trust property' and not on any other matter arising under the trust deed. The relief prayed
F for by the settlor did not relate to the management or administration of the trust property. [101 G; 102 A—D]

(b) Section 10(1) of the Official Trustees Act, 1913, might have empowered the High Court to appoint the Official Trustee in the place of the settlor, as the settlor was not willing to continue as trustee. But it could not have granted the other reliefs asked for. [102 G]

G (c) Section 43 of the Trustees and Mortgagees Powers Act, 1866, is similar to s. 34 of the Trusts Act. Under that provision, a Judge of a High Court could have only given opinion, advice or direction on any question respecting the management or administration of the trust property and therefore, the order on the originating summons could not be justified on the basis of the section. [103 D]

(d) There is no rule in Ch. 13 of the Original Side Rules of the Calcutta High Court, under which the order on the originating summons
H could have been made. It is not as if the Judge, in passing his order on the originating summons, was merely interpreting the original trust deed in which case it might not have mattered whether his interpretation was correct or not. [104 A—C]

It may be that a Judge sitting on the original side of the High Court has all the powers of a Chancery Judge in England, but the inherent powers of a Chancery Judge only relate to management and administration of trust property which powers are similar to those codified in s. 34 of the Trusts Act and s. 43 of the Trustees and Mortgagees Powers Act, and is therefore of a limited character. [105 G—H; 106 A]

Chapman v. *Chapman*, [1954] A.C. 429 and *Chapman's case*, [1953] Ch. 218, referred to.

(3) But for the order on the originating summons the settlor would have certainly altered by will the quantum of interest given to the first respondent. The first respondent did not challenge the second trust deed during the father's life-time and there was no knowing that he would have challenged it till he filed the suit. Since the Official Trustee merely carried out the order of the Court, he is not a trustee *de-son-tort* and his liability should not be greater than that of a trustee. Therefore, there is no justification for directing him to account from the date he took charge of the trust estate, and the ends of justice would be met, if accounting was ordered as from the date of suit. [106 D—H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 168 of 1966.

Appeal from the judgment and decree dated December 22, 1960 of the Calcutta High Court in Appeal from Appellate Decree No. 701 of 1956.

B. Sen, P. K. Chatterjee and *P. K. Chakravarti*, for the appellants.

N. C. Chatterjee and *D. N. Mukherjee*, for respondent No. 1.

The Judgment of the Court was delivered by

Hegde J. Two important questions of law arise for decision in this appeal, by certificate. It will be convenient to formulate those questions after we set out the material facts.

One Aswini Kumar Chatterjee (since deceased) executed the Trust deed Exh. 1 on December 6, 1930 in respect of some of the properties owned by him. It is provided therein (a) that the settlor would be the trustee of the Trust Estate and would enjoy the income and profits of the trust properties during his lifetime, (b) after his death his wife Sm. Santimoyee Devee and/or his sons as soon as they or any of them attain the age of majority should be the sole Trustee or Joint Trustees and (c) from and after his death the said Trust Estate should be held to the use and for the benefit of the said Sm. Santimoyee Devee and the said sons. Santimoyee Devee to be paid from the income and the profits of the said estate Rs. 50 monthly and the balance of the income and profits of the Trust Estate to be held for the use and benefit of each of the sons in equal shares and after the death of the said Santimoyee Devee to make over the whole of the Trust Estate to each of the sons in equal shares. He reserved to

himself the power to vary the terms and conditions of the Trust so far as they relate to the quantum of interest given to each of the beneficiaries after the death of the settlor "by his instrument by will alone and in no other way or act".

The settlor administered the trust property for sometime and thereafter thought of effecting by deed *inter vivos* certain changes in the trust. To enable him to do so he took out an originating summons on the original side of the Calcutta High Court under Chapter XIII of the Original Side Rules of that Court seeking primarily two reliefs *viz.*, (1) to have the Official Trustee, Bengal appointed as the Trustee in his place and (2) to empower him to alter the clause relating to variation of the quantum of interest given to each of the beneficiaries by a deed *inter vivos*. From the averments made in the application, it is clear that relief was sought under the provisions of the Indian Trusts Act (Central Act 2 of 1882) and the Official Trustees Act (Central Act 2 of 1913). In the body of the petition the settlor definitely prayed for permission to revoke the clause in the trust deed relating to his power to vary the quantum of interest of the beneficiaries by will alone and in its place authorise him to make that variation "by deed *inter vivos* and not by will alone". The relevant reliefs asked for in the petition read as follows :

> (1) "that the provisions contained in the Deed of settlement dated the 6th December 1930 whereby the persons therein named were appointed Trustees of the said Trust Estate and whereby power was reserved to petitioner to alter the said quantum of interest by will alone and in no other way be revoked and . . . .
>
> (2) that the petitioner be empowered to alter the said quantum of interest in such manner as he may think proper, by deed *inter vivos* and not by will alone."

