

(1935) 12 CAL CK 0030
In the Calcutta High Court

Ebrahim Peer Mohamed

APPELLANT

Vs

Kissen Gopal Bagree and Others

RESPONDENT

Date of Decision : 13-12-1935

Acts Referred:

Transfer of Property Act, 1882 — Section 40
Trusts Act, 1882 — Section 90, 91

Citation : AIR 1937 Cal 180

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—This is a difficult matter, both, on account of the state of our law on the subject of trusts, and on account of the very peculiar facts. I would, therefore, have preferred to give a written judgment. I propose to give judgment now because I anticipate that in this case the parties having spent so much on a point of principle, will probably desire to obtain the decision of a Higher Court.

2. A. Facts.—I will deal first with the facts. The history of the matter may be conveniently divided into stages. The first stage is represented by the document itself, the deed of 21st August 1929. That is the first and most important fact in the case. I shall have to deal with the nature and provision of the deed in considerable detail. I will merely state now that it purports to be made-between Ratilal, a trader in financial difficulties, seven persons named as trustees of whom the majority were creditors, and of whom the defendant Kissen Gopal Bagree is one. The others or their representatives are also parties to this suit. The third party to the deed is or are the creditors who have subscribed their names in the schedule. Speaking generally the deed provides for the deferred payment of Ratilal's debts in full, without interest. The payments are to be made out of the property of Ratilal which, by the deed, he agrees to convey and assign to the trustees. That is the gist of it. The next fact or set of facts which I would isolate is the manner in which, or circumstances under which, the deed came to be executed. I will give my view now on the evidence without deciding for a moment how far such evidence is relevant or can affect the provisions of the

deed. There is on behalf of the plaintiff the evidence of Hassan Ali Khairaz, the General Manager of the plaintiff firm, who was not present in Calcutta at the time of execution of the deed, but who gave evidence as to the dues of the plaintiff firm, viz., a sum of Rs. 10,000 and Rs. 4,000, and of the instructions given by him to his Manager in Calcutta, one Musajee Ismail. Mr. Hassan Ali's evidence, I have no hesitation in accepting. He gave evidence in English, as I think frankly and intelligently.

3. On behalf of the plaintiff there is the evidence of Durga Sankar, an employee of Munnalal Sobhachand, a partner of which firm was also a trustee: vide Q. 8 and following. On the defendants' side there is the evidence of one Bungsilal Bhuiya, an employee of Jeevanram Gungaram: vide Q. 72-74 whose evidence I disbelieve in its entirety. There is also the evidence of Kissen Gopal Bagree himself, vide Q. 27 and 288, and Mr. A.K. Dutt, the solicitor (particularly Q. 4, 177 and 190). With regard to Kissen Gopal I may as well state at once my view of the witness. He was a very poor witness, so poor indeed that one has to make allowances for him. I am satisfied that he is not in normal health. He is a particularly emotional individual, incapable of restraining a flow of testimony, which is therefore most; difficult to estimate at its true value. His evidence on this point is that it was considered that the deed in question was of no effect (Q. 288: "I thought I would come into possession of the property and I would then become the pucca trustee)." This should be compared with Mr. A.K. Dutt's evidence: Q. 4, 177 and following:

Our idea was that this document was meant to ascertain the views of the creditors, and if the creditors agreed, that there would be formal trust deed.

4. Whether Mr. Dutt's view of what was intended is or is not relevant, I am quite clear that his evidence on this point is the result of auto-suggestion. With regard to evidence of Durga Sanker who gave details of how the deed came to be executed, and the meetings of creditors before it was executed, it is in the same class with the Gomasthas who have given evidence on the one side or the other, Goculdas and Suraj Prosad. They are partisan witnesses on both sides, and standing by itself I would not be prepared to accept without hesitation the evidence of any of these men on one side or the other. It is what might be described as a "team" case. On the other hand, under all the circumstances I am quite clear that this document was not the mere "feeler" as suggested by counsel, or Mr. A.K. Dutt or Kissen Gopal. We shall never know exactly how it came to be prepared, but I have no doubt that it was prepared in or about Mr. A.K. Dutt's office, not necessarily by Mr. Dutt himself, and that it was intended to be an effective deed of arrangement with creditors. It is perfectly true (this goes to the legal difficulties of the case) that this deed of arrangement contains no word of conveyance. I am quite sure that this, unless due to fraud, which is not suggested, is due to inadvertence and not to a deliberate intention to making the document colourless or of no effect. This suggestion I reject.

