
(1908) 12 BOM CK 0003
In the Bombay High Court
Case No : O.C.J. Suit No. 839 of 1901

Manchershaw S. Narielwalla

APPELLANT

Vs

Ardeshir S. Narielwalla

RESPONDENT

Date of Decision : 08-12-1908

Acts Referred:

Trusts Act, 1882 — Section 5, 6

Citation : (1908) 10 BOMLR 1209

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—At the close of Mr. Raikes" opening argument it appeared to me pretty plain that he would fail unless he could make out a valid gift. I therefore suggested one or two extreme hypothetical cases which might warrant some enlargement of the principle on which the English rule is founded. But Mr. Raikes candidly said that he doubted whether he could press that side of the case, and a cursory study of the authorities showed that he was right. The question therefore which I am now to decide is in its final form a narrow question, but it presents more than one difficulty. To make it perfectly clear and intelligible, let me state the facts, out of which it arises.

2. On the 7th September 1892 one shapurji Sorabji Narielwalla purported to make a gift of Rs. 75,000 to his wile Virbaiji on her recovery from a dangerous illness. This gift, or intended gift, is manifested by two book entries of that date, a debit and a credit entry in the cash book. The material words of the debit entry are "given as a gift to Bai Virbaiji." The material words in the credit entry are "on account as follows; Sheth Shapurji Sorabji Narielwalla gave the amount as a gift to you, the same is credited." Both are initialled by Shapurji. There is no dispute about them. They are admitted. Then the Mehta appears to have transferred this item from the cash book to Bai Virbaiji"s current account. There the money would have carried the usual rate of interest, ninepercent. That was in the ledger. Shapurji saw this and ordered it to be cancelled. An entirely new account of this

Rs. 75.000 was accordingly opened, see Ex. 29. It bears no date, but it is of the same year 1892. Then there is Ex. 30 which completes or appears to complete the correction made in Ex. 29. This is not dated either but is of the year 1892, and starts a fresh account in the ledger referring to Exs. 1, 2 in the cash book. All these entries are undisputed. It is to be noted that not till after the death of Shapurji is any interest credited to Virbaiji on this large sum; after his death, she is allowed interest at the very unusually low rate of three quarters per cent.

3. Next there is a disputed fact, the oral announcement by Shapurji to the assembled family of the gift. Defendants allege that the day after the cash book entries, Shapurji, called all the adult members of the family together by his wife's bedside, and told them that he had given her Rs. 75,000 as a gift to celebrate her recovery. The defendants' evidence on this point, has been severely criticised by Mr. Lowndes. But while making every allowance for the imperfections on which Mr. Lowndes dwelt I am satisfied, taking the evidence as a whole, that something of the kind did occur. I have no doubt that whether the announcement was made quite as solemnly and formally as Ardeshir and Shirin now swear that it was, some announcement of that kind was made. It is just what we should expect. The head of a family intending to make a commemorative gift of this sort on an occasion of family rejoicing, would naturally wish to communicate it to all the members of the family. And while the only two direct witnesses are Ardeshir and Shirin, there is much in the rest of the evidence showing that all the family were perfectly aware that the gift had been made, to the extent at least of entries 1, 2. in the cash book. I do not believe, however, that even if Shapurji did call the family together and tell them that he had given Virbaiji Rs. 75.000, he added, as Shirin says that he did, any statement about the rate of interest the gift was to carry. That strikes me as evidently an afterthought. Nor do I attach very much importance to this alleged solemn oral ratification of the cash book entries, in the presence of all the adult members of the family. Whether it really did take place or not, it seems quite certain that in that or some other way, all the adult members of the family knew what was in Shapurji's mind, and knew that there were those entries in the cash book. These then are the material facts, undisputed, or if disputed found by the Court, upon which I have to find an answer to the question.

4. I took time to consider my judgment because at the close of the whole argument so much had been said, that I thought it better not to give effect to my first opinion until I had gone fully and carefully over all the ground on which the defendants relied.

5. I do not attach very much importance to the argument that the defendants case both in the written statement and the issues is restricted to a gift, and ought not now to be allowed to be converted into a case of trust. It appears to me, after studying every case English and Indian, which I have been referred to or have found, that parties who have alleged a gift, have been allowed to go into the further question whether the facts of the case raised a trust or not, and the

addition of the words as a present" on which Mr. Lowndes strongly relied, seem to me to leave the principle untouched. The Court always has to see whether if there was not a gift in the strict sense of that word, the acts and words of the donor taken together are or are not sufficient to raise a trust. And that I think must be done here.

