

(1927) 10 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Suit No. 880 of 1926

Madhavprasad Nanuram Pandit

APPELLANT

Vs

Monghilal Ramanand Maheshri

RESPONDENT

Date of Decision : 13-10-1927

Acts Referred:

Citation : AIR 1928 Bom 97 : (1928) 30 BOMLR 186 : 108 Ind. Cas. 482

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—[After deciding certain questions on which the parties agreed, his Lordship proceeded :]

2. The real dispute between the parties is limited to question No. 2, and that question is whether a valid trust has been created in respect of the sum of Rs. 88,914-9-3 mentioned in para, 5 of the plaint. The dispute is between the Advocate General, who is the fifth defendant in the summons, and the other parties excepting the executors who submit themselves to the orders of the Court.

3. It is contended by the Advocate General that there is a valid trust with regard to this sum, and the other parties deny that any valid trust was created or declared with regard to it. It appears from the plaint and the written statement which have been put in on behalf of the Advocate General that this sum of Rs. 88,914-9-3 appears in the account books of Jagannath as being credited to what is called the school account under date Posh Vad 4th Samvat year 1974, corresponding to January 1, 1918, and the case made out on behalf of the Advocate General is that this sum is the balance of another sum of a lac of rupees which Jagannath obtained as profit in a certain transaction into which he entered with the firm of Messrs. Cawasji Framji & Co. So that, taking the summons, the plaint and the written statement, and the questions proposed, there is not the slightest doubt that what I am asked to decide is whether there is a trust in respect of this sum and this sum only in favour of a school called the

Marwari Bepari School.

4. The facts as they appear from the evidence are briefly as follows. It appears that Jagannath Girgraj was managing a school called the Marwari Bepari School, and there is some evidence to show that either he established it himself or it was through his efforts that that school was established somewhere in 1916. It also appears from the evidence that Jagannath took very great interest in the education of the youth of his community. It is not clear on the evidence when Jagannath ceased to have direct connection with this school, but the evidence shows that somewhere in Samvat year 1974-75 Jagannath ceased to manage the school and the management then passed into the hands of a Managing Committee of which the most important person was a man called Ramkisen Sagarmal. This Managing Committee of the school was really a sub-committee appointed by what is called in these proceedings a Cloth Committee which was the Managing Committee of an Association known as the Hindustan Piece Goods Merchants Association.

5. In or about May 1919 Jagannath had purchased 10,000 bales of cloth from the Textile Mills. These bales were required by the firm of Cawasji Framji & Co., and negotiations for the sale of the bales to the firm took place between Jagannath and one Narandas Parshottam, a partner in the firm of Cawasji Framji & Co. It appears from the evidence of Narandas that Jagannath told him that he wanted to make at least a lac of rupees by way of profit in the transaction as he wanted to give it to the Marwari Bepari School. The contract was entered into, and the day after the conversation between Narandas and Jagannath, Narandas gave a cheque for a lac of rupees by way of profit to Jagannath. That was on or about May 21 or 22, 1919. Jagannath credited this amount in his books of account in the name of Sri Ramchandra Hanumanprasad and debited the same to the Central Bank of India. The fifth defendant contends that this sum of one lac of rupees was donated by Jagannath to the School as from that date.

6. The burden of proving that there was a valid trust declared or created by Jagannath with regard to the sum would obviously be on the fifth defendant. Now there is no doubt that a trust can be created by word of mouth. But in order that such a trust may be proved it is necessary to prove that there was either an express declaration as to the trust, or that there is evidence of language or expressions used by the owner of the property to indicate with reasonable certainty that a trust was created. If there is no express declaration, or if there is no language, from which the Court can infer that a trust was declared or created, then there must be at least evidence of acts or conduct?and that evidence must be clear evidence?to show that the owner of the property intended to constitute himself or another person a trustee of the property for some one else. No formal language is necessary to constitute an effective declaration of trust, but the language used must, I think, as the decided cases show, make it certain (1) that the settlor intended to constitute a trust binding in law on himself or the person to whom the property was given; (2) that he intended to bind definite property

by the trust; and (3) that he intended to benefit a definite person or persons in, a definite way. These three points which the language used must make certain are what are commonly spoken of as the three certainties. The principles to be applied to a case like this, where it is alleged that an oral trust was created, are laid down in two decisions of our Court. The first of these is the case of *Hirabai v. Jan Mahomed Khalkdina* I.L.R (1881) Bom. 229. In that case Sir Charles Sargent observed at p. 250 :?