5. The next fact or set of facts to be considered in connexion with this

transaction of 21st August 1929 is the indebtedness or alleged indebtedness to the plaintiff firm in Rs. 10,000 and Rs. 4,000. With regard to the Rs. 10,000, Mr. Hassan Ali gave evidence and produced books. Gocul Dass was called on behalf of the defendant in order to establish that no such sum was owing. He spoke to certain of the books of Ratilal which were produced from the custody of the receiver and in my opinion was the instrument of a stupid and dishonest attempt to establish that this money was not due (Q. 69, 214, 324 and 335). I am quite clear that he knew, and that the lay gentleman looking after Mr. Bagree's case knew perfectly well that there were entries in other books establishing this debt. I am quite clear that Gocul Dass' play upon the "due date" was a premeditated way of escape if he should be cornered with these entries. There is no question, therefore, but that this Rs. 10,000 was due.

6. With regard to the Rs. 4,000 the debt is not denied, but it is made use of to found a particular defence which I shall have to consider, and I therefore give my view of the evidence. It was due upon a cheque or promissory note on which Ratilal and a third party were liable. It is entered separately as a distinct sum, in the Schedule to "the deed," as I shall call the document of 21st August 1929. Evidence has been given on this matter by Hassan Ali and Durga Sanker (Q. 165 and 167). The evidence of Musaji Ismail for reasons which will become hereafter apparent, we have not got. There are also certain letters from Ratilal and an account in respect of this Rs. 4,000 showing that the debt had been paid off gradually after the execution of "the deed." The question will arise whether the instructions of Hassan Ali, because, as I have stated already, I accept his evidence, were or were not communicated to the other trustees and the other creditors. I may as well express my opinion now on this point to the effect that they were. On this point, therefore, I am prepared to accept the evidence of Durga Sanker, not because it is Durga Sanker but because of the other circumstances, in particular the nature of the debt, the fact that it is separately entered in the Schedule, the letters and the manner in which the separate account was kept.

7. The next set of circumstances relates to the period August 1929 to September 1930. What was done during that period, and it is upon this that there has been the principal conflict of fact. I propose only to give my view of the result of the evidence, having already given my view of the witnesses. The gist of the evidence on behalf of the plaintiff is that steps were taken under the deed, and that at any rate with regard to the business the trustees took possession and managed it through Ratilal as Manager. I do not accept the evidence on behalf of the plaintiff, Durga Sanker, to the effect that in some manner or other, the trustees took possession of the house or landed property. There is in my opinion nothing to establish that. The gist of Kissen Gopal's evidence is that nothing was done, nothing could be done, a phrase which recurs continually throughout counsel's address, and occurs continually in the evidence. It is said that the business continues exactly as before: that Ratilal continued to pay creditors as he wished to, and that no step of any kind was taken. There is the evidence on

this point on the one hand, of Suraj Prosad and Durga Sanker, and on the other side Gocul Das and Kissen Gopal. I prefer Suraj Prosad as a witness to Durga Sanker or to Gocul Das. I am not saying that his evidence is to be accepted unless there are circumstances to corroborate it. As regards Kissen Gopal's evidence I have already indicated my view.

8. The facts which influence me in coming to a conclusion are the fact that the shop was closed in August 1929, again closed in September 1930, the fact that there were meetings both of trustees and creditors to which I shall have to refer, the fact of the letters of resignation. I hardly rely upon the entries in the books or the circumstances that there was a pujah performed in August or September 1929, but I think there was, and I think it was in connexion with the commencement of the business under the control of the trustees. The meetings I have referred to are identified by four notices: the notice issued by the trustees on 2nd December 1929 of a creditors' meeting; a notice of 26th August 1930 of a creditors' meeting; a notice of 31st August 1930 of a trustees' meeting; a notice of 1st September 1930 of a joint meeting of creditors and trustees, and a notice of 4th September 1930 of a creditors' meeting. These notices show quite clearly that nothing of any importance towards implementing the deed was in fact done. That fact, so far as it is in favour of the defendant, is indisputable.

