
(1911) 04 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 223 of 1908

Bai Mahakore

APPELLANT

Vs

Bai Mangla

RESPONDENT

Date of Decision : 12-04-1911

Acts Referred:

Trusts Act, 1882 — Section 5

Citation : (1911) 13 BOMLR 564

Hon'ble Judges : N.G. Chandavarkar, J;Heaton, J

Bench : Division Bench

Judgement

Chandavarkar, J.—The facts which are admitted are shortly these. On the 1st of November 1891, the deceased Damodardas made a credit entry of Rs. 20,000 in his books in the name of his wife, Harkore, carrying interest at 4 1/2 per cent. The entry was made as of the 30th of November 1890. He also treated the amount of the entry as belonging to his wife in his annual balance sheet showing his assets and liabilities, in his Samadaskat book, and in his Vyajvahi which contained his interest account, and in which interest was calculated on the amount at varying rates. In November 1895, Harkore went on pilgrimage and from the entries in Damodardas's books it appears that before going she had with" drawn Rs. 150 odd from her account. Harkore died on the 2nd of March 1901. On the 7th of February 1903, Damodardas debited Rs. 15,000 to her account and credited the same amount to the three sons of his and her daughter, Mahakore. On the 23rd of February 1903 he made a will, in which he stated that the amount was his own and had never belonged to his wife.

2. These facts standing by themselves might be insufficient to show that Damodardas had intended to create a trust in respect of Rs. 20,000 in favour of his wife, and that he had constituted himself her trustee as to that amount. But the respondents rely on a document (Exhibit 447) purporting to be a declaration of the trust and written to his daughters by him six months after the death of his wife Harkore. The genuineness of the document has been questioned for the

appellants but I see no reason whatever to doubt it. The signature on it purporting to be that of Damodardas is admitted as his. What is alleged is that before going on pilgrimage he had left a number of blank papers signed by him with one of his sons-in-law; but of this there is no satisfactory proof. Were that true, the appellants should have found no difficulty in producing a few such blank papers or adducing credible evidence in support of their allegation. It is true that the document in question was passed on the very next day after Damodardas had asked his pleader, Mr. Ambashankar, whether he could dispose of the money in his wife's name, and the pleader had told him that "he had no authority to do so, as he was not the heir of his wife." But I can see no improbability in the fact of Damodardas acknowledging the trust in favour of his wife to his daughters. His pleader the day before had pointed out to him that they were the heirs entitled to the amount standing in his wife's name, and it is not strange, rather it is very probable, that, acting on the pleader's opinion, he made the declaration. The time when it was made is important. Damodardas was about to go on a pilgrimage. Naturally he would be anxious to settle all his affairs, and make definite arrangements about his property and his wife's. It is usual with Hindus proceeding on pilgrimage to do that.

3. If the document, Exhibit 447, is proved, as I hold it is, there can be no question that Damodardas intended a trust in favour of his wife. The only question, then, is whether that trust was carried into effect legally by him. It is contended for the appellants it was not, because (it is urged) Damodardas did not comply with the requirements of Sections 5 of the Trusts Act, the second clause of which provides that "no trust in relation to trust property is valid unless declared as aforesaid" (i.e., in the first clause), "or unless the ownership of the property is transferred to the trustee." According to the contention, there must be either "a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered" or a transfer of the property to the trustee. In this case there was neither.

4. Section 5 of the Trusts Act must be read with . Section 5 lays down what may be called the extrinsic conditions necessary to create a trust. In other words, it prescribes the mode of its creation. Section 6 lays down the intrinsic conditions necessary for a valid trust; in other words, given an instrument in writing or transfer of the kind mentioned in Sections 5, it prescribes what is necessary to make out a trust from the words used in the instrument or the act denoting the transfer. The question must naturally have occurred, I presume, to the draftsman of the sections, "Section 5 prescribes transfer as one of the two alternative modes for creating a trust of moveable property. But the word transfer, as defined in the Transfer of Property Act (Sections 5), excludes the conveyance or delivery of property by a man to himself. Where a man creates a trust and constitutes himself its trustee, how-can there be a transfer?" Hence, I apprehend, the exception was made in Section 6 that in such a case there need be no transfer. Section 5, Clause 2, lays down a general rule ; Sections 6 creates an exception, in the case of a trust of moveable property.

5. But it is argued that this construction is inconsistent with the plain language of Sections 6, which requires that it should be read "subject to the provisions of Section 5." I do not see the inconsistency. Section 5, Clause 2, requires transfer for a valid trust of moveable property where it is not created by a non-testamentary instrument of the kind mentioned in the first clause; and Section 6 virtually declares that where a person is himself the author of a trust, there is a transfer, if the other conditions prescribed in Sections 6 are complied with.

6. Then it is said that, in that case, upon this construction of Section. 6, a transfer is necessary for a valid trust of Immovable property except where the trust is created by a person of his own property and he is himself the trustee; but Sections 5 requires. nothing of that kind in the case of such a trust. Here, again, I fail to perceive any contradiction between the two sections on the construction above stated. "Transfer of property, as defined in Sections 5 of the Transfer of Property Act, "means an act by which a living person conveys property;" and seeing that by s 54 of the Act, the Legislature has made it plain in the case of a sale that a transfer of Immovable property can be made by a registered instrument, the intention of the Legislature appears to me clear that in the case of a trust of Immovable property, such an instrument would operate as a transfer. When Sections 5 and 6 of the Trusts Act are read, as they should be read by the light of the relevant Provisions of the Transfer of Property Act, I venture to think that the words of Sections 6 of the former Act, which have given rise to difficulty of construction, must be construed as meaning that, though as a rule transfer is one of the conditions necessary for a valid trust whether in the case of moveable or Immovable property no transfer is required where the trust is declared by will or the author of the trust is himself to be the trustee; and that one of the modes of transfer is a non-testamentary instrument in writing which is registered.