The aforementioned originating summons was taken out on August 20, 1937. The matter came up for hearing before Ramfry J. evidently after service of notices on the respondents on August 25, 1937. On that date the learned Judge passed the following order :

> "It is ordered that the provisions contained in the said Deed of Trust whereby the persons therein named were appointed Trustees of the said Trust Estate and whereby power was reserved to the said applicant to alter the quantum of interest of the beneficiaries by will and in no other way be and they are hereby

revoked and it is further ordered that the said applicant as such settlor as aforesaid be at liberty to alter the said quantum of interest in such manner as he may think proper by deed *inter vivos* and not by will and it is further ordered that the said applicant the present sole trustee under the said Deed of Trust be and is hereby discharged from further acting as such Trustee and the Official Trustee of Bengal be and is hereby appointed the sole trustee of the said Deed of Trust. And it is further ordered that the stocks and shares and securities (both movable and immovable) now comprised in the Trust Estate... do vest in the said Official Trustee of Bengal as such Trustee as aforesaid."

At this stage it is necessary to emphasize that what the settlor asked for was the court's permission to revoke the clause in the Trust deed empowering him to alter the quantum of interest given to each of the beneficiaries "by will alone" and in its place to confer upon him power to make the said alteration by deed *inter vivos*. The court in specific terms ordered the revocation and granted the authority sought for. Acting under the power purported to have been given by the order of Ramfry J., the settlor executed a second Trust deed on March 22, 1938. Under that deed, in the place of the Trustees nominated under the original deed, the Official Trustee was constituted as the sole trustee. Sachindra, (the first respondent herein) one of the sons of the settlor was deprived of all his interest as a beneficiary in the corpus of the trust properties. He was given a meagre allowance of Rs. 20 per month during his life-time. The settlor died in 1946.

On December 18, 1950, the first respondent filed the suit out of which this appeal has arisen praying for following declarations :

(a) that the power reserved by the settlor in the original Trust deed for altering the quantum of interest of the beneficiaries by will alone and by no other means was irrevocable; (b) that the order passed by Ramfry, J. on August 25, 1937 was null and void as having been made without jurisdiction; and (c) the original Trust deed stood unaffected by the second Trust deed and therefore he was entitled to the benefits provided under the said deed. He also asked for a decree directing the Official Trustee to pay him 1/4th of the income of the Trust Estate, so long as Santimoyee Devee was alive and on her death to make over one-fourth of the corpus of the Trust Estate to him and further render accounts to him of the profits of the Trust Estate since the time of the death of the settlor. The Official

A Trustee as well as some of the other defendants resisted the suit. They contended that the settlor was entitled to execute the second Trust deed in exercise of the power reserved by him under the original Trust deed and in any event he could do so because of the order of Ramfry, J.

B The trial court decreed the suit as prayed for but the first Appellate Court reversed the decree of the trial court and dismissed the suit upholding the contentions advanced on behalf of the contesting defendants. In second appeal the High Court reversed the decree of the first Appellate Court and restored the decree of the trial court.

C Two questions that arise for decision in the appeal are : (1) whether the settlor was entitled to execute the second Trust deed in pursuance of the power reserved by him under the original Trust deed and (2) whether in any event the validity of the second Trust deed is not open to challenge in view of the order made by Ramfry, J. on August 25, 1937.

D Mr. B. Sen, learned Counsel for the appellant contended that on a proper reading of the Trust deed it would be seen that the settlor had reserved to himself the power to vary the terms of the Trust in so far as they relate to the quantum of interest given to each of the beneficiaries after the death of the settlor. According to him the recital in the deed that such a variation can be done only by an instrument of will and not otherwise is E not a matter of substance but only a form. Therefore we must hold that the settlor had the power to make the variation in question. He did not dispute the proposition that a settlor is incompetent to vary any of the terms of a Trust settled by him unless he had reserved for himself the power to make the variation in question. The real question for decision is whether F the stipulation in the Trust deed that the variation in question can only be made by will and not otherwise is binding condition. If it is held to be a material condition then the settlor must be held to have had no power to vary the same.