9. The next point which by reason of its possible legal effect I will treat separately, is as to what happened at the last meeting. I have been asked to draw the inference that something happened at the last meeting equivalent to a resolution or decision of the creditors to "abandon the deed." As to this I will give my view on the question of fact in dealing with the point of law sought to be made. The next fact or set of facts is the mortgage to Kissen Gopal Bagree dated 18th May 1931 and the payments to creditors made in that and the succeeding years. Again, I give my view rather of the result, than of the evidence in detail. The theory of these transactions put before me both in the pleading and in the evidence-in-chief on behalf of the defendant is that it was a perfectly normal mortgage: the money Rs. 15,000 was paid out to the mortgagor Ratilal, and that with this money the mortgagor paid creditors who had or would have filed suits against him.

10. On the cross-examination of Kissen Gopal Bagree it appeared to me that this theory required considerable modification to make it fit in with the facts. It appeared, for instance, that the money had not been paid to Ratilal, that there was some sort of account kept by the solicitor out of which moneys were undoubtedly paid to creditors, and that by no means the whole of the Rs. 15,000 was accounted for. It was by reason of the curiosity which this position aroused in me, and by reason of the fact that counsel for the plaintiff threatened to comment on the position so far as disclosed, that counsel for the defendant decided to call Mr. A.K. Dutt. On the evidence of Mr. A.K. Dutt the position is quite clear. The arrangement is indicated both by the letter of 18th May 1931 written at the time (Ex. K) and from the account itself (Ex. 40). The account

Shows that odd sums amounting to some Rs. 7,000 were paid to Mr. A.K. Dutt by or on behalf of Kissen Gopal Bagree, and that sums roughly equivalent to the sums so paid were paid out to creditors. The cheques have been produced and I have no doubt that they were so paid. It is said that Mr. Bagree actually paid more than this Rs. 7,000, i.e., sums amounting in all to Rs. 11,000, and for purposes of this case I shall assume that is so.

11. It is clear therefore that there was an arrangement whereby Kissen Gopal Bagree was to assist Ratilal to get off vis-a-vis his creditors and as cheaply as possible (at a rate of about two annas in the rupee) and Kissen Gopal Bagree was to obtain control of the whole of the debtor's property. In point of fact, under the arrangement, and taking it at its face value, he got Rs. 3,000 as against his original claim of Rs. 5,000. Now, all this is not so terrible, and I am not prepared, having seen Mr. Bagree, to consider him a villain. I am not sure that his motive was not as much benevolent as to benefit himself. I am further prepared to believe that he thought himself justified. He was probably advised to this effect; but that is hardly the point. The point is, did he do what the law will not permit? He did in fact pay himself at the expenses of and secured himself at the expense of other creditors and obtain control of property which upon one view of the case was property held in trust for creditors. It is not really a question of amount, whether it be Rs. 3,000, or Rs. 20,000, but a question of principle.

12. There is one last question of fact to which I must refer, because it is made the ground of a substantive defence: the conduct of Musaji Ismail, the plaintiff's branch Manager in Calcutta. It is said that he suggested the mortgage (Mr. Bagree's evidence Q. 126). It is said that he also made attempts to purchase this mortgage property from the Receiver (Q. 128, 146 and 145), and it was sought to be proved that he made this offer on behalf of the plaintiff firm. This latter suggestion had not been supported. Mr. Hussan Ali has given evidence that he knew nothing about the mortgage, or the fact that Musaji Ismail got himself appointed Receiver in the mortgage suit. Musaji Ismail was dismissed in February 1934 and in July 1934 this suit was filed. I shall give my view on the question of fact involved, in dealing with the point of law.

