his own judgment and discretion in making an order of such nature does not preclud him from utilising, as a matter of practical administrative procedure. the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order and also to draft it in the first instance.....
It suffices that the judgment and discretion finally exercised and the orders finally made by the Superintendent were actually his own; and that there then attaches thereto the presumption of regularity in order to effectuate the intent manifested thereby."

As the Assistant Custodian has not exercised the discretion vested in him by law and as he has subordinated his discretion to the will of the Custodian, I agree with the learned Single Judge that he is guilty of abuse or capricious or arbitrary exercise of discretion. The order of the learned Single Judge must, therefore be affirmed and the appeal dismissed with costs. I would order accordingly.

Dulat, J.—I agree.

B. R. T,

1958

REVISIONAL CIVIL

Before Grover, J.

JAIRAM DAS CHELA KALYAN DASS,—*Petitioner.*

versus

SHANKAR DASS AND OTHERS,—*Respondents.*

Civil Revision No. 361 of 1957.

Code of Civil Procedure (Act V of 1908)—Section 2(2) and Orders 20 and 34—Preliminary decree—Meaning of—Whether confined to the preliminary decree mentioned in Orders 20 and 34—Order IX Rule 8—Suit—Whether can be dismissed in default after the passing of preliminary

decree—Hearing of the suit—Meaning of—Section 151 and Order XLVII—Order based on misapprehension of facts or otherwise illegal—Whether should be recalled—Limitation—Whether a bar to such recall.

Held, that there is nothing in principle to show why, if an order satisfies all the conditions of a preliminary decree as defined it should not be taken as such, simply because it is not expressly provided for in the Code. A preliminary decree is not confined to the four corners of the specific provisions contained in Order 20 or Order 34 of the Code. All that has to be seen is, in terms of the Explanation, whether the decrees are of such a nature that further proceedings have to be taken before the suit can be completely disposed of.

Held, that the court has no jurisdiction to dismiss a suit for default after a preliminary decree has been made and before a final decree is passed.

Held, that Order IX Rule 8 C.P.C., cannot possibly apply when no hearing is to take place on a particular date. By the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider question relating to the determination of the suit which will enable him finally to come to an adjudication upon it.

Held, that where the order made by a Court is based on misapprehenesion of facts or is illegal, it is the duty of the Court to recall and cancel its invalid orders so that injustice may not be done to the litigants. This can and ought to be done under the provisions of section 151 of the Code of Civil Procedure and in such matters the bar of limitation also cannot stand in the way.

Petition under section 44 of Act IX of 1919 Punjab Courts Act and section 115 of Civil Procedure Code for revision of the order of Shri G. K. Bhatnagar, Senior Sub-Judge, Hissar, dated 1st April, 1957, dismissing the review application with costs.

F. C. MITAL, for Petitioner.

P. C. PANDIT, for Respondents.

JUDGMENT

Grover, J.—This order will dispose of Execution First Appeal No. 156 of 1957 as well. There is a Dera in village Patwar, Tehsil Hansi. It is of Dadu Panthi Sadhus and is known as Dera Samad Baba Siri Ram Das. After the death of the last Mahant Ram Das, Shankar Das claimed that he had been appointed as his Chela and was entitled to succeed to him. A suit was filed by Jai Ram Das and in that suit Shankar Das was declared to be unfit to be a Mahant. In 1942, Ram Parshad and five other filed a suit under section 92 of the Code of Civil Procedure for the appointment of a Mahant or Manager for the proper management of the Dera, who was to be directed to keep regular accounts of the income of the property and to spend it properly for the objects of the Dera and also for the settlement of a scheme for the management of the Dera. Shankar Das was made a defendant but he supported the case of the plaintiffs. Jai Ram Das was also impleaded as a defendant. This suit was dismissed on 21st April, 1944 on the ground that it was not public trust. Against that decree an appeal was brought to this Court which was registered as Regular First Appeal No. 218 of 1944. It was decided on 24th June, 1948, and it was held *inter alia* by this Court that— Grover, J.

