

(1906) 06 BOM CK 0011
In the Bombay High Court
Case No : Appeal No. 1414

Raghunathji Mulchand

APPELLANT

Vs

Varjiwandas Madanje

RESPONDENT

Date of Decision : 15-06-1906

Acts Referred:

Evidence Act, 1872 — Section 111

Citation : (1906) 8 BOMLR 525

Hon'ble Judges : Lawrence Jenkins, J;Batty, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Lawrence Jenkins, C.J.—The plaintiff, as the constituted attorney for his mother Rambhabai, has obtained a grant to himself of letters of administration to the estate of Jivan Cursonji deceased for his mother's use and benefit, and he has brought this suit (amongst other things) to establish title to certain shares in the Maneckji Petit Manufacturing Company Ltd.. as forming part of that estate.

2. It is conceded that the shares were bought with the proceeds of other shares in the same Company, which at one time formed part of Jivan Cursonji's estate, and the only defence made before us is that there was a gift of those shares which displaces the title set up by the plaintiff.

3. The only question, therefore, on this appeal is, first, whether the gift has been established as a fact, and, secondly, if so whether the gift is valid in law.

4. Jivan Cursonji died on the 22nd of March 1892 intestate and without issue at Porbunder in Kathiawar, leaving a sole widow named Mankuverbai.

5. Part of his estate consisted of eleven shares in the Maneckji Petit Manufacturing Go., Ltd.

6. Two of these shares were sold by the widow Mankuverbai in her lifetime, and we are now only concerned with the title to the remaining nine shares, or more

properly the nine shares in the Manekji Petit Manufacturing Co., Ltd. bought with the proceeds of sale of the nine shares which had belonged to Jivan Cursonji in his lifetime.

7. Of these nine shares two stood in the name of Jagjivan Walji from 1887 down to the date of the alleged gift to which I will hereafter refer.

8. The remaining seven shares stood in the name of Madanji Soonderji who is also known as Madanji Dharamsey.

9. It is the defendant's case that the two shares, which stood in the name of Jagjivan Walji, were transferred by way of gift to Madanji Soonderji in the month of May 1898, and that the seven shares standing in Madanji Soonderji's name were in the month of June 1898 given to him for the benefit of himself and his two sons, the first two defendants.

10. The alleged donor was Mankuvarbai, Jivanji's widow, and the sister of Madanji Soonderji.

11. The two shares Nos. 3523 and 3760, remained in the name of Jagjivan Walji up to the early part of May 1898.

12. On the 2nd of May Jagjivan Walji executed a transfer of these shares in favour of (sic)

13. On the 11th of May this transfer was registered in the Company's books.

14. It now appears hit this transfer was by way of security for moneys advanced to the firm of Walji (sic) of which Jagjivan Walji was a member. On the 16th of May, Rs. 6,000 were credited to the firm of Walji Ranchhod in the books of Dharamsey Sheshkaran, the two shares were redeemed, and by a document dated the 20th May 1898 and registered in the Company's books on the same date, these shares were transferred to Madanji Soonderji.

15. It is the case of the first and the second defendants that prior to this Mankuvarbai had handed over the certificates of these shares to Madanji Soonderji by way of gift, and that the legal transfer was the completion of this transaction.

16. According to the dates as they have now been ascertained, this delivery of certificates must have taken place, if at all, on the 17th of May.

17. According to the case of the first two defendants the certificates of the seven shares were in like manner delivered by Mankuverbai to Madanji Soonderji in the early part of June by way of gift. There is oral evidence in support of these two gifts, and on the strength of it Mr. Justice Chandavarkar has held both to be established.

18. In accordance with this view the suit was dismissed and the plaintiff was ordered to pay the first and second defendants their costs of the suit.

19. From this decree the present appeal has been preferred. Before us two points only have been urged. First, that the gifts have not been proved in fact, and, secondly, that if proved, they were invalid inasmuch as Madanji Soonderji was in a position of confidence towards his sister who had no independent advice.

20. It is to be noticed that the gifts are alleged to have been made in Porbunder a Native State of Kathiawar.

21. No evidence has been led before us nor has any argument been addressed to us as to the law that governs in that State, and it has been throughout assumed that a widow in Porbunder has a power of disposition by gift inter vivos over shares that have devolved on her as the heiress of her husband, and that the law of that State imposes no formality in the case of gifts which has not been observed in this case. In the circumstances, I think, we must deal with this gift on the lines on which the case has throughout been conducted, and limit ourselves to a consideration of the only two points that have been contested.

22. In holding in favour of the gifts Chandavarkar J. relied principally on the oral evidence of Tulsidas Juggivan by whom he manifestly was most favourably impressed. Next he relied on the testimony of the two defendants, Vurjivandas and Van-dravandas, which to his mind was satisfactory. And finally he considered the probabilities were in favour of the gift.

23. Now it is clear that on the lines on which this case has been fought, if the learned Judge's appreciation of the oral evidence is accepted, the factum of the gift has been established.

24. Has the appellant adduced sufficient reasons for justifying us in holding that the oral evidence has been misappreciated? I think not. What has been principally relied on is the admission by Tulsidas on his further examination in the course of this appeal that he misplaced the date on which the certificates of the two shares were delivered to Madanji Soonderji.

25. Before Ghandavarkar J. he said, " My father died on the 15th of Vaisakh Shudh Samvat 1954 (i.e., 6th May 1898). Three or four days after that I handed over the shares and transfers to Mankuverbai."

26. On his examination in the course of this appeal he said: " Premji Dharamsi's affidavit has been brought to my notice. Having read it I do not adhere to my former deposition that the first gift was made of the two shares four or five days after the death of my father. Now I say it was ten or twelve days after my father's death."