6. The broad rule from which there has been no real deviation since *Milroy v. Lord* (1852) 4 De G.F. & J. 274 is that where there has been a clear intention to make a gift, but on account of some omission on the donor's part, that intention has failed, the Courts will not erect a trust on the imperfect gift. At the first view I thought that that rule so exactly covered and disposed of the facts here, that I doubted whether I should reserve judgment. But I wanted to turn over again the extremely able concluding argument which was addressed to me on the whole question by Mr. Raikes. I have now devoted much time and attention to the nice point in issue, and shall state my conclusion and the reasons for it as shortly as I can. The Indian cases so far from helping the defendants seem when carefully read to go rather against them. The leading case of *Jamsetji v. Sonabai* (1865) 2 B.H.C. 133 is evidently a decision on the facts of that case, and so far as the principle of it reaches, it is no exception to the general and firmly established rule of the English Courts. The Court held on the facts that there was a clear trust, and that being so of course there was an end of the matter. The question in each ambiguous case of this kind is whether or not there is a clear trust. It is to be noted too that the facts in *Jamshetji's* case were altogether different from the facts here; there does not appear to have been in that case any intention to make an out and out gift, followed by failure to complete, and so a doubt whether the facts gave rise to a resultant or constructive trust. The same may be said, though the facts are not so different, of the case of *Merlai v. Pirozbai* (1881) I.L.K. 5 Bom. 268. The Court held on all the facts that there was a clear intention on the part of the settlor to divest himself of the beneficial interest, and to create a trust. The case of *Ashabai v. Haji Tyeb Haji Rahimtulla* ILR (1882) 9 Bom. 115 is I think taken in its entirety a strong authority against the defendants. Its most direct bearing on our present enquiry, (apart from its re-affirmation of the English rule) is that the Courts cannot make a trust out of mere book entries; and the same comment may justly I think be made on the case of *Hirbai v. Jan Mahomed Rhalakdina* ILR (188) 7 Bom. 229.

7. The earlier English cases, notably those in Romilly's time, went very far, though some at least were corrected and reduced to a stricter principle by the Court of Appeal in *Milroy v. Lord* (1852) 4 De G. F. & J. 374. At that time the English Courts appear to have been straining their jurisdiction to give effect to every imperfect gift by converting it into a trust. But there was one class of these cases, where the gift was by a husband to his wife, which really did rest upon, a separate principle, and might well have been distinguished, (up to the time of the passing of the Married Woman's Property Act) from the remainder to which the rule in *Milroy v. Lord* applied. That distinction arises out of a woman's disability while & feme converte to hold property in her own right. As there could

under such conditions have been no real transfer of the chattel the subject of gift from the husband to the wife, no transfer, that is to say effecting a change of legal ownership, it would have amounted to no more than the husband giving with one hand what he took with the other. So where there was a clear intention to give, which as between strangers needed in law to be effectuated by actual delivery, the latter condition was useless and superfluous between husband and wife. The Courts therefore began to treat all such imperfect gifts as evidencing an intention on the "part of the husband to constitute himself a trustee for his wife, of the subject matter of the intended-gift. And it is a part, not the weakest part of the defendants" argument, that as the present gift must have been made while the principle of the older English law, expressed in such cases as *Grant v. Grant* (1854) 34 Beav. 623 was still in force and governed *Parsis in India*, those and not the later cases founded on *Milroy v. Lord*, ought to be followed. In *Grant v. Grant* (1854) 34 Beav. 623 the Master of the Rolls said after stating the reason peculiar to gifts between husband and wife, "therefore this comes under that class of cases in which it has been held that although there is not an absolute delivery, a declaration of trust is sufficient". And he went on to say that the question was whether the husband had used words which were equivalent to a declaration of trust. Such words need not be in writing. But they must be clear, unequivocal and irrevocable. They need not be technical words. "Any words," he went on, "that show that the donor at the time he speaks means to divest himself of all beneficial interest in the property, are in my opinion sufficient for the purpose of creating the trust". And what follows certainly makes this a very strong case in the defendants" favour. It is true that in discussing the general principle the learned Master of the Rolls seems to lose sight of the distinction between the cases where the gift is by a husband to his wife, and where it is between strangers, which was given as the reason for not following that case, by Vice Chancellor Hall when he decided in *re Breton's estate* (1881) 17 Ch. D. 416. But the whole judgment in *Grant v. Grant*, which was again followed by Vice Chancellor Malins in *Baddeley v. Baddeley* (1878) 9 Ch. D. 113 goes strongly in favour of the defendants. The learned judge is very emphatic. If A. say to B. I give you my ?1000 consols now standing in my name in the books of the Governor of the Bank of England, that and nothing more would constitute A, a trustee for B. of the said ?1000 consols. Probably the judge meant this to be a case of husband and wife, since it was in reference to that relation that the learned judge seems to me to have been speaking throughout. Then he goes on to explain that such a gift to be convertible into a trust, if otherwise imperfect, must be final and irrevocable, that is to say, the words must be I hereby give, or I have given, not I intend or I mean to give etc. And this is the ground on which he distinguishes *Walter v. Hodge* (1818) 2 swa . 22. In *Mews v. Mews* (1852) 15 Beav. 529 decided by the same learned Judge, the facts were that the husband left a sum of money at his bankers, on which his wife used to draw, but she never said that he had given it to her. He knew of it perfectly, and sanctioned it, but on his death-bed he appears to have treated the money as his own, and thus by conduct contradicted his wife"s averment that he had given it to her. In these