13. B. Pleadings and Issues.-I will now deal with the pleadings. The plaint contains a direct attack upon the mortgage, but incidentally a claim to have the trust or alleged trust of the deed administered. I agree that the prayers are not complete and I would, had it been sought, have been prepared for that purpose to allow an amendment. However, the suit has throughout been treated by me as a suit to enforce or administer the trust of the deed and to declare in some manner or other the mortgage property to be trust property. The case was opened and had been contested on those lines. The written statement of Kissen Gopal Bagree contains the following main pleas: (1) non-joinder by reason of the receiver in the mortgage suit not being made a party. This point I can exclude from the discussion by deciding now in the plaintiffs' favour. There is a mass of

authority on it, which counsel for the defendant found it difficult to get me to consider in detail. (2) 3-A and 3-B: This sets out certain allegations of fact with regard to the deed but no legal contention; 3-C also sets out an allegation of fact except possibly the sentence "the said deed was in fact abandoned." As I read this pleading and still read it, I take it that "abandoned" means abandoned at birth. In other words Mr. Roy's "waste paper" point, i. e., not that this trust was determined by "discharge" or "extinguishment" either by impossibility or revocation. There is in point of fact no pleading of "discharge" or "extinguishment." I use the two words to cover the case both of contract and trust. (3) Para. 12: There was no trust at the time of the said mortgage and the properties mortgaged were not subject to any trust. This meets the case of constructive trust. (4) Para. 14:-No trust was in fact created by deed or otherwise. That meets the case either of express trust or constructive trust. (5) Para. 15, Acquiescence and estoppel.

14. On these facts certain issues were raised by Mr. Roy which I allowed to be placed on the record subject to myself deciding what I consider to be the essential points and dealing with the case on them. The issues raised by Mr. Roy contain several issues of fact but substantially cover the ground. On issue (8-a), "Was the said deed abandoned by the parties?" I pointed out at the time that there is no legal conception that I know of the "abandonment" of a trust. This issue follows the wording of the first sentence of Para. 3-C of the written statement to which I have referred. The essential questions are to flay mind four and I shall deal with the case accordingly: (1) The effect of the document itself, i. e. Is there an express trust? (2) The effect of subsequent events either as perfecting or as impairing the effect of the document itself; (3) question of constructive trust; (4) the effect in either case (i. e., express or constructive trust) of the conduct of the plaintiff upon his right to obtain relief: that depending (a) upon the matter of the Rs. 4,000 and (b) upon something in the nature of estoppel.

15. Four essential questions: (1) I now discuss the four questions, the first being the effect of the document itself. A preliminary question is: how far evidence of surrounding circumstances, that is to say, prior, contemporaneous and subsequent events, is to be taken into consideration in construing this document. Mr. Roy's contention is that the fact that "nothing was done" shows that nothing was intended to be done and shows, therefore, that the document is a nullity. In this case at any rate, I accept no such contention, whether relevant or not (and I think not). In this case the fact that nothing was done in my opinion throws no light on what was intended to be done by the document itself. The contentions on behalf of the defendant with regard to this document are as follows: First and foremost that the deed is a nullity. I have already referred to that aspect of the case. That is Mr. Roy's "waste paper," his "feeler" and Mr. A.K. Dutt's "tentative proposal." The grounds of this theory were stated by Mr. Dutt as follows: First that all the creditors did not sign, (2) that the deed itself is conditional, that is to say, the property was not conveyed and, (3) that it was so "intended," upon

which I have already expressed my view. Alternatively Mr. Roy argues that the deed is not a valid trust and that for two reasons, firstly, non-registration u/s 5, Trusts Act, and secondly the absence of words of transfer in the deed itself: Section 6.

16. Lastly, Mr. Roy argues, if a contract, i. e., if not trust, but something more than waste paper, circumstances have brought about that such a contract cannot be enforced, e. g., limitation, no specific performance, discharge and so forth.

17. (I) Express Trust: Having expressed my opinion that the deed is a nullity, I now take up the fundamental question of law in this case. The question is, does it constitute a trust under the Indian Law? Mr. Roy has cited a case which I agree is not logically distinguishable, the case in *Alagappa Chettiar v. Laxmanan Chettiar* AIR 1919 Mad 555. Having regard to the way in which this case was argued by Mr. Roy, I felt bound to consider this point independently. I agree with Mr. Roy that I have to decide this point according to the Indian law and according to the Indian law alone. But in this case, in order to find out what that law is, I have to consider English law, at any rate to discover how far the Indian Trusts Act is a departure from English law.

