

Privy Council Appeal No. 88 of 1927.

Bengal Appeal No. 168 of 1924.

Hariram Serowgee - - - - - *