(a) the Dera was a public trust;

(b) there was no validly appointed Mahant; and

(c) the plea that the Dera in question was a branch of Bhawani Dharamsala owned by Dadu Panthi Sadhus was not sustainable.

The case was remanded to the trial Court for decision on the other issues. On 23rd August, 1948

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the Senior Sub-Judge decided that the Mahant of the Dera should, subject to the approval of the Court, be the person appointed by the Mahants of the neighbourhood. Pending the appointment of the Mahant, Shankar Das was to act as a trustee of the institution. The suit was decreed with the direction that Shankar Das would be liable to be removed at the instance of the duly appointed Mahant of the Dera, if his appointment was approved by the Court. Jai Ram Das, who appears to be the contesting defendant, filed an appeal to this Court which was registered as Regular First Appeal No. 166 of 1948. This appeal came up for hearing before Harnam Singh and Kapur JJ., and was disposed of by their order, dated 26th November, 1952. It was decided that the Mahant of the institution should be a person appointed by the Dadu Panthi Mahants and Sadhus living in Hissar, Gurgaon and Rohtak Districts. It was further decided that the proper procedure was to keep the suit pending till the Mahant of the Dera was appointed in accordance with the usage of the institution. Full and detailed directions were given to the trial Court with regard to the procedure which was to be followed for holding the election of the Mahant and for deciding objections to the election. . Parties were directed to appear before the Court of first instance on 13th December, 1952. Meanwhile, Shankar Das was to continue to manage the Dera and the property attached thereto in accordance with the directions given by the trial Court on 23rd August, 1948, till a new Mahant was elected. A decree was framed by this Court in accordance with the judgment.

It appears that in pursuance of the order of this Court the parties presented themselves before the trial Court on 13th December, 1952 when another date was fixed, namely 5th January, 1953.

On that date the defendants were present, but there was no appearance on behalf of the plaintiffs. The reason obviously seemes to be that the interests of Shankar Das and the plaintiffs were identical and since Shankar Das had been put in charge of the management for the time-being, the plaintiffs were no longer interested in pursuing the matter futher. The following order was recorded by the learned Senior Sub-Judge on that date:—

> "No one is present on behalf of the plaintiffs. B. Kunj Lal and Shri Parkash Chandar Advocates, were called but they did not want to appear on behalf of the plaintiffs for want of instructions. It is now 4.15. Defendant No. 2 denies the claim. The suit is, therefore, dismissed with costs, under Order IX, rule 8, Civil Procedure Code. The Pleader's fee should be Rs. 100 and the costs shall be recovered from the plaintiffs on the record."

In April, 1954, Jai Ram Das defendant made an application moving the trial Court to carry out the orders of this Court mentioned above. This application was dismissed on 21st March, 1956. Another application was filed in April, 1956 by Jai Ram Das for review of the order of dismissal for default dated 5th January, 1953. This application was rejected on 1st April, 1957. Jai Ram Das had moved another application on 21st May, 1956, drawing the attention of the Court once again to the previous orders of this Court and praying that those orders be carried out. This application was dismissed on 1st April, 1957. The civil revision is directed against the order dated

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1st April, 1957, dismissing the application for review relating to the order dated 5th January, 1953. In this petition there is also a prayer that the order dated 5th January, 1953 itself should be set aside. The execution first appeal is directed against the other order dated 1st April, 1957 by which the application of Jai Ram Das made in May, 1956 was dismissed.