18. (a) ENGLISH LAW: - English Law recognizes various contrasted species of trusts, (i) First, of all "express and constructive trusts" (I follow Underhill by including under "express trust" precatory trusts classed by Lewin as "implied trusts"), (ii) Secondly, under English law trusts are divided into trusts in favour of volunteers and trusts in favour of non-volunteers, (iii) Thirdly, they are divided into "executed" and "executory" trusts: see Halsbury Article 85, Underhill, 5, 6 and 8, Halsbury, Article 37. It seems to me there is a distinction (normally negligible) between "executed trust" on the one hand, and the "completely constituted trust" of Halsbury, and the "perfectly created trust of Lewin and Godfroi on the other. It seems to me that under English Law a trust may be "executed" in the technical sense, that is to say, all its provisions may be clear, but may not be a "perfectly created trust." (iv) I, therefore, treat as a fourth division-"perfectly created and imperfectly created trusts." As to what constitutes a "perfectly created trust," see Godfroi, Edn 5, p. 33.,

19. In my opinion this deed under English law would be classed as follows:-(i) First of all express trust, (ii) in favour of non-volunteers, thirdly (iii) possibly executed, (iv) but certainly imperfectly created. Consider the consequences. The fact that it is not "perfectly created" would in English law make no difference because being for the benefit of non-volunteers equity would regard it as "perfectly created." Not only this, but in English law it might be regarded (even if for the benefit of volunteers, which it is not) as a "trust of a covenant." I refer here to the cases following the *Empress Engineering Cases* In re *Empress Engineering Co.* (1880) 16 Ch D 125 dealt with by Under bill at pp. 39 to 49: see Godfroi 59, 61.

20. Lastly in English law, apart altogether from the question of express trust with

which I have been dealing, the circumstances (of which the document itself is one) might well give rise to a "constructive trust." That, however, is a distinct point. I am now dealing with the question of trust arising from the document itself.

21. (b) INDIAN LAW.-I now come to Indian law. It has been argued before me on behalf of the plaintiff that the law under the Trusts Act is not substantially different. I agree with counsel for the plaintiff that it takes a brave man to codify equity. But the contention on behalf of the defendant is that it is not equity that has been codified but that the principles of certain decisions have been collected and put into the form of a statute and that upon the selections this statute alone must, the rights of parties claiming in India on matters relating to trusts, be based.

22. First: consider the Trusts Act as a whole. All "constructive trusts" are relegated to Chap. 9 and indeed excluded from the category of trusts. The illustrations of Section 6 show that Lewin's "implied trusts," i. e., "precatory trusts," are included in "express trusts." A point to note incidentally is that Section 78 which deals with "revocation" refers only to one class of trust in favour of volunteers-that for creditors, an indication to my mind that the rest of Chaps. 1 to 8 deal only with "perfectly created trusts."

23. Secondly: I find nothing in the individual sections, either Section 3, defining "trust" or the latter sections defining the rights and liabilities of trustees which justifies the conclusion that the Act does not confine express trusts to express trusts validly created under Sections 5 and 6.

24. Thirdly: Does the exception to Section 5 help us? I think not. The exception in my opinion applies only to Section 5. I refer to the clause beginning "These rules do not apply." The section applies only to Section 5 that is to say, registration and writing. The exception is intended to operate in the same manner as the exception created by the Court of equity to prevent the Statute of frauds being used as an instrument of fraud. (For the meaning of this, see Lewin, p. 47 and Manuel Louis Kunha v. Jnana Coelho (1908) 31 Mad 187.) It refers, I think, to fraud in the procuring of the transaction, in or about the transaction itself. I have not, however, considered this point with any great care, because, first of all, the document is in writing; secondly, I propose to hold that registration is not necessary, and thirdly, because I hold on the construction of the Act that this exception does not apply to Section 6 so as to let in equities in respect of "imperfectly created trusts." (On the point of registration, in order to exclude that from the discussion I propose to regard this as a deed of composition and to follow the decisions which, whether logical or not, assume that the provisions of the Trusts Act are controlled by the exception in the Registration Act.)