circumstances the Master of the Rolls held that there was no clear and distinct act (or declaration) by the husband divesting himself of the property and engaging to hold it as a trustee for his wife. *Milroy v. Lord* was decided in 1852 and *Grant v. Grant* in 1854, but from the report of the latter case it does not appear that the former was cited. But, *exceptis excipiendis*, *Milroy v. Lord* has remained the leading case, and appears to have settled the law while clearly stating the principles upon which it is founded. Lord Justice Turner there said, " I take the law of this Court to be well settled, that in order to render a voluntary settlement, valid and effectual, the settlor must have done everything which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may I apprehend be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of the Court, be resorted to, for there is, no equity in this Court to perfect an imperfect gift. The cases I think go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

8. So far, comparing *Milroy v. Lord* with *Grant v. Grant*, it is clear that there is no real conflict in principle; the difference lies in the mode of applying the same principle. The Master of the Rolls dealing with the case of husband and wife, thought that such gifts as he had before him, were not intended to take effect by transfer, but were in essence trusts, and the words in which the gifts were made, were enough to show that the intention was to create a trust, not to make a gift. All that *Milroy v. Lord* says, put shortly and simply, is that where a man means to make a gift *inter vivos*, and fails to do so, the Court will not erect a trust upon that abortive intention. The conflict, if there is any, must arise out of the different views Judges have taken of the words "everything which according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding upon the settlor." In the case of husband and wife, before the Married Woman's Property Act, eminent Judges appear to have thought that a husband had done everything that was necessary to be done to transfer the beneficial interest in the property, where it consisted of movables, by an explicit oral declaration, such as I have given this or that to my wife, although there was no subsequent transfer of the chattel from husband to wife. And a fortiori, of course where the husband made such a declaration in writing. What the learned Judges, especially Romilly M.R. and Malins V.C., seem to me to have