A long series of authorities in the Courts of Equity in England have established that, although the Court will not assist an incomplete gift, it will give effect to a declaration of trust by the donor when clearly and satisfactorily established.

7. Then the learned Judge cites the observations of Sir George Jessel in the well known case of *Richards v. Delbndge* (1874) L.R. 18 . This is what Sir George Jessel said (p. 14):?

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways : he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee,? but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

8. In the case of *Ashabai v. Haji Tyeb Haji Rahimtulla* I.L.R (1882) Bom. 115 the same learned Judge observed as follows (p, 122):?

Now the principle to be drawn from the authorities-at any rate the more recent authorities?is, that, in order that an owner of a fund may constitute himself a trustee of it, he must either expressly declare himself to be a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise domination and control over it exclusively in the character of a trustee.

9. Then he refers to the case of *Richards v. Delbridge* and *Heart-ley v. Nicholson* (1875) L.R. 19.

10. That being the position in law, the question which I have to consider is, whether on the evidence which has been led before me a trust was fully constituted before Jagannath's death. For, if a trust was fully constituted, then, as the learned Counsel for the fifth defendant contends, there is no doubt that

any subsequent dealing with the property, which becomes the subject-matter of the trust, cannot affect the nature of the property or the position of the parties with reference thereto.

11. The evidence in the case relied upon is partly oral and partly documentary. This latter consists of the entries to be found in the account books of Jagannath. I shall first deal with the oral evidence. The important witness on behalf of the fifth defendant is Narandas Parshottam, and I have no hesitation in saying that he certainly is not an interested witness, and if any one out of the four or five witnesses called on behalf of the fifth defendant was likely to know anything with regard to this sum of one lac, or with regard to the intention of Jagannath about the same, I think it would be Narandas Parshottam. But all that Narandas says is that Jagannath told him that he wanted to give this one lac to the Marwari Bepari School, and to set apart that sum for the Marwari Bepari School, That, in my opinion, is absolutely sufficient to establish an express declaration of trust. This is all that Narandas says in his examination-in-chief. It is true that towards the conclusion of his cross-examination in answer to a question put by the Court Narandas stated that he knew from his knowledge that Jagannath had set apart this sum of one lac for the Marwari Bepari School. But, as to this, I find it difficult to understand how Narandas came to know that Jagannath had set apart this sum for the School. He can only know this either because Jagannath informed him to that effect, or he may come to know of it after he examined or looked into the account books of Jagannath. There is nothing to show that his knowledge was derived from the account books of Jagannath. Therefore, when Narandas says from his knowledge that Jagannath set apart this sum for this School, it must be taken that that information was imparted to him by Jagannath himself. But, if Jagannath told Narandas that he had set apart the sum, then obviously Jagannath told him something which is not borne out by the entries in his books. There is no doubt on the account books that there is not a single entry in any of the numerous books produced before me showing that at any time the sum of one lac of rupees was set apart for the Marwari Bepari School. In judging of the evidence of a witness like Narandas, and I may say that of the other witnesses also, one has to bear in mind the remarks of Sir Charles Sargent made in the case of *Hirabai v. Jan Mahomed Khalakdina* I.L.R (1881) Bom. 229, to which I have already referred. The learned Judge at p. 251 said in that case :?

The equitable doctrine of the transfer of ownership by acknowledgment of trust, when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties, speaking to conversations which took place seventeen years ago, without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country, and would offer a direct encouragement to perjury.