27. As I have already said, the gift must have taken place, if at all, on the 17th of May and that corresponds with the altered statements.

28. No doubt there is a variation in Tulsidas' story, but seeing that he was deposing to events said to have occurred in 1898 I do not regard the departure from his original story as so serious as to throw complete discredit on it, and Mr.

Justice Batty, before whom Tulsidas was examined on the second occasion, does not think that the examination before him should displace the estimate of his evidence formed by Chandavarkar J.

29. Both sides claim that the surrounding circumstances aid them.

30. The plaintiff points to the failure of the defendants to formulate a clear and distinct case from the first and would make much of the affidavit sworn by Varjivandas in Suit 657 of 1900.

31. He claims, too, as strongly favouring his view, the dispositions made by Mankuverbai's will and the absence of any writing evidencing the gift.

32. The defendants, on the other hand, rely on the absence from the will of any reference to the shares, and on Madanji's dealing with the shares and their dividends, pointing out that one share had been sold and that except the dividends accrued prior to the gift or very shortly after, none had been credited to Mankuverbai.

33. All these circumstances were before Chandavarkar J. when he formed his favourable estimate of the defendant's oral evidence, and giving to them every consideration they do not in my opinion justify the conclusion that Chandavarkar J. has erred in accepting that oral evidence as true.

34. Therefore I hold that the factum of the gifts is established. But can the gifts be upheld? It is urged for the plaintiff that they are vitiated by the fiduciary relation in which Madanji stood towards Mankuverbai.

35. This point was apparently not much elaborated before Chandavarkar J., and though it undoubtedly was taken, it was taken without success.

36. Before this Court much has been made of this aspect of the case, and that the parties might not be prejudiced they were permitted to go into further evidence which was recorded by Batty J.

37. Now here again nothing is proved as to what the law is in Porebunder State so that we must rest on the principle that it lies on him who asserts it to prove that the law of the foreign state differs from ours, and in the absence of such proof we must hold that no difference exists except possibly so far as the law here rests on specific Acts of the Legislature.

38. First, then, did Madanji stand in a fiduciary relation towards Mankuverbai which might affect the validity of the gift?

39. Chandavarkar J. held that "there was no special confidence created to bring the transaction within Section 111 of the Indian Evidence Act."

40. But this conclusion, in my opinion, gives the go-bye to the undoubted fact that the seven shares were vested in Madanji on a specific trust in favour of Mankuverbai, and the evidence shows that he received the dividends and managed for her so far at any rate as those seven shares concerned. It in no way

detracts from the confidential character of this relation that prior to the gift Madanji did not hold the certificates.

41. On the other hand the two shares were not vested in Ma-danji before the gift to him nor can I find that he received the dividends, managed the two shares, or in respect of them stood towards Mankuverbai in a fiduciary relation.

42. What then is the legal result of this position ? It was said by Lord Romilly in *Vaughton v. Noble* (1861)³⁰ Bea 34 that " a cestui que trust cannot give a benefit to a trustee"; but without going that length it is clear that "persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them." This applies to the case of trustee and cestui que trust (*Liles v. Terry* [1895] 2 Q.B. 679 ; see too *Wajid Khan v. Ewaz Ali Khan* ILR (1891) 18 Cal. 545.

43. Evidence has been adduced before Batty J. with a view to establishing that independent advice was given, but it is his opinion after seeing the witnesses- and I agree with him- that the evidence in support of the conversations invoked in aid is far from convincing, and even if it be credited the evidence fails to show that any independent advice worthy of the name was given to Mankuverbai.

44. So far then as the seven shares are concerned I am of opinion that the gift cannot prevail. But as the gift of the two shares is not open to the same objection, for the circumstance that two persons stand to each other in the relation of trustee and cestui que trust does not affect any dealing between them unconnected with the subject of the trust *Knight v. Marjoribanks* (1849) 2 Mad. .

45. I have not overlooked the fact that it is not the donor who impugns the gift but the reversioner, who became entitled to Jivan Karsonji's estate on her death. But no reliance was placed on this in the argument, and, in my opinion, rightly so, when regard is had to the position of a reversioner who has been prejudiced by a gift attempted to be made by the widow of him whose heir he is.

46. Nor has it been suggested before us that it is a circumstance in favour of the gift that his sons, the first and second defendants, were associated with the trustee as donees of the trust property.

47. The result then is that in my opinion the appeal should be allowed as to the seven shares.

48. As one of the shares has been sold by Madanji his estate will be liable in respect of that. The first two defendants are willing to admit assets of their father in their hands to the extent of Rs. 2000 and the plaintiff agrees to accept this Rs. 2000 in satisfaction of all claims in respect of the share sold by Madanji in 1900. The plaintiff is, therefore, entitled to have the gift of the seven shares set aside.

49. There will also be a decree in the plaintiff's favour against the first two defendants for Rs. 2000 and those defendants are further directed to transfer to the plaintiff the six shares remaining unsold on obtaining letters of administration in respect of the shares and the dividends thereon; the first and second defendants undertake forthwith to obtain the necessary letters of administration and the plaintiff undertakes to pay to the first and second defendants such sum as may be payable under the agreement recorded by Mr. Justice Batty on the 7th of April 1906. By consent declare that the plaintiff is entitled to the Rs. 118-12-7, the plaintiff undertaking to pay thereout Rs. 18-12-7 to the defendants.

50. The decree should be prepared with a declaration that the seven shares notwithstanding the gift formed part of the estate of Jivan Karsonji.

51. The plaintiff is to get two-third of his costs of the suit and appeal from defendants 1 and 2.

52. There will be liberty to apply.