25. Fourthly: It was the avowed policy of the Indian Trusts Act, and indeed all those Acts which came into being at the instance of Whitley Stokes, and the

Indian Law Commission to do away with equitable interests and estates not fully created. The distinction between "executory and executed trusts" has been ignored: see the definition of trust, Section 3, and similar provision in the Transfer of Property Act. The whole of the Indian Trusts Act deliberately excludes the idea of equitable estate and provides for "obligation," obligations which constitute trusts under Chs. 1 to 8, and obligations "in the nature of trusts" in Ch. 9. In this connection the cases cited to me by Mr. Roy, in AIR 1931 79 (Privy Council) have a bearing.

26. Fifthly: As regards authorities. Agnew and other text books assume that the Courts in India will as in England regard "imperfectly created trusts" in favour of non-volunteers as perfected: see Agnew, pp. 49-54. But is this justified? I find in none of the cases which have been cited by one side or the other any authority for the contention on behalf of the plaintiff that in order to create an express trust there need not be a transfer. In Madras there is one already referred to, Alagappa Chettiar v. Laxmanan Chettiar AIR 1919 Mad 555. In Bombay there is Gordhandas v. Bai Ram Coover (1902) 26 Bom 449 at pp. 470, 472. There is one which was not cited but which has some bearing on the present case, Dhondo v. Keshav (1905) 7 BLR 179, at p. 182. In Calcutta there is Amerendra Krishna v. Monimunjari Debi AIR 1921 Cal 148 at p. 993. In none of them do I find suggested that in Indian Courts an "imperfectly created trust" will be considered upon equitable principle as in England. (What is the position in the case of the large body of trusts to which the Indian Trusts Act is not applicable, I have not fortunately to consider.)

27. Sixthly: Before leaving this subject I would like to call attention to certain other Indian statutes: the Specific Relief Act, the Transfer of Property Act and the Trusts Act. The definition of trust in the Specific Relief Act (1877) does not coincide with that in the Indian Trusts Act. The Specific Relief Act, Section 3, Illus. (g), provides for cases which would come u/s 91, Trusts Act. But here the purchaser is called a "trustee:" see also Section 27(b), Illus. 2. In the Limitation Act also Section 10, and elsewhere, the word trust and trustees are used and in my opinion they bear a significance larger than that of an express trust recognized as valid under the Indian Trusts Act. Section 40, T.P. Act, reads as follows: "Where a third person is entitled to the benefit of an obligation arising out of a contract but not amounting to an interest." This is comparable with Section 90, Trusts Act, and might cover the case of a trust. The language is comparable with that in Section 3, Trusts Act. The principle of *Empress Engineering Company cases* *In re Empress Engineering Co.* (1880) 16 Ch D 125, as I understood this matter, is this that a covenant between A and B expressly as trustee that A will transfer property to B on trust for C in effect constitutes B the trustee of an executed trust of a legal chose in action. There is no doubt an imperfect trust of the actual property to be conveyed, but the benefit of a covenant is itself property and this has been vested in B in trust for C. The Indian Courts, *Deb Narayan Dutt v. Ram Sudhan Mandal* AIR 1914 Cal 129; *Jivan Krishna Mullick v. Nirupama Gupta* AIR 1926 Cal 1009; *Iswaram Pillai v. Taragan*

AIR 1914 Mad 701, have recognized this principle as part of the Indian law. With regard to the Indian Trusts Act the benefit of contract being property, is not expressly excluded by Section 8. To my mind Sections 6 and 8 do not exclude a trust of chose in action and in case of trade debtors this would be a normal class of property to be conveyed; such property can of course only be vested in the trustee by an assignment. On the other hand Section 6 does seem to me inferentially to exclude the substitution of a "trust of a covenant" for an imperfectly created trust of the property, e. g., in this case the trust property "indicated" is the actual movable and immovable property. That has not been transferred.

