

1912 made in favour of the appellants. Of course the respondents will pay the costs of this appeal, and the costs below.

VISSANJI
SONS & Co. Solicitors for the appellants : *Messrs. Latteys & Hart.*

SHAPURJI
BURJORJI. Solicitors for the respondents : *Messrs. T. L. Wilson & Co.*

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911 MADONJI DEVCHAND AND OTHERS, APPELLANTS AND PLAINTIFFS, v.
August 22. TRIBHOWAN VIRCHAND AND ANOTHER, RESPONDENTS AND
DEFENDANTS.*

Indian Trusts Act (II of 1882), section 5—Trust declared outside British India—Proceedings in British Indian Courts—Redeemed mortgage retaining mortgaged share as trustee for mortgagor—Notice of assignment by mortgagor—Death of mortgagor before registration of transfer to assignee—Validity of trust—Completion of gift.

N, through her agent T, mortgaged a share in the Bank of Bombay with P. Later she directed T to redeem it and have it transferred by way of gift to her two nephews. It was redeemed and a transfer form was signed by P in favour of the nephews, but the Bank declined to register it on the ground that the transferees were minors. N thereupon directed that it should be transferred to the names of T and M jointly as trustees for the minors. A transfer was accordingly signed by P in favour of T and M, and this was duly registered by the Bank. The day before it was lodged with the Bank for registration, N died.

It was contended that the gift was imperfect and the trust in favour of the nephews invalid.

Held, that as the trust was set up in a British Indian Court the Indian Trusts Act applied, although both N and P were living and domiciled in Kathiawar (*i. e.*, outside British India) when N declared her wishes regarding the share.

Held, further, that N had an equitable interest in the share and that, the mortgage having been discharged, P, the registered proprietor, held the legal title as trustee and was bound to deal with it as T or his principal. N should direct.

Held, further, that the share had passed out of the control of N before her death, the certificate as well as the transfer being in the hands or under the control of T, to whom her desire to benefit the minors had been communicated, and that the legal holder P, having notice and having signed a transfer in favour of

* Appeal No. 3 of 1911; Suit No. 847 of 1907.

the minors before N's death, could only convey for their benefit, and had subsequently done so to the trustees desired by N.

Held, therefore, that the trust was valid and the gift complete.

ON 1st November 1892 one Ruttonji Shamji, a Dassa Shrimali Hindu, died at Mangrole, a Native State in Kathiawar, leaving him surviving two widows, Monghibai and Nandoobai. At the time of his death there stood in his name (*inter alia*) four shares in the Bank of Bombay and two shares in the Manockji Petit Manufacturing Company. On 1st August 1893 Monghibai died, and litigation ensued between the executors of her will and Nandoobai with reference to the share of Monghibai in the property left by Ruttonji Shamji. A settlement was eventually reached, however, Nandoobai agreeing to pay the executors the sum of Rs. 10,251 in full satisfaction of their claim.

On the application of Nandoobai a will made by Ruttonji Shamji the day before his death was declared inoperative by the Mangrole Court on the ground of unsoundness of mind and letters of administration were granted to Nandoobai. Letters of administration to the property and credits of Ruttonji Shamji in Bombay were similarly granted by the Bombay High Court to Nandoobai's brother, Tribhowan, whom she had appointed her attorney in that behalf.

On 15th June 1900, Tribhowan, in order to pay off the executors of Monghibai, borrowed Rs. 4,000 from one Morarji Jootha and transferred the four Bank of Bombay shares above mentioned into the name of Morarji's wife Premcorebai by way of security for the loan. On 19th September 1902 three of the Bank shares were sold and the proceeds paid over to Premcorebai in repayment of the advance by Morarji, who had since died. The one share still remaining in the name of Premcorebai was intended by Nandoobai to be given to her two nephews Pranlal and Keshavlal. Premcorebai, therefore, executed a transfer in their favour, but the Bank declined to register it on the ground that the transferees were minors. Nandoobai then directed that the share should be transferred into the names of her brothers Tribhowan and Motichand, the

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1st and 2nd defendants, jointly as trustees for the minors. Premcorebai accordingly executed a fresh transfer which was lodged with the Bank on 15th December 1902 and duly registered. On 14th December 1902, however, Nandoobai died. Previous to her death she had transferred to her brothers Tribhowan and Motichand the two shares in the Manockji Petit Manufacturing Company standing in Ruttonji Shamji's name.