meant, was that where there could be no transfer of the legal ownership, any explicit declaration by writing or parol, in which the husband said" that he gave to his wife, operated in law as a trust, and the husband constituted himself trustee of the property, thus said to have been given, for his wife. Or to put it more broadly still, since technically there could not be a gift inter vivos between husband and wife, all such intended gifts at once became trusts, the husband being from the making of them trustee in respect of the property for the wife. There is nothing in that, I think, having, regard to the reason of the decisions, opposed to the principles of *Milroy v. Lord*. But later cases have very distinctly and emphatically overruled, or dissented from *Grant v. Grant*, and *Baddeley v. Baddeley*. The three most, important are. *In re Breton's Estate* (1881) 17 Ch. D. 416 *Heartley v. Nicholson* (1874) L.R. 19 Eq. 233 and *Richards v. Delbridge* (1874) L.R. 18 Eq. 11. At the time *Richards v. Delbridge* was decided, the law on this subject had been brought down to *Richardson v. Richardson* (1867) L.R. 3 Eq. 686 through *Morgan v. Malleson* (1870) L.R. 10 Eq. 475 favouring the view now pressed by the defendants, while, the contrary view rested on *Milray v. Lord* and *Warriner v. Rogers* (1873) L.R. 16 Eq. 340. In *Richardson v. Richardson* (1867) L.R. 3 Eq. 686 unindorsed promissory notes were held to pass by way of trust, under a voluntary but imperfect gift, while in *Morgan v. Malleson* there was a voluntary gift in this form " I hereby make over to M. an India bond value 100?," signed by the donor and given to M. without handing over the bond. Lord Romilly held that the memorandum was a good declaration of trust in favour of M. But in *Warriner v. Rogers* (1873) L.R. 16 Eq. 340 Vice Chancellor Bacon followed *Milroy v. Lord* and refused to follow *Richardson v. Richardson* and *Morgan v. Malleson*. Jessel M.R. said in *Richards v. Delbridge* that the two last cases were wholly opposed to the first two. Vice Chancellor Bacon had observed "the rule of law on. this subject I take to be very clear, and with the exception of two cases which have been referred to but. sup the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust-the indispensable thing--I take to be, that the donor or grantor or whatever he may be called should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power at least in the way of interest." Then Jessel M.R. re-states the rule with telling clearness and brevity, thus: ""The principle is a very simple one. A man may transfer the 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 recognized 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 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.....The true distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose fiduciary or otherwise." Then after quoting *Milroy v. Lord* he goes on: " It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and Vice Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer .for valuable consideration are held to be evidence of a contract which the Court will enforce." Then came *Baddeley v. Baddeley*, in which Vice Chancellor Malins said that the law had been correctly laid down in *Grant v. Grant*, and that he was not disposed to disagree from *Richardson v. Richardson*, and *Morgan v. Malleon*, notwithstanding the contrary decision of the Master of the Rolls in *Richards v. Delbridge*. There was thus a direct conflict of opinion between the Rolls Court and the Vice Chancellor's Court, when the case of *In re Breton's estate* came before Vice Chancellor Hall. For the same reasons as those upon which *Richards v. Delbridge* was decided Hall Vice Chancellor dissented from the cases founded on *Grant v. Grant*, and finally stated the law, founded on *Milroy v. Lord*, and applied in *Richards v. Delbridge* to be the true law of the Court. The only additional reason he gives is that in cases of this peculiar kind he can well imagine a husband saying to his wife, I am willing to give you this out and out, but I am not willing to become a trustee for you in respect of it. I do not wish, to be involved in a trust of that kind or in any trust. And therefore the Vice Chancellor held what was on the face of it meant to be a present gift, but had failed through the donor being mistaken about the law requisite to perfect it, could not and ought not and to be construed into a trust. Again in *Heartley v. Nicholson* (1874) L.R. 19 Eq. 233, Vice Chancellor Bacon re-affirms the same principle quoting the observations of Jessel M.R. in *Richards v. Delbridge* (1874) L.R. 18 Eq. 11 with approval. It is to be noted that this goes far to explain the previous decision in *Fox v. Hawkes* (1879) 13 Ch. D. 822 which as conjectured by Vice Chancellor Hall, when cited before him at the trial of *In re Breton* (1881) 17 Ch. D. 416 probably turned on special and peculiar circumstances.

9. The effect of all these authorities is clear, that in England at any rate the defendants must inevitably fail. Whether there are any further circumstances in this case which taken along with the earlier English, and the Indian cases, would entitle them to succeed is now to be briefly considered. First let me re-state what I conceive to be the law as finally settled by the English cases, and not since disturbed. Where the intention is to make a gift, and the intention has failed for