28. Seventhly: Lastly, a point occurred to me, which had not occurred and did not appeal to counsel and which, therefore, was not discussed before me. Is not the Indian law generally wide enough, to permit in principle of a "trust of a covenant?" The Specific Relief Act and the T.P. Act to my mind point to an answer in the affirmative. If this is so, does the Indian Trusts Act exclude or prohibit such a trust? The principle of *Empress Engineering Engineering Co. Ishwaram Pillai Taragan* AIR 1914 MAD 701 is this: On Question 1, therefore- the effect of the document itself-I hold that no express trust was validly created.

29. II. Question 2, the effect of subsequent action upon the document, I will deal with quite shortly. So far as perfecting the document is concerned, on the view I have taken, the evidence is immaterial because you cannot perfect an imperfectly created trust by circumstances except, of course, in the case of movable property by delivery which operates as a transfer. With regard to impairing the effect of the document, having regard to the answer to Question 1 does not arise, I shall however express a view. In the first place it must be remembered that no revocation, extinction or discharge is pleaded. I hold on the evidence, however, that no revocation or extinction is established. I am unable to find on the evidence, specially the evidence as to the last meeting, that there was anything upon which could be founded a legal case of discharge. One little point which was raised, but not fully argued, I will dispose of, viz. that the terms of the trust or deed of arrangement not having been carried out, the matter is at large. The law does not appear to establish any such proposition. It seems to me that while the individual creditor is released from his undertaking to take less than his due, the trust itself in favour of creditors is neither determined nor destroyed.

30. III. I now come to Question 3, whether there is in this case a constructive trust or, under our law, an "obligation in the nature of trust." I hold that there is. The question now discussed is whether under all the circumstances of this case, the facts bring us within any of the sections of Oh. 9, in particular Sections 88, 91, 93, 94. In dealing with these obligations S 88 shows clearly that persons other than trustees upon express trusts are included. Section 91 will have to be considered. I have already referred to analogous sections in the Specific Relief Act and in the Transfer of Property Act. Section 40, T.P. Act, and Sections 3 and

27, Specific Relief Act, put a third person acquiring property, in respect of which there has been a binding contract, in the position of a trustee. In this case the applicability of Section 91 arises thus: Is Bagri a person who has acquired property with notice that another person (himself and the other trustees) had entered into an existing contract affecting the property of which specific performance could be enforced? In this case the person who acquires the property is himself one of those who entered into the contract. I consider that in this case (for reasons already indicated) not only could the other person (the trustees) enforce the contract, against the debtor, but that the contract might be enforced by the creditors themselves. In this case B (trustee) has agreed with C (a creditor) to obtain from A (debtor) and hold property for A's benefit. B enters into a contract with A to get the property, that is, the deed. In my opinion the Court would compel delivery of the property as between A and B in favour of C. The Court would further compel B to obtain delivery. B then buys the property himself, a person whom the Court would compel to obtain the property, and to hold it in trust for C. B has in fact taken the property in order to obtain an advantage over C, who ought to have been his cestui que trust under an express trust. Can it be said that the contract is not "an existing contract" or that it is not "liable to be enforced"? A possible question not discussed before me is, existing when, and enforceable when? At the time of the purchase, or at the time of the suit to enforce the obligation. The question then arises as to limitation. I have already referred to the fact that the Limitation Act imports yet other denotations of "trustee." I would myself be prepared to hold that somebody named as trustee of an express trust, which fails because it is not perfectly created, but is otherwise "executed," but who is nevertheless held to a position of "trustee" of a constructive trust, would attract Section 10, Lim. Act, and I do so hold. I think, apart from Section 10, limitation should not run until C was aware of the circumstances. I cannot think that B can be heard now to say that a suit to enforce the contract is barred or that limitation will run against C until and unless C is aware that the trustee or the debtor has refused to perform the contract. In my view, therefore, there is an existing contract which could be specifically enforced within the provision referred to in Section 91.