12. This case was first heard before Mr. Justice West, and his judgment is

reported in ILR 7 Bom. 241, and at p. 243 the learned Judge observes :?

It is plain that, even if these witnesses are in any degree morally honest ones, their recollection of the purchase and exhibition of the note, and of what Khalphanbhoy said about it seventeen years ago, is too misty and uncertain to deserve any great confidence. It has been held in many cases that it is unsafe to build up a trust upon mere conversations, loosely remembered, and inaccurately related. In the course of time people, whose perceptions of the importance of this or that small distinction in what took place were never really awakened, blend their own thoughts and wishes imperceptibly with the first simple suggestions of the memory. This may occur without positive dishonesty; and resentment at unkind usage, for which there appear to be grounds in this case, helps a halting conscience over many stumbling blocks.

13. In the light of these remarks, it is not necessary for me to examine in detail the evidence of other witnesses. But I cannot help remarking that I am not at all impressed by the evidence of the witness Parbhudayal Bhaniram. It is also clear on a careful consideration of the evidence of these witnesses that all the four witnesses excepting Narandas are interested witnesses. The first of them is a man called Madanlal Joharmal. His evidence is no doubt more definite as to the alleged trust created by Jagannath than the evidence of the other witnesses. But if, as I have pointed out, at the time that the transaction was entered into Jagannath intended to create a trust, he certainly would indicate it in more clear language to Narandas than possibly later on when he happened to talk about it to other persons like Madanlal, and if therefore Narandas' testimony falls short of the requisite definiteness required in order to constitute an oral trust, then it is not possible for me to accept the evidence of a man like Madanlal who, I have no doubt, is an interested witness. But, coming a little closer to his evidence, I find that in the examination-in-chief he stated that he had a conversation with Jagannath at the end of 1919 or the beginning of 1920, that is to say about four or five months after Jagannath is alleged to have made his first declaration about the disposal of one lac of rupees. Now what does Madanlal say? He said that Jagannath told him that he had set apart a lac of rupees for the Marwari School which was in existence and which he was managing, and he further told him that a building for the School was to be built out of this one lac of rupees, and the occasion for this conversation seems to be, according to his evidence, that Jagannath desired that the witness should serve on the Managing Committee of the School. According to the witness he was a member of the Managing Committee of this School up to 1914. After that he had no connection with the School. He was actively connected with another rival institution called the Marwari Vidyalaya, and I find it difficult to believe that Jagannath would go out of his way to speak to this man about this sum when this man, admittedly, had nothing to do with the Marwari Bepari School. But, if one goes deeper into the evidence of this man, he seems to come within the description of witnesses whose testimony, according to Mr. Justice West, ought to be accepted with the greatest caution, for he says that the conversation took place at the shop of

Jagannath about the end of 1919 or beginning of 1920. Then in his cross-examination he says Jagannath had also spoken to him even before this meeting at this shop, and that was even four or five months prior to this, that is about the time of the transaction so that according to this man's evidence, it seems that whenever he happened to meet Jagannath, Jagannath would tell him that he wanted to give a lac of rupees to the school. When he was cornered he turned round and said that he did not understand the question, and that Jagannath really spoke to him only once. As to his statement that Jagannath had set apart a lac of rupees to the Marwari Bepari School the remarks which I have made with reference to the evidence of Narandas would also apply. It is not possible that Jagannath could have told him that he had set apart a sum for the Marwari School, whereas in fact he had not. I need not go into the other details of his evidence which show that the man is really mixing up his impression as to what Jagannath intended with his own conviction as to what Jagannath stated. Then the last witness is Harkison Mehra, who also is an interested witness inasmuch as he is a member of the managing committee of the school on behalf of whom this litigation has really been started, and all that he says is that Jagannath told him that he had given a lac of rupees to the Marwari Bepari School, and he would credit the amount to the school in his accounts. Then it appears that Jagannath had actually purchased a plot of land at Fanaswadi, and there are various discrepant statements made with reference to this plot by these two or three witnesses. Nor I am quite sure that Narandas is accurate when he says that he was taken to see this plot immediately after the transaction. It may be that he was taken to see the plot, but I am not satisfied that his statement that it was immediately after the transaction, can be accepted, and for this reason that the conveyance which is produced shows clearly that it was in August 1919 that the transaction was really entered into, and the earnest money was paid in August, and the price much later on.