want of transfer, or any other cause, the Courts will not convert what was meant to be an out and out gift into a trust. The intention, in doubtful cases may be shown in favour of the contention that although words of present gift were used a trust was meant, by the donor or settlor having done everything in his power to divest himself of the beneficial ownership, more especially in the way of interest. Where however the Courts can find from the facts of any individual case, that although the words used are words of present gift there was an unmistakeable intention of the donor to constitute himself a trustee, and to create a trust effect may be given to the true intention. Thus it comes out after all that in each case there must be a substantial question of fact: Was it intended to make an out and out gift or only to create a trust? And some at least of the indicia I have specified. In that connexion I must say a few words about what is really an important feature in this case, I mean the conditions for payment of interest. If Shapurji while intending to give Rs. 75,000 to Virbaiji went no further than paper entries, which he might as far as I can see have cancelled the next day, there would be a plain failure of the intention, and it would be hard to say that any trust was created. But if he did not mean to transfer the possession, but merely to allow the use, retaining the subject matter of the gift in his own hands, and confirming that intention allowed interest on the money to the cestui que trust, then there would be a fairly strong ground on which to rest a presumption, that the intention was to create a trust, not to make a gift-10. How do the facts, as far as I am able to ascertain them from the evidence, stand about this question of interest? In the first place it does seem to me improbable that the defendants should have wholly invented that part of the case. Long before there was any dispute, when according to the evidence all the family were quite agreed that the Rs. 75000 had been given and ought to be paid to Virbaiji the interest was calculated at the singular rate of three quarters per cent. The defendants' evidence taken as a whole leaves little doubt on my mind that Shapurji had said something about interest, as also about the rate. It is for instance certain, the book entries show it and I do not understand that plaintiff seriously dispute it that this sum of Rs 75,000 was first transferred from the cash book to Virbaiji's ordinary current account; and struck out by the order of Shapurji, The reason given by the defendants is that had the money been allowed to stand in that account it would have carried interest at nine per cent whereas it was the intention of Shapurji to allow no more than 3/4 per cent. To say the least of it that explanation is not inconsistent with the facts. We hear from Shirin a great deal about the dissatisfaction of Virbaiji at the low rate of interest allowed her. but that is in all probability greatly exaggerated, if it contains any truth at all. But assuredly if this were an out and out gift, it is strange that Virbaiji should have allowed it to lie for even a month at such an absurdly low rate of interest. It is not as though she knew no better. She had good investments of her own, and her current account apparently was carrying nine per cent. Although that consideration tells heavily against the theory that this was in any sense a perfect gift it seems to lend colour to the theory that although words of present gift were used there never was any intention on the donor's part, to part with the

ownership, to do more than create a trust of this sum for Virbaiji. But while as I say there is a good deal in the oral evidence about the rate of interest which Shapurji meant to allow, there is not much that is definite, not much upon which I could rely for more than the qualified conclusion I have allowed myself to form, namely that something at any rate had been said by Shapurji before he died about allowing interest to Virbaiji on this Rs. 75,000. On the other hand favouring the plaintiff is the undeniable fact, that although the alleged gift was made on the 7th September and the yearly accounts must have been made up at the ensuing Diwali, say October or November, this sum re-appears as a separate account for the opening year, without a pie of interest. Here the explanation which the defendants have to offer does not appear to me to be as satisfactory as it should be. Though very confusedly stated, it amounts to this, that the period for which interest was to be allowed was so short, and the rate so low that Shapurji did not think it worth while to calculate and add it. But it would I think have exceeded Rs. 50 at any rate, and that is not such an infinitesimal sum, that it would be considered negligible in the book keeping of such a man as Shapurji Narielwalla. He was well to do, but not a millionaire; it was hardly likely that he would treat even Rs. 50 with such superior indifference. Thus the only really certain and indisputable evidence I have to go upon, the evidence of the books, gives this fact, that up to the death of Shapurji not an anna of interest was allowed to Virbaiji on this account. We have the paper entries, and we have practically nothing else. It is only after Shapurji's death, that interest at the rate of three-quarter per cent, is allowed. If it be a fact that Shapurji did intend to allow interest at this rate, then I think that it does tend to support the defendants' case. For if Shapurji had meant to give this money out and out, he would not of course have been in a position, he would not have thought that he was in a position, to dictate what interest he would allow on it. The answer would have been plain. You are offering me a beggarly rate of interest. I can get ten times as much almost anywhere in the open market, I will take the money and invest it for myself. But adopting all that the defendants' witnesses have said on this point, it does not amount to more than this that Virbaiji complained many times. She never offered or attempted to withdraw the money. She never made any threat of that kind. It may be urged that the position of a wife in this country is such that unless she were an advanced and rebellious wife, it never would occur to her in such a case to dispute her husband's command. Still less could she, if she had any decency or self-respect, have thought of doing so, when the subject of the dispute was his own bounty. Could she have squabbled with him over the rate of interest, after he had just given her such a substantial proof of his affection and generosity? Those arguments are entitled to consideration. They are weighty. Possibly, having regard to the habits and sentiments of these people, they are valid, and outweigh the ordinary common sense arguments which would at once occur to the "emancipated" women of the West.