The plaintiffs filed this suit in 1907 claiming as reversionary heirs (along with the 3rd, 4th and 5th defendants, who refused to join as plaintiffs) to recover the property of Ruttonji Shamji.

The suit was tried by Davar, J., and was dismissed on the grounds recapitulated in the judgment of the Appeal Court printed below.

The plaintiffs appealed.

Shortt, with *Desai*, appeared for the appellants.

Jinnah, with *Bahadurji*, appeared for the respondents.

SCOTT, C. J. :—The plaintiffs as heirs of Ruttonji Shamji prayed for a declaration that two shares in the Manockji Petit Spinning and Weaving Company and four shares in the Bank of Bombay standing in the name of the 1st and 2nd defendants belonged to and formed part of the estate of Ruttonji Shamji and that the plaintiffs and the 5th defendant (and two other defendants now deceased) were the absolute owners thereof and of all dividends accrued due thereon and for consequential relief by transfer of the shares and payment of the dividends.

Ruttonji Shamji was a Dassa Shrimali Bania of the Jain religion domiciled at Mangrole in Kathiawar who died without issue and possessed of considerable property on the 18th of November 1892 leaving two widows Monghibai and Nandoobai. Monghibai died on the 16th of August 1893 leaving a will whereof she appointed executors. After her death litigation was commenced by the executors claiming from Nandoobai part of the property left by Ruttonji Shamji as belonging to Monghibai's estate. Eventually a settlement was arrived at

whereby Nandoobai agreed to pay to Monghibai's executors the sum of Rs. 10,251 in respect of the share of Monghibai in Ruttonji's estate in three instalments. For the purpose of paying the last instalment Nandoobai who resided at Mangrole appointed her brother Tribhowan, the 1st defendant, her attorney to obtain from the High Court in Bombay letters of administration to the estate of Ruttonji to enable him to raise money upon mortgage of four shares in the Bank of Bombay standing in Ruttonji's name. Letters of administration were obtained by Tribhowan accordingly and the four shares were transferred by him by way of mortgage to Premcorebai, the wife of Morarji Jootha, as security for a loan of Rs. 4,000.

Shortly before her death which occurred on the 14th of December 1902, Nandoobai made a gift of two shares in the Manockji Petit Company standing in Ruttonji's name to her brothers the 1st and 2nd defendants and the same were duly transferred to their names in the books of the Company. A little later she arranged for the payment of the debt secured by the Bank of Bombay shares. Three of the shares were sold and the proceeds paid to the mortgagee and the certificate for the remaining share was handed back to an agent of Tribhowan, the 1st defendant, on payment of a small balance which still remained due. Nandoobai had given instructions to Tribhowan to get the remaining share transferred into the names of her sister's two sons for their benefit. The intended beneficiaries were, however, minors and although Premcorebai executed a transfer form in their favour on the 1st of December 1902 it was found that the Bank would not accept it for registration on account of the incompetence of the transferees. To get over the difficulty Nandoobai then directed that the share should be transferred to the names of the 1st and 2nd defendants on behalf of the minors.

Accordingly the names of the 1st and 2nd defendants were substituted as transferees and the transfer was lodged for registration on the 15th of December 1902. The transfer was then duly registered in the names of the defendants 1 and 2. Meanwhile Nandoobai had died on the 14th of December 1902. None of these facts are now disputed.

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The issues raised in the lower Court on the pleadings were:—

- (1) Whether Ruttonji Shamji was not a Jain ?
- (2) Whether according to custom and usage obtaining in the Jain Community Nandoobai and Monghibai, the widows of the said Ruttonji Shamji, did not become absolutely entitled to the whole of the property of their deceased husband ?
- (3) Whether the said deceased Nandoobai did not make a gift of the two shares in Manockji Fetit Spinning and Weaving Company to each of the first two defendants as in para. 6 of the written statement alleged ?
- (4) Whether the said Nandoobai did not give one share in the Bank of Bombay to her sister Moolibai's sons by way of gift, as alleged in para. 6 of the written statement ?
- (5) Whether the plaintiffs and defendant 5 are the next reversioners of the property and effects of the said Ruttonji Shamji on the death of his widow Nandoobai ?
- (6) Whether the gifts of the shares referred to, in issues 3 and 4 are not valid gifts ?
- (7) General issue.