7. For these reasons I am of opinion that in this case there was a valid trust in favour of Harkore. As to the ornaments it is admitted that if the document Exhibit 447 is held proved the respondents are entitled to them.

8. The decree is confirmed with costs.

Heaton, J.

9. The plaintiffs sue as some of the heirs of one Harkore kom Damodardas Tulsidas to recover a three-fourths Share her property. Assuming that she left property of her own the plntiffs are entitled to three fourths of it. This is not denied.

10. The property alleged to be Harkore's comprises a sum of money and certain ornaments. Her husband was a trader and certain respects a banker also, as clients sometimes deposited money with him. In such cases he showed these deposits in his accounts and in his annual balance sheets and sometimes he had a samadaskat, a kind of pass book, made out in the depositor's name. In November 1891 Damodardas caused, the sum of Rs. 20,000 to be entered in his

business accounts in the name of his wife as if she had deposited that sum with him. Thereafter up to the time of Harkore's death and for some time afterwards, that sum with accumulated interest, appeared in the accounts and the balance-sheets exactly as if Harkore had been a depositor with Damodardas. This is the sum of money three-fourths of which the plaintiffs claim. Defendants denied that either the money or ornaments were Harkore's. The First Class Subordinate Judge, who heard the suit, decided all the main points in favour of the plaintiffs, holding that both the money and ornaments were Harkore's. He decreed the claim. Defendants have appealed.

11. The facts are fully stated in the judgment of the lower Court. I concur with its conclusions as to the facts in dispute. The difficulty arises in connection with the inferences to be drawn from those facts.

12. I will first deal with the ornaments. The determination whether they were or were not Harkore's depends largely on the genuineness or falsity of an alleged signed and attested declaration purporting to be made by Damodardas on the 28th July 1901 (Exhibit 447). This was some months after Harkore had died and the day after he added a codicil to his original will, made in 1900 some months before his wife Harkore died. At this time, July 1901, no disputes had arisen. We have heard all that has to be said against this signed declaration and hold it to be genuine. Admittedly it bears Damodardas' real signature and we cannot discern any indications extrinsic or intrinsic, in appearance or matter or circumstances which with any degree of clearness or probability point to fabrication. I think the Subordinate Judge has satisfactorily disposed of what is alleged against it. In this declaration it is admitted that Harkore had ornaments. That being so the number and identity of those ornaments are not disputed and to that extent the decree of the lower Court must be affirmed.

13. The same declaration speaks of "the money given by me as a gift to your mother Bai Harkore and which is placed to credit in my money-lending shop." This is of some importance as confirming the account entries and showing that Damodardas consistently regarded that money (the Rs. 20,000) as his wife's.

14. A samadaskat book was produced relating to it which the defendants allege is also fabricated. It is unnecessary to say more than that the Subordinate Judge has given good reasons for holding it to be genuine and that after a scrutiny of the evidence and hearing the arguments we agree with him.

15. The Subordinate Judge held that the money had become Harkore's in virtue of a gift. It was at one time contended that she had herself deposited the money, but that was not proved and has not been urged in appeal. The facts are simply that Damodardas credited Rs. 20,000 to his wife and thereafter treated her as a depositor for that amount. This does not indicate a gift of money: if a gift at all it is a gift of a right to money. The money remained a part of the capital of the shop. It was as much Damodardas' after the credit entry as before. Money deposited in a bank becomes the property of the bank and ceases to be the

property of the depositor. The latter becomes a creditor and the Bank is a debtor. So "here, Damodardas became a debtor and Harkore a creditor. There was no gift of money, nor is it argued in appeal that there was such a gift. Therefore the conclusions of the lower Court as to the money cannot be supported on precisely the grounds taken by the First Class Subordinate Judge.

16. But it is argued on behalf of the plaintiffs, respondents in appeal, that there was a trust. To see whether this is so we have to look to Sections 5 and 6 of the Indian Trusts Act. According to Sections 5 no non-testamentary trust in relation to moveable property is valid unless declared by a registered document or unless the ownership of the property is transferred to the trustee. Here there is not a registered document and there was, I think, no transfer of ownership. The property, the money, was and remained in the ownership of Damodardas.

17. If we turn to Sections 6 we find that "a trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust &c." In this case I do not think the author of the alleged trust, Damodardas, indicated an intention to create a trust. It seems to me he indicated an intention to treat Harkore as a depositor and nothing more. The proved facts appear to me precisely to fit this conception of the case and to be irreconcilable with any other. A depositee is not a trustee for the depositor in respect of the deposit and the position here is that of depositor and depositee and nothing more. Therefore I think there was not a trust.

18. Nevertheless Damodardas was a debtor and Harkore a creditor. The evidence to my mind conclusively proves that Damodardas intended her to have the rights of a depositor and never wavered from that intention until disputes arose sometime after Harkore's death. Long before that time the positions of depositor and depositee were established and confirmed by the continued and unvarying treatment of Harkore as a depositor; by the regular addition of interest to her deposit amount; and by the debiting to that amount of money spent on the expenses of Harkore's pilgrimage. It had become too late for Damodardas by any act of his to annul the relations of depositor and depositee. Therefore I think the Subordinate ? Judge was substantially right in his conclusions, though he" referred to the matter as a gift. Damodardas conferred on Harkore a right to the money though he did not actually give her money. This right he by his own acts and words made perfect by those means which in the circumstances were appropriate to the purpose.

19. Therefore I would confirm the decree of the lower Court with costs.