10. Again if we accept the story the defendants tell of the solemn declaration which Shapurji made to the assembled family, it does not appear to me to carry

the matter much further. It does to this extent. The Indian cases observe strongly upon the impolicy of construing trusts out of mere book entries. And apart from this declaration to the family, this would be a case of book entries and nothing else. For that reason no doubt the defendants have relied so strongly on what Shapurji is alleged to have said. But if he did say it, was it more than an explicit re-affirmation of virtually the words of the book entries? And those words are of course, unexplained, words of present gift and nothing else. Leaving out the English cases, however it would seem that the Indian Courts have always been disposed to look to conduct, as explanatory of the words used; and even if the words were words of present gift, should subsequent conduct make it certain that no gift was intended, while there was an intention to create a trust, then the Courts, as far as I can see, have inclined, though with the utmost caution to effectuate the trust. What then is the criterion? In the case of a gift the donor must intend to part entirely with the property at the moment of completing the gift. If he expresses that intention, but fails to carry it out, we have an imperfect gift which the Courts will not convert into a trust. But where the donor or the grantor, uses words of present gift, but has no intention of parting with the property, but only with the beneficial interest, it might be right to look to the real meaning rather than to the verbal form, and if that real meaning can be positively ascertained, give effect to it. As a principle, I believe that is sound, salutary, and founded on authority. But in applying it I must be very cautious. I must be sure that the materials before me warrant me in saying with some degree of certainty that there was an intention to create a trust, and that there was no intention to make a gift. That raises a question of fact to be answered with reference to the circumstances of each particular case. One case will not necessarily be an authority for another. And in nine cases out of ten, where this principle has to be applied the ground will be doubtful and insecure, our difficulty lies in the indefiniteness of legal conceptions which prevail among people of this class. And there we have to remember what Vice Chancellor Hall said. It is quite likely that Shapurji would have been willing to give his wife Rs. 75000 out and out, if he had had it, while he would not have been willing to be her trustee for that amount. The position of a trustee is in some respects onerous, and always delicate. It entails responsibilities, and imposes fetters, which might frighten, or be extremely irksome to a trader like Shapurji. And here again we must remember what Jessel M.R. has said. I think that in the opinion of these eminent English Judges who have agreed in finally settling the English law, it is clearly necessary to the creation of a trust, that the author of the trust should express that intention in some words, which can leave no doubt that he did mean to accept the position of a trustee. Conduct which might be deemed conclusive in England is very likely to be a treacherous and misleading guide in India, where the conditions of family life, are often widely different from those which prevail in the West. I have given this question very anxious thought for many days, I have bestowed upon it the best consideration I could, and I do not mind owning that my mind has been in great doubt, and even now I am by no means so sure as I like to be before giving my considered judgment. It comes to this that every fact,

available, is a fact showing that Shapurji meant to make a present gift. When I say fact, I mean undisputed fact, as opposed to such disputed facts arising out of the evidence, which may or may not be true. And of such I have only been able to say with confidence, that I am pretty sure there was some formal declaration to some members of the family, and that there was some talk, not at that time, but between Shapurji and his Mehta, and very likely with Pestonji and Ardeshir too about allowing interest. But that is so lacking in precision, that I do not think it has any substantial evidentiary value. It further comes out, that all that is certain and undisputed are the book entries. And what can I say of them? I surely cannot say that they contain anything approaching a declaration of trust. On the contrary they are directly opposed to it. I have however little doubt that while Shapurji probably thought vaguely in his own mind of this act as a gift, and therefore described it as a gift, he did not intend that his wife should take the money there and then. On the other hand while, had he clarified his thought, he might have realized that what he was aiming at was much more like a trust than a gift, I am not prepared to say, that he meant to make himself a trustee for his wife, or that had it been put to him point blank "Are you willing; to constitute yourself a trustee for this Rs. 75,000 ?" he would have assented. In these circumstances, circumstances of grave doubt.

11. I admit, I think it wiser, for my part, to take my" stand on the perfectly clear and solid ground of the English cases. Applying them, it must be clear from my summary that, this would be an intended gift, which the donor had failed to complete. The principle stated by Jessel M.R. in *Richard v. Delbridge* (1374) L.R. 18 Eq. 11 with such lucidity and pointed brevity, has always seemed to me fatal to the defendant's case. I may add that I have read, but do not think I derive any assistance from, the two comparatively recent cases of *Coochrane v. Moore* (1908) A.C. 402 and *Shrager v. March* (1890) 25 Q.B.D. 57.