The law on the point is stated by Halsbury (1) thus :

G "*Defects not of the essence.* Equity relieves only against defects which are not of the essence of the power; relief will not be granted so as to defeat anything material to the intention of the donor of the power. Thus mere defects in the mode of execution will be aided, and so will an appointment by will made under a power to appoint only by deed. But no aid will H be given to an appointment by irrevocable deed made under a power to appoint only by will or to an

(1) 3rd Edn. Vol. 30 p. 272 Paragraph, 518.

> appointment which would result in a fraud on the power or aid a breach of trust. Moreover, no aid will be given to the exercise by will of a power of revocation by deed if it is clear that a deed is of the essence, as where the original power of appointment was by will or deed and on its exercise a power to revoke by deed only was reserved. Nor will the court aid a lease containing unusual covenants granted under a power to lease with usual covenants, or a lease granted without consent under a power to lease with consent, or a sale of land reserving timber made under a power not authorising such a reservation, or a sale of land reserving the minerals under a power not authorising such a reservation."

Similar are the views expressed in Hanbury's book on *Modern Equity* (7th Edn. p. 56). Referring to the decision in *Tollet* v.*Tollet*(1) the learned author observes :

> "The case brings out another important point. The power was exercised by will, whereas it should have been exercised by deed. Now a Will is revocable at any time during the testator's life time, and so the defect is treated as one of form only, and relief will be granted. But the defect constituted by the converse process, the attempted exercise by irrevocable deed of a power which should have been exercised by will is treated as a matter of substance, and, in *Reid* v. *Shergold*(2) as fatal to the objects of the power."

The law is similarly stated in *Molineux* v. *Evered*(3).

From the above discussion it also follows that the settlor had no power to appoint new trustees during his life time nor designate persons other than those already designated in the original Trust deed to act as trustees after his life time.

Considerable arguments were advanced before us as to the effect of the order made by Ramfry, J. on August 25, 1937. On behalf of the appellant it was urged that Ramfry, J. had jurisdiction over the parties to the application in question as well as on the subject matter. Hence the validity of the order made by him cannot be challenged even if it is held that that order is not in accordance with law. To put it differently it was urged that what could be complained of is not the lack of jurisdiction on the part of the court to make the order in question but an illegal exercise of that jurisdiction; but such an attack cannot be made against that order in a collateral proceedings. On the other hand it was urged by Mr. N. C. Chatterjee, learned

(1) (1728) 24 E. R. 828.
(2) [1805] 10, Ves. 370.
(3) [1910] 2 Ch. 147.

A Counsel for the respondents that Ramfry, J. had no jurisdiction to pass the order in question. His grievance was not that Ramfry, J. exercised his undoubted jurisdiction illegally but that he had no jurisdiction at all to make the order in question.

It is plain that if the learned judge had no jurisdiction to pass
B the order in question then the order is null and void. It is equally plain that if he had jurisdiction to pronounce on the plea put forward before him the fact that he made an incorrect order or even an illegal order cannot affect its validity. Therefore all that we have to see is whether Ramfry, J. had jurisdiction to entertain the application made by the settlor.

C

What is meant by jurisdiction? This question is answered by Mukherjee, Acting C. J. speaking for the Full Bench of the Calcutta High Court in *Hirday Nath Roy* v. *Ramachandra Barna Sarma.*(1) At page 146 of the report the learned judge explained what exactly is meant by jurisdiction. We can do no better than
D to quote his words :

A "In the order of Reference to a Full Bench in the case of *Sukhlal* v. *Tara Chand*(2) it was stated that jurisdiction may be defined to be the power of a Court to *hear and determine a cause, to adjudicate and exercise any judicial power in relation to it* : in
E other words, by jurisdiction is meant *the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.* An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction', which has been stated to
F be *'the power to hear and determine issues of law and fact'*, 'the authority by which the judicial officer take cognizance of and decide causes'; *'the authority to hear and decide a legal controversy'*, 'the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or
G exercise any judicial power over them;' 'the power to hear, determine and pronounce judgment on the issues before the Court'; 'the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect'; 'the power to enquire into the facts, to apply the law, to pronounce the
H judgment and to carry it into execution'. (emphasis supplied).