14. Taking the oral evidence, therefore, as a whole, in my opinion, it is not sufficient to establish a trust with regard to this one lac of rupees. But assuming that it is, the rest of the evidence in the case is certainly not in favour of the contention of the fifth defendant. I have already pointed out that immediately after the receipt of the amount Jagannath credited it in the name of Shri Ramchandra Hanumanprasad. There is no evidence before me as to what this means. But I am prepared to assume that the name consists really of two names of well known deities of Hindus. Even then what is the position? At the time that the transaction was entered into Jagannath had in his books of account an account of the Marwari Bepari School. He had also another account called a Charity Account, and as a matter of fact when some years ago he had donated a sum of Re. 10,000 to this very school, that sum was entered in the Charity Account, and the sum was actually paid to Ramkisonadas Sagarmal on behalf of the school. If, therefore, Jagannath intended to create a trust in favour of this school, I cannot understand why immediately after he got the money he did not credit it in the school account or in the Charity Account, nor can I understand

why he did not make over the amount to the managing committee of the school, The only answer which the learned Counsel for the fifth defendant has given is that he intended to keep the control over this amount with himself, in other words, to constitute himself a trustee. But if he intended to do that, he might have made a proper entry in his account book showing that intention. But what is the evidence to show that Jagannath intended to constitute himself a trustee and to keep a control over it? There is not a particle of evidence of that before me, and the contention is based merely on the inference which the learned Counsel says ought to be drawn from the circumstances.

15. But the subsequent history of this one lac really shows that Jagannath did not intend to part with the control over this money. This sum being credited in 1919 was carried through his books up to the time of his death. But it appears that after making this credit entry the amount was sent to the Central Bank, and if one examines the account of the bank, which was put in at a later stage of the case, one finds that at the end of 1920 the only balance in favour of Jagannath in that account is to the extent of about Rs. 700 odd. Tins coupled with the admitted fact that a few months before his death Jagannath sustained heavy losses, a fact which is admitted by every witness on behalf of the fifth defendant, shows to my mind that the probabilities were that Jagannath undoubtedly intended to benefit the school out of this one lac at one stage, but owing to his business and financial engagements found himself unable to complete the gift and carry his intention into effect. One of the three points to be made clear before a trust can be established is, as I have pointed out, that there must be a definite object which the donor intended to benefit in a definite way. The credit of one lac of rupees in the name of Shri Ramchandra Hanumanprasad may show a general indication of charity, but is certainly not a credit from which it can be inferred that the intention of the donor was to benefit a particular definite object, namely the Marwari Bepari School. But further the evidence shows that Jagannath did not divest himself of the ownership as to this sum of rupees one lac and went on dealing with it as if it was his property. I am, therefore, of opinion that it is not established that there was a trust declared or created with reference to this sum of one lac of rupees, and it is here that the real difficulty of Mr. Vachha begins. For, as I have pointed out, the whole case of the fifth defendant is that a valid trust was created with reference to the sum of Rs. 88,914, and the case is that it is the balance of this one lac of rupees. But when I come to examine the books of account I find that this sum of Rs. 88,914 originally came from the profit and loss account, and was carried forward through the books nearly a year and a half before the fund of one lac came into existence. In order to get over this difficulty some ingenious arguments have been addressed to me, but I do not think it necessary to examine the same as they are based on theories which, to say the least, are absurd. In his opening Mr. Vachha stated that this sum of Rs. 88,914 was the balance of one lac of rupees, and said the learned Counsel that Jagannath deducted out of this one lac of rupees a sum of Rs. 11,000 odd as he had donated a sum of Rs. 10,000 to the