At the first hearing issues 1 and 5 were found by consent in the affirmative, and the learned Judge upon the evidence held on issue 2 that Nandoobai and Monghibai according to the custom of the Jain community of Mangrole and Uplata on the death of their husband became absolutely entitled to the properties left by him, on issue 3 that Nandoobai did during her lifetime make a gift of one share in the Manockji Petit Mills to each of her brothers, the 1st and 2nd defendants, on the 4th issue that Nandoobai during her lifetime made a gift of one share in the Bank of Bombay for the benefit of her sister's of sons and on the 6th issue that Nandoobai was entitled to make the gifts and that they were valid.

Upon these findings the suit was dismissed.

On appeal the plaintiffs' counsel has not contested the validity of the gift of the Manockji Petit shares to the defendants 1 and 2, except on the ground of undue influence, a ground of objection which we declined to allow as it was not raised in the lower Court. The plaintiffs' counsel then confined himself to the question of the validity of the disposition of the share in the Bank of Bombay in favour of the nephews of Nandoobai. The issues relating to this share were tried in the

lower Court without bringing the beneficiaries on the record upon the assumption, we presume, that the defendants 1 and 2 held in trust for them. That position was, however, abandoned in argument before us, for it was contended that there was an invalid trust as well as an imperfect gift. Under these circumstances if we had any doubt as to the propriety of affirming the decision of the lower Court it might be necessary to add the nephews of Nandoobai as parties and to remand the case for retrial as to their interest in the share in the Bank of Bombay. We are of opinion, however, that the plaintiffs' contention must fail. The evidence recorded fully establishes the custom whereby the widows of Ruttonji became absolutely entitled to his property and we have nothing to add to the judgment of the lower Court upon this question. If the widows were absolutely entitled it is difficult to see how the plaintiffs can claim the property left by Nandoobai in preference to her brothers, but a complication is introduced by the finding by consent on the 5th issue to the effect that the plaintiffs and defendant 5 are the next reversioners of the property and effects of Ruttonji on the death of Nandoobai.

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The evidence recorded establishes the testamentary power of the widow but does not deal specifically with the question whether, failing a disposition by the widow of the property of the deceased husband either *inter vivos* or by will, it will go to the heirs of the widow or to the heirs of the husband.

Assuming for the purpose of argument that the plaintiffs have a reversionary interest in preference to the 1st and 2nd defendants, it can only be in property left undisposed of by the widow and we are of opinion that Nandoobai effectually disposed of her interest in the share in the Bank of Bombay.

Nandoobai had an equitable interest in the share although the legal holder was the registered proprietor Premcorebai. The mortgage having been discharged Premcorebai held the legal title as trustee for her transferor Tribhowan and was bound to deal with it as he or his principal Nandoobai should direct. Premcorebai's son, Jamnadas Morarji, the active member of the mortgagee's family, says that on payment of the

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balance due on the security of the share, the transfer which Tribhowan had in his possession was signed by Premcorebai at Jamnadas' request and was sent along with a letter to the mortgagee's moonim Nathu Kalliauji at Bombay instructing him to hand over the share and the transfer to the man appointed by Tribhowan. Jamnadas also deposes to a conversation with Champsey, the father of the boys, from which he gathered that the transfer was to effectuate a gift by Nandoobai to her nephews. This would also be brought to the notice of Jamnadas and Premcorebai by the fact that on the transfer as originally made out the transferees were the nephews of Nandoobai. In further proof of the transfer by Nandoobai of her beneficial interest in the share of her nephews is the fact that Tribhowan who was managing her affairs transmitted her instructions to get the share transferred into the boys' names to the broker Tarachand Walji and that, according to Champsey, the boys' father, Nandoobai told him that she was giving the share to his sons and also that the broker in Bombay had informed her that the share could not be transferred to the minors' names so she said it would be transferred to her brothers' names and they would hold it for Champsey's sons. As the certificate as well as the transfer was then in the hands or under the control of Tribhowan to whom her desire to benefit the minors had been communicated, it is difficult to see what more Nandoobai could have done to divest herself of her equitable interest in favour of her nephews.