(1) I.L.R. LXVIII Cal. 138.

(2) [1905] I.L.R. 33 Cal. 68.

Proceeding further the learned judge observed : A

"This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction : *for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction;* and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety, as is illustrated by the decisions reviewed in the order of reference in *Sukhlal* v. *Tara Chand*(1) and *Khosh Mahomed* v. *Nazir Mahomed*(2) see also the observation of Lord Parkar in *Raghunath* v. *Sundar Das*(3) *....We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court* and a hearing as well as a determination. A judgment pronounced by a court without jurisdiction is void, subject to the well-known reservation that, when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it : *Rashmoni* v. *Ganada.*(4)" (emphasis supplied). B C D E F G H

(1) [1905] I.L.R. 33 Cal. 68.
(2) (1905) I.L.R. 33 Cal. 352.
(3) [1914] I.L.R. 42 Cal. 72.
(4) [1914] 20 C.L.J. 213.

A Finally the learned judge quoted with approval the decision of Srinivas Aiyangar, J. in *Tuljaram* v. *Gopala*(1) wherein Aiyangar, J. laid down that "if a Court has jurisdiction to try a suit and *has authority to pass orders of a particular kind*, the fact that it has passed an order which it should not have made in the circumstances of the litigation, does not indi-
B cate total want or loss of jurisdiction so as to render the order a nullity". (emphasis supplied).

From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not suffi-
C cient that it has some jurisdiction in relation to the subject matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties. Therefore the fact that Ramfry, J. had jurisdiction to pass certain orders either under the Indian Trust Act, 1882 or under the Official Trustees Act, 1913 or under the
D Trustees and Mortgages Powers Act, 1866 or under his inherent power is not conclusive of the matter. What is relevant is whether he had the power to grant the relief asked for in the application made by the settlor. That we think is the essence of the matter. It cannot be disputed that if it is held that the learned judge had competence to pronounce on the issue presented for
E his decision then the fact that he decided that issue illegally or incorrectly is wholly beside the point. See *Ittavira Mathai* v. *Varkey Varkey and Anr.*(2). Therefore we have now to see whether the learned judge had jurisdiction to decide the issue presented for his determination. The relief prayed for, as seen earlier, was to permit the settlor to revoke particular clauses
F in the Trust deed and to authorise him to alter the quantum of inerest given to each of the beneficiaries by a deed *inter vivos*. Had the learned judge jurisdiction to entertain those pleas ?

Reliance was placed on s. 34 of the Indian Trusts Act, 1882 as conferring power on the judge to make the order in
G question. That section reads :

> "Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than ques-
H tions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal."

(1) (1916) 32 M.L.J., 434. (2) [1964] 1 S.C.R. 495.

Under this provision the court could have only given "opinion, advice or direction on any presented question respecting the management or administration of the trust property" and not on any other matters. The relief prayed for by the settlor did not relate to the management or administration of the trust property but on the other hand it asked for authority to alter the quantum of interest given to each of the beneficiaries by a deed *inter vivos*. The jurisdiction conferred on the court under s. 34 is a limited jurisdiction. Under that provision, the court has not been conferred with overall jurisdiction in matters arising under a Trust deed. The statute has prescribed what the court can do and inferentially what it cannot do. From the fact that the court has been conferred power to grant only certain reliefs it follows as a matter of law that the court has been prohibited from granting any other relief. The jurisdiction of the court is circumscribed by the provisions of s. 34 of the Trusts Act. The court had no jurisdiction to pronounce on the pleas put forward by the settlor. From the facts stated in the petition and from the relief asked for, it was obvious that the case did not come within the scope of s. 34 of the Trust Act. Therefore when the learned judge granted the relief asked for, he did something which he was not competent to do under s. 34 of the Trusts Act.

Next we were told the learned judge had jurisdiction to pass the order in question under s. 10(1) of the Official Trustees Act, 1913 which reads :

> "If any property is subject to trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act, and there is no trustee within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court willing or capable to act in the trust, the High Court may on application make an order for the appointment of the Official Trustee by that name with his consent to be the trustee of such property."