Marwari Bepari School. In the first place, if Jagannath wanted to deduct a sum of Rs. 10,000 which he had already donated, from the sum of one lac. I see no reason why he would not have taken Madanlal and the other witnesses into his confidence and also Narandas and told them specifically that having given Rs. 10,000 to the school the balance of one lac of rupees was going to be devoted by him to the Marwari Bepari School. In the second place, as I have pointed out, the entry of Rs. 88,914 really came from the profit and loss account long prior to Jagannath's acquiring the sum of one lac of rupees. But then it is not clear at all that a sum of Rs. 11,000 odd was really what had been given by Jagannath to the school. As stated in the opening address of the learned Counsel on behalf of the fifth defendant, the account shows that he had only given Rs. 10,000. The entry which is put before me shows that a sum of Rs. 11,000 odd was given to the school. But as the entry shows, it was not given to the school by Jagannath alone but by Jagannath and Tarachand Joharmal. Therefore, there is no consistency in the various stories which have been put forward.

16. The position, therefore, is that undoubtedly there is the sum of one lac of rupees continued in the name of a deity and there is another sum of 88,000, and distinct from it, which has been in the books prior to May 1919, and I really do not know what case the Advocate General has. If the contention is that there was a trust with reference to the one lac of rupees, the answer to that is, that is not the fifth defendant's case, unless of course it is established that the sum of Rs. 88,000 which is referred to in the plaint and the originating summons is the balance of one lac of rupees, which certainly is not made out. If it be said, however, that there is a trust with reference to this sum of Rs. 88,000 which has been sometimes credited to what is called a school account and sometimes another account called a Pathshala account, then there is no evidence as regards any declaration of trust with reference to it. Not a single witness has ever mentioned this sum of Rs. 88,000 at all, and the mere crediting of the sum in the accounts is not, on the authorities, enough to constitute a trust. If, on the other hand, the contention is that there is a trust with reference to one lac of rupees, I have already found that there was no declaration of trust with reference to it. But there is nothing in the evidence to show that Jagannath did any acts which indicate his intention that he wanted to constitute a trust with reference to this one lac. All that happened was that having credited the sura and sent it to his bank he operated on the banking account, and the entry seems to have been carried in the next year's ledger which terminated in 1920, Jagannath having died in 1921. But then it is argued that soon after the acquisition of this fund by Jagannath, he instructed his engineers to prepare plans for the school. Undoubtedly this is a very useful piece of evidence. But that, in my opinion, cannot help the case of trust any further, and for this reason. According to the evidence of Mr. Aga, the engineer, he was asked to prepare plans not only for the school, but also for a temple, a dharamshala, for shops and for residential quarters. Therefore the mere fact that instructions were given to the engineer to prepare a plan, does not definitely show that Jagannath intended to appropriate

a Bum of one lac of rupees to the school alone. As I said, it is not in dispute that Jagannath intended to benefit the school, and if probably his financial condition had been as it was when he obtained this one lac of rupees, and had he survived, he might have carried his intention into effect. The mere instructions to the engineer to prepare a plan cannot amount to conclusive evidence that a trust was constituted. But even then I find from the evidence of the engineer that nothing happened in the matter at all, and in spite of the several reminders from the engineer neither Jagannath nor his Munim cared to go to him or make further inquiries in the matter. That is the only piece of conduct which has been stressed in favour of the contention as to the existence of a trust, and I am not disposed to attach much importance to it having regard to the fact that nothing happened beyond the preparation of a plan. If my view is correct that a trust was not fully constituted at the time Jagannath received this amount, then I do not see how his giving instructions to his engineer to prepare a plan will carry the case any further....

17. I have heard counsel on the question of costs, and after a careful consideration of all the circumstances of the case, I think the proper order to make as to costs would be that all costs of all parties should come out of the estate. Costs of plaintiff and defendants other than defendant No. 5 to be as between attorney and client. Costs to include costs of de bene ease examination of the second defendant.

18. Costs of two counsel certified.