It is contended for the appellants that as Nandoobai died on the 14th of December, the day before the transfer to the defendants 1 and 2 was lodged for registration with the Bank and while the share still stood in the name of Premcorebai, no gift was completed and no trust was created. Reliance is placed upon section 5 of the Indian Trusts Act which provides that no trust in relation to moveable property is valid unless declared in writing signed by the author of the trust or unless the ownership of the property is transferred to the trustee. Although Nandoobai and Premcorebai both were living and domiciled at Mangrole in Kathiawar when Nandoobai declared her

wishes regarding the share, it does not follow that the 5th section of the Indian Trusts Act will not apply to the defendants setting up a trust by Nandoobai in a British Indian Court. In *Rochefoucauld v. Boustead* ⁽¹⁾ Lord Justice Lindley said: "Counsel for the plaintiff contended that the Statute of Frauds had no application to lands in Ceylon. But, having regard to *Leroux v. Brown* ⁽²⁾, and to the language of section 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries."

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How far are these remarks applicable to section 5 of the Indian Trusts Act, which says, "no trust is valid unless"? The effect of similar words in the English Stamp Act which provides that "a Sea Policy shall not be valid unless" was discussed in *Royal Exchange Assurance Corporation v. Sjörforsakrings Aktiebolaget Vega* ⁽³⁾. Bigham, J., said: "Even assuming that the policy is to be interpreted with reference to Swedish law, I should still be of opinion that it could not be admitted in evidence. The statute makes such a contract invalid. That means no more than that it is a contract which cannot be put in suit. It is not illegal or immoral. The case, therefore, falls within the authority of *Leroux v. Brown* ⁽²⁾. The document is shut out because it would be contrary to our procedure to admit it."

We, therefore, think that section 5 of the Indian Trusts Act is applicable to this case. It is clear that there is no written and signed declaration of trust by Nandoobai, but on the other hand the property was already vested in a trustee, namely, Premcorebai. The facts appear to us to bring this case within a class of cases consistent with the provisions of section 5 of

⁽¹⁾ [1897] 1 Ch. 196 at p. 207.

⁽²⁾ (1852) 12 C. B. 801.

⁽³⁾ [1901] 2 K. B. 567 at p. 575.

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the Indian Trusts Act described by Lord Romilly in *Bridge v. Bridge*⁽¹⁾ as follows:—

“ If the stock stood in the names of trustees, and the beneficial owner of it executed, in favour of a volunteer, an assignment of such stock, and if notice of that assignment were given to the trustees, who acknowledged the validity of it and acted upon it, they would thereupon, through the act of the beneficial owner, become the trustees for the volunteer, and equity would enforce the due performance of that trust in his favour.”

The cases referred to in this passage are not confined to cases of written assignments by the beneficial owner, for example, in *M Fadden v. Jenkyns*⁽²⁾, a verbal message to a debtor desiring him to hold the debt in trust for another, when the trust was accepted by the debtor and communicated to the *cestui que trust* was held to create a trust binding upon the personal representatives of the creditor. Here it has not been argued that Chapter VIII of the Transfer of Property Act is applicable. In some cases the fact that a settlement is intended and is not executed is sufficient to defeat the intended trust as in *Coningham v. Plunkett*⁽³⁾, but in the present case Nandoobai never intended to take any further step than she did take.

We, therefore, hold that the share had passed out of the control of Nandoobai before her death and that the legal holder Premeorobai having notice and having signed a transfer on the 1st of December in favour of the minors could only convey for their benefit. This she did subsequently to the trustees desired by Nandoobai.

Assuming, therefore, that any property left undisposed of by Nandoobai at her death would devolve on her husband's heirs we hold that the share in the Bank of Bombay does not fall within this category.

We dismiss the appeal with costs.

Attorneys for the appellants: *Messrs. Mulji & Khambata.*

Attorneys for the respondents: *Messrs. Captain & Vaidya.*

Appeal dismissed.

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(1) (1852) 16 Beav 316 at p. 322.

(2) (1842) 1 Ph. 163.

(3) (1843) 2 Y. & C (Ch.) 245.