The question that has been raised in the petition for revision is that the order dated 5th January, 1953, by which the suit was dismissed for default, was wholly illegal and invalid and that the Court itself was bound to restore the suit and recall its own illegal orders as soon as the matter was brought to the notice of the Court. It is contended by Mr. Faqir Chand Mittal, who appears on behalf of the petitioner, that the order which had been made by a Division Bench of this Court which was followed by a decree gave some definite directions in the matter of appointment of a Mahant which the Court was bound to follow no matter whether the plaintiffs chose to appear or not in the suit. It is also urged that the decree which was passed by this Court at that stage was in the nature of a preliminary decree and, if that be so, the Court had no jurisdiction to dismiss the suit under Order 9 Rule 8 of the Code of Civil Procedure. This third point that has been raised is that no hearing was to take place on 5th January, 1953 and the trial Court could not have dismissed the suit under Order 9, Rule 8 of the Code of Civil Procedure. The fourth contention is that while disposing of the application for review the trial Court has failed to notice that rule 2 of Order 47 has been omitted by Act No. 66 of 1956. The trial Court has declined to review the order dated 5th January, 1953 on the ground that a successor of the Court that had made that order had no jurisdiction

to review the same under Order 47, Rule 2 last contention is that even if the matter was not covered by Order 47, Rule 1, the order dated 5th January, 1953 should have been set aside in exercise of the inherent powers under section 151 of the Code of Civil Procedure.

There seems to be no doubt whatsoever that the order made by the trial Court on 5th January, 1953 was wholly illegal in the circumstances of the present case. In *Lachmi Narayan* v. *Balmukand* (1) where the facts were very apposite to the facts of the present case, it was laid down by their Lordships of the Privy Council that where a decree had been made in a suit, which was for partition in that case, and the suit, was remitted to the Subordinate Judge by the High Court in order that necessary steps for effecting the partition of the undivided property might be taken, the suit could not be dismissed by the trial Court for default. There seems to be a good deal of force in the contention raised by Mr. Mittal that the decree made by this Court on 26th November, 1952 was in the nature of a preliminary decree. According to section 2(2) of the Code of Civil Procedure, a decree may be either preliminary or final. In the 'Explanation' it is stated that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. No doubt the Code provides for the passing of preliminary decrees in the various classes of cases mentioned in Order 20, rules 12, 13, 14, 15, 16, and 18, and Order 34, rules 2, 3, 4, 5, 7 and 8. At one time the view prevailed in the Calcutta High Court that except in the cases covered by the

(1) A.I.R. 1924 P.C. 198.

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aforesaid provisions no preliminary decree could be passed (*Mohendra Chandra* v. *Ram Ratan* (1). In a later case, however, in Peary Mohan v. Manohar, (2), the same Court changed its view and held that the list was not exhaustive. In a Full Bench decision of the Travancore-Cochin High Court in *Narayanan Thampi* v. *Lakshmi Naravana* (3), it has been held that there is nothing to preclude the Court from passing a preliminary decree in cases not expressly provided for in the Code. In Chitlay's commentaries on the Code of Civil Procedure, Volume I, (1957 Edition), it is stated at page 133 that there seems to be nothing in principle to show why, if an order satisfies all the conditions of a preliminary decree as defined, it should not be taken as such, simply because it is not expressly provided for in the Code. With this view I am entirely in agreement. Looking at the language employed in section 2(2) of the Civil Procedure Code, I have no doubt that a preliminary decree is not confined to the four corners of the specific provisions contained in Order 20 or Order 34 of the Code. All that has to be seen is, in terms of the Explanation, whether the decrees are of such a nature that further proceedings have to be taken before the suit can be completely disposed of. In the present case it is quite clear that the trial Court was bound in terms of the order made by this Court to make arrangements for convening a meeting of Dadu Panthi Sadhus and Mahants living in Hissar, Rohtak and Gurgaon for the purpose of electing a Mahant. That meeting was to be held as directed by the High Court and notices etc. were to be issued in the manner stated in the order. The Court was then to consider any objections to the election that might be raised

(1) A.I.R. 1919 Cal. 361.
(2) A.I.R. 1924 Cal. 160.
(3) A.I.R. 1953 T.C. 220.

and after deciding the same the Court had to accord its approval to the election and then the suit was to be decided. The trial Court was further directed to give possession of the Dera and the property attached thereto to the Mahant who would be so elected. The order of this Court had all the attributes of a preliminary decree after the points in controversy between the parties had been decided with regard to the character of the trust and the procedure for the appointment of a Mahant. It is well settled that the Court has no jurisdiction to dismiss a suit for default after a preliminary decree has been made and before a final decree is passed. This is the ratio of the decision in *Lachmi Narayan* v. *Balmukand* (1).