This provision has no relevance as regards the controversy with which we are dealing. That provision might have empowered the court to appoint the Official Trustee in the place of the settlor as the settlor was not willing to continue as the trustee. But it could not have granted the other reliefs asked for.

Reliance was next placed on s. 43 of the Trustees and Mortgagees Powers Act, 1866. There is no reference to this Act in the application made by the settlor. Obviously he did not rely on any of the provisions in that Act. But then if the court could

A have acted on the basis of any of the provisions in that Act, the fact that it did not purport to act under that provision is immaterial. Therefore we have to see whether the court could have acted on the basis of any of the provisions in the said Act. The only provision of that Act on which reliance was placed on behalf of the appellants is s. 43(1). The portion of that section B relevant for our present purpose reads :

> "Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the management or administration C of the trust property or the assets of any testator or intestate..."

This provision is more or less similar to s. 34 of the Trust Act. Under that provision a judge of a High Court could have only given opinion, advice or direction on any question respecting the management or administration of the trust property. D Therefore the order made by Ramfry, J. cannot be justified on the basis of s. 43 of the Trustees and Mortgagees Powers Act, 1866.

It was then said that the order in question could have been made by Ramfry, J. in the exercise of his inherent powers as a E judge sitting on the original side of the Calcutta High Court. It was argued that a judge sitting on the original side of the High Court of Judicature at Calcutta has all the powers of a Chancery Judge in England as that power has been conferred on him by the Letters Patent granted to that High Court. We shall assume it to be so. We may note that the settlor did not invoke the inherent jurisdiction of the Court nor did the judge purport to exercise that F power. But, still, that cannot invalidate the order made if the court had the inherent jurisdiction to make that order. Hence the real question is had he that inherent jurisdiction? Chapter XIII of the Calcutta High Court Rules prescribes what orders can be obtained in an originating summons proceedings. The jurisdiction of the judge acting under that Chapter is a summary G jurisdiction. Rule 1 of that Chapter empowers the judge to entertain an application in respect of matters enumerated in clauses (a) to (g) of that rule. Admittedly cls. (a) (b), (f) and (g) are not relevant for our present purpose. Under cl. (c) the court could only decide about furnishing of any particular accounts by trustees and vouching (where necessary) of such H accounts. Under cl. (c) it could direct the trustees to pay into court any monies in his hands and under cl. (e) direct him to file an account and vouch the same to do or abstain from doing any particular act in his character as a trustee. The orders under

Ch. XIII are made in chambers. As mentioned earlier the proceedings under that Chapter are summary proceedings. No rule in that Chapter was brought to our notice under which the order in question could have been made. A

Different questions might have arisen for consideration if an application under rule 9 of Chapter XIII had been made requesting the High Court to interpret the original Trust deed in a particular manner. Such a plea was not taken in the application filed by the settlor before Ramfry, J. Further it was not the case of the appellant either in the High Court or in the courts below or even in this Court that Ramfry, J. merely purported to interpret the original Trust deed whether his interpretation is correct or not. B C

Let us now proceed to the question whether the Chancery Court in England had jurisdiction to pass an order similar to that made by Ramfry, J. This question was elaborately considered by the House of Lords in *Chapman and Ors.* v. *Chapman and Ors.*(1). The leading judgment in that case was delivered by Lord Morton of Henryton. In his speech he elaborately considered the various decisions rendered by the English courts. The broad question that he posed for decision was whether the court could permit the settlor to alter the terms of a trust and if so in what respect. It was urged before him on behalf of the appellants in that case that the court had jurisdiction to permit the alteration of any of the terms of a trust. Negativing that contention his Lordship observed at p. 456 : D E

> "Striking instances of cases which negative the existence of the alleged, unlimited jurisdiction are *In re Crawshay,*(2) *In re Morrison*(3) (Buckley, J.) and *In re Montagu*(4) (Court of Appeal). In the first of these cases North, J. said: 'I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will. On the assumption that the scheme would be beneficial to the estate I cannot decide that I have jurisdiction to authorise it.' In the last mentioned case the Court of Appeal held that it had no jurisdiction to allow the trustees of a settlement to raise money by mortgage of the settled estate and to apply it in pulling down and rebuilding some of the houses on the property. Lindley, L. J. said : 'We none of us see our F G H

(1) [1954] A.C. 429.
(2) 60 L.T. 357.
(3) [1901] 1 Ch. 701.
(4) [1897] 2 Ch. 8.

A way to hold that there is jurisdiction to make an order in this case. It is very desirable that the court should have jurisdiction to deal with such a case; but Parliament has never gone so far as to give it that jurisdiction. No doubt it would be a judicious thing to do what is wanted in this case, and if the persons
B interested were all ascertained and of age, they would probably concur, and then it might be done; but they are not all ascertained nor of full age; and unless the court can authorize the trustees to do it, it cannot be done.' Lopes, L.J. said: 'I have no doubt that what is proposed is beneficial and would increase both the
C income and the capital value of the property. The question is whether the court has jurisdiction to sanction it. There is no provision in the settlement which would authorize the works in question, nor do they fall within any of the improvements sanctioned by the Settled Lands Act."

D From the above observations it is clear that the learned judge proceeded on the basis that the court has no jurisdiction to permit the alteration of any of the terms in a trust deed excepting as regards the following matters :

(a) Changes in the nature of an infant's property *e.g.* by directing investment of his personalty in the
E purchase of freeholds;

(b) Allowing the trustees of settled property to enter into some business transaction which was not authorized by the settlement;

(c) Allowing maintenance out of income which the
F settlor or testator directed to be accumulated; and

(d) Approving a compromise on behalf of infants and possible after-born beneficiaries.

It will be noticed that the power given under those four
G heads are those relating to management and administration of trust property. That power is similar to the power conferred on courts by s. 34 of the Trusts Act and 43 of the Trustees and Mortgagees Powers Act, 1866. In fact in this country we have codified the very powers that were exercised by the Chancery Courts in England under their equitable jurisdiction. The Court of Appeal in *Chapman's* case(1) Evershed, M.R. and Romer,
H L.JJ., Denning, L.J. dissenting stated the law on the point thus :

(1) [1953] Ch. 1 218.

The inherent jurisdiction of the Court of Chancery is of a limited character. It is a jurisdiction to confer upon the trustee, *quoad* items of trust property vested in them, administrative powers to be exercised by them where a situation has arisen in regard to the property creating what may be fairly called an 'emergency'. The inherent jurisdiction does not extend to sanctioning generally the modification or remoulding of the beneficial trusts of a settlement. A B

Hence we are not persuaded that the Chancery Court in England had jurisdiction to pass orders similar to that passed by Ramfry, J.

From whatever angle we may examine the validity of the order made by Ramfry, J., it appears clear to us, that the said order was outside the jurisdiction of the learned judge. It was not merely a wrong order, or an illegal order, it was an order which he had no competence to make. It is not merely an order that he should not have passed but it is an order that he could not have passed and therefore a void order. C D

The circumstances of the case call for certain modifications in the decree of the High Court. On the facts of this case we see no justification for treating the Official Trustee as a trustee *de-son-tort* and to require him to account as such. In the proceedings before Ramfry, J. the plaintiff did not choose to appear and contest. It is not his case that he was not served in that proceeding. But for the order of Ramfry, J. the settlor would have certainly altered the quantum of interest given to the plaintiff under the original Trust deed by means of a will. As it now turned out the plaintiff has benefited by the wrong step taken by the settlor. The Official Trustee has merely carried out the order of the court. It was not open to him to go behind that order That being so we see no justification to treat him as a trustee *de-son-tort*. Equity requires that he should be made to account as if he was a trustee. In other words his liability should not be greater than that of a trustee. It is also proper to permit him to reimburse himself all the costs incurred by him in all the courts from out of the trust funds in his hands. E F G

We see no justification for allowing accounting in this case from the date the official Trustee took charge of the trust estate. Till the institution of the present suit from which this appeal has arisen there was no knowing that the plaintiff would challenge the second Trust deed executed by his father. He did not challenge it during his father's life time. On the faith of the order of the High Court, the Official Trustee must have been disbursing the trust income to the various beneficiaries. It will be inequitable to reopen all those transactions. We think the ends H

A of justice will be met if accounting is ordered as from the date of the institution of the present suit. The plaintiff-respondent is entitled to his costs in all the courts. But he shall get the same from out of the Trust Estate.

Subject to the modifications directed above in the decree of
B the High Court this appeal is dismissed.

V.P.S. *Appeal dismissed and decree modified.*