12. I must notice one more argument used by Mr. Raikes in his most interesting and able advocacy of the defendants' case. He contended that as the marriage here was long anterior to the Married Woman's Property Act, which composed the differences that were to be found between the decisions in Lord Romilly's time, and those which followed, the earlier law of England, which was said to have been correctly expressed by such eminent Judges as Lord Hardwick, Lord Romilly and Baron Parke ought to be applied, without regard to such cases as in *re Breton's Estate* (1881) 17 Ch. D. 416 and according to that law a present gift to a wife by a husband which could not be effectuated by transfer of possession, was ipso facto a declaration of trust. My answer to that is, pace Lush's attempt in his book on Husband and Wife to show that Vice Chancellor Hall was in error when he refused to follow the *Grant v. Grant* series because he failed to give proper weight to the distinction which those cases drew between such gifts and gifts between strangers, that after a full and careful study of the whole case law I feel no doubt that the law in England was quite settled against the defendants' contention, even before the passing of the Married Woman's Property Act, or in India, the Indian Succession Act. Ingenious though the argument is, I have felt

after long deliberation, that I ought not to accede to it.

13. In this view of the case it would be unnecessary to consider plaintiff's last, and perhaps strongest, answer to the defendant's case. But my view may be wrong. And if it is, then the plaintiff would have to rely upon Section 5 of the Trusts Act. That Act was in force when Shapurji made this gift. Section 5 prescribes the conditions under which alone a valid trust of immovable and of movable property can be created. A trust of movable property can only be created by such an instrument, as is mentioned in dealing with a trust of immovable property, by will, or by delivery. So far all is clear. But then comes Section 6. Here of course there is no writing of the kind required, nor is there any will, nor any delivery. So that unless the words in brackets in Section 6 form an exception to the rule of Section 5 it is plain that the defendants must fail. Do they? I have found the utmost difficulty in finding a proper and useful construction for all the terms of Section 6. The section is expressly made subject to Section 5, But it goes on to enunciate the details which make a good trust, and it seems to me, since at the end, the last condition is coupled by the word "and" not disjoined by "or", that in effect the whole section can only apply to trusts of movable property. If that is so, what is required to be stated must be stated I suppose by word of mouth, or by some writing not of the kind mentioned in Section 5. If however that is so, including a trust by will in the bracketed sentence seems wholly superfluous. Waiving that difficulty for the moment, we find that to create a trust it is necessary to specify, certain things, and, (except where the author of the trust, and the trustee are one and the same person) to deliver the trust property. I must say, that if that means anything it seems to me to mean, at the first view, that where the author is himself also the trustee, the preceding requirements if satisfied will suffice to create a valid trust of movables, without any transfer. And that would be exactly the case here. But Mr. Lowndes contends that the whole of Section 6 is subject to Section 5 and therefore that the view I have just stated must be wrong. If it were right, he argues, we should have found the bracketed exception in Section 5. It cannot be denied that there is a good deal in that. If Mr. Lowndes is right the whole of Section 6 comes to this, in such a case as I am dealing with, that no trust of movable property could be created except by will or by an instrument in writing of the kind prescribed in Section 5. I do not believe that was the intention of the legislature. I believe that the legislature meant that a specific oral declaration on all the preceding points, would be enough where the author was himself the trustee, without transfer. And were that the only objection in the defendants' way, I should overrule it. But I have given my reasons at length for holding upon other grounds that there was no trust, and that the intended gift failed. The result is that upon this, the only point reserved for my decision, I must find against the defendants. I do not dwell on two other points raised by Mr. Raikes: (1) That Section 5 cannot be used to further a fraud. (2) That the plaintiff has acquiesced, because I do not think either of them is sustainable for a moment. The administrators have therefore in respect of this Rs. 75,000 been

guilty of a breach of trust. I hasten to add that I do not impute the slightest dishonesty to them. I am sure that they acted in the sincere and very natural belief that they were carrying out Shapurji's wishes; and I am also sure that they acted quite openly and straight forwardly, and that all the family, including the plaintiff, knew what they were doing and cheerfully assented. This conclusion casts no imputation whatever upon their characters. But in my view they have been guilty of a breach of trust, and this money must be made good to the estate. Costs up to date to be provided for by consent. Interest allowed at six per cent.