Apart from the fact that the decree made by this Court was a preliminary decree, the trial Court was not competent to dismiss it for default under Order 9, Rule 8. Order 9, Rule 8 cannot possibly apply when no hearing is to take place on a particular date. As to what is meant by a hearing, has been settled by a long course of decisions. By the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which will enable him finally to come to an adjudication upon it,—*vide Manohar Dass* v. *Birandari* (2). Even the learned Judges of the Calcutta High Court in the case which was decided by the Privy Council in *Lachmi Narayan* v. *Balmukand* (1), were of the view that hearing occurs only when a Judge is taking the evidence or hearing arguments or is otherwise coming to the final adjudiction of the suit. The view was not disapproved by their

(1) A.I.R. 1924 P.C. 198.
(2) A.I.R. 1936 Lah. 280.
(3) AIR 1924 P.C. 198.

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Lordships of the Privy Council who did not consider it necessary to finally determine whether the word "hearing" should or should not have the aforesaid particular limitations because the decision of the High Court in that case could be supported on another ground. The date which had been fixed in the present case, namely 5th January, 1953, was not meant for any one of these purposes. All that was to be done on that day was that the Court had to make arrangements for carrying out the detailed directions given by this Court in the matter of election of the Mahant.

If it be held, as has been decided by me that 5th January, 1953 was not fixed for the hearing of the suit and that the decree made by this Court on 26th November, 1952 was a preliminary decree, the order of dismissal of the suit for default was wholly illegal and the Court was bound to recall its invalid order. It is hardly necessary to refer to any authorities except *Sheikh Mohammad* v. *Rukmina Kunwar* (1), for laying down that where the order made by a Court is based on misapprehension of facts or it illegal, it's the duty of the Court to recall and cancel its invalid orders so that injustice may not be done to the litigants. This could be done and ought to have been under the provisions of section 151 of the Code of Civil Procedure, and in such matters the bar of limitation also could not stand in the way. I have no doubt, therefore, that as soon as Jai Ram Das brought it to the notice of the Court below that the suit could not have been dismissed for default on 5th January, 1953, it became the duty of the Court to set aside the illegal order and to carry out the directions made by this Court in the matter of election of the Mahant. The order of 5th January, 1953, itself being illegal must be set aside as also the

(1) A.I.R. 1946 All. 506.

subsequent order of 1st April, 1957, by which the review application was wholly erroneously rejected by applying a provision of the law which had been repealed at the time when the order was made.

For these reasons the petition for revision must succeed and it is hereby allowed and the order dated 5th January, 1953 of the trial Court is set aside as also the subsequent orders relating to the same. The suit would be restored and the trial Court shall proceed to carry out the directions of this Court. In the execution appeal the application of Jai Ram Das was dismissed on the ground that unless the order of dismissal of the suit was set aside, no further proceedings could be taken. As that order is being set aside by me in the revision petition, it is unnecessary to decide the execution appeal. The same is dismissed as having become infructuous.

In the order of the Division Bench of this Court dated 26th November, 1952 the meeting was directed to be held on a date to be fixed by the Court of the first instance in March, 1953. As the orders of this Court were not carried out that date has passed and a request has been made by Mr. Faqir Chand Mital on behalf of the petitioner that I should extend the date and fix a fresh date for holding of the meeting. I do not consider it proper that I should amend the orders of the Division Bench and I am doubtful whether it is within my competence to do so. In these circumstances Mr. Mital agrees that he will make a proper petition to the Division Bench in the matter.

As the whole trouble arose on account of a mistake committed by the Court itself, it will be proper to leave the parties to bear their own costs in both the cases in this Court.

B.R.T.