31. Section 93 also applies to this case. There remains Section 94, which appears to be a residuary section intended to provide for any case which an English Court of Equity would regard as constituting a constructive trust not provided for in the other sections. It is unfortunately worded, e. g., because having at the outset negatived any idea of beneficial ownership or beneficial interest or anything other than "the right to an obligation," this section talks of a person having possession of the property, but not having the whole "beneficial interest," thus importing the idea of estates. According to Section 3 there cannot be a "beneficial interest" without a "trust" and a "trustee." "Beneficial interest" in Section 94, therefore, means something different, i. e., as I read it, beneficial estate, or something akin to beneficial estate according to the ideas of English law. B in this case can, I think, be regarded as such a person. He has possession

of property, that is, the property itself. By reason of his undertaking to hold this property for the creditors, and by reason of his purchase with notice of the obligations affecting the property, he has, in my opinion, not got the whole beneficial interest in this property. Therefore whether it be regarded in the light of the trust of a covenant or a constructive trust pure and simple, it seems to me that his case is covered by the principle of Section 94.

32. IV.Q. 4.-Is the plaintiff debarred from relief? So far as this depends upon limitation, I have incidentally dealt with it. There remains the question of the Rupees 4,000, the question of laches and delay, apart from limitation, and the question of estoppel or confirmation. With regard to the Rs. 4,000 the point taken is that the plaintiff having acted contrary to the terms of the alleged trust he cannot rely upon it: vide *God.*, p. 74: *Lewin*, p. 73. See also *Cullingworth v. Lloyd* (1840) 2 Beav 385; *McKewan v. Sanderson* (1873) 15 Eq 229 at p. 234. It is quite true that a creditor, if he wishes to obtain an advantage over the other creditors, where there is a deed of arrangement, must make full disclosure. If he does not, either he cannot rely upon the deed or he must give up the benefit he has received. On the evidence that was given, and to which I have already referred, I am prepared to find, if I have not already done so, that disclosure in this case was made by the plaintiff. With regard to laches and delay, no very particular argument has been placed before me, and any such argument must be based upon knowledge or notice to the plaintiff. Mr. Roy's point was (1) estoppel or confirmation by the plaintiff by reason of certain acts or omissions of Moosaji Ismail, Branch manager. This matter was, as I say, not very fully dealt with by counsel, Mr. Roy treating it as obvious on the one side, Mr. Banerjee treating it as equally obvious on the other. The matter to my mind can be divided into two categories: (1) acts by or on behalf of the plaintiff, and (2) mere knowledge plus inaction. The acts relied upon were the suggestion by Moosaji Ismail of the mortgage and his participation in the mortgage suit as receiver, both these things being established. I am not prepared to hold that either of these acts was done on behalf of the plaintiff or in Moosaji Ismail's capacity as manager. The reason will appear from my view on the second point, that of notice. My view, is that the knowledge of Moosaji Ismail was not knowledge, which under ordinary principle, can be attributed to his employer. It seems to me that Moosaji Ismail on such evidence as is before me was acting otherwise than in the affairs of his employer and in prejudice to and fraud of his master's rights. In such circumstances I hold that the plaintiff is not debarred by either having confirmed the mortgage or taken no action to attack the mortgage prior to the suit.

33. I have heard counsel on matters of cost and heard Mr. Mukerji in an application that some allowance or maintenance should be made to his client pending administration. With regard to Monibai I am unable to make any order. With regard to costs, I have considered various alternatives, but none of them appear to me wholly satisfactory. I am not forgetting that all the defendants do not stand in the same position. Some never executed the deed, some resigned at an early stage. But on the whole I think that the best order to make is simply

that first defendant pay the plaintiff's costs of this suit and no other order. Costs subsequent to this decree will be reserved. It was obvious that the decree in this case would be a matter of some complexity and I therefore asked counsel to be ready with a form. Much however could not be expected from the defendant, and counsel for the plaintiff was apparently too overcome by his success to be of any assistance. Without the assistance of counsel I do not intend to exert myself in considering various difficulties and how they should be met. Unless therefore the matter is dealt with by the Court on appeal the parties will have to avail themselves of the liberty to apply which will be included in this decree. I will therefore only declare that the defendant Kissen Gopal Bagri holds the property, the subject matter of the deed of mortgage and hypothecation mentioned in the plaint, upon the trusts mentioned in the deed dated 21st August 1929, free of encumbrances created in his favour and of any decrees or orders obtained by him upon the basis of such encumbrances, and there will be a decree for the administration of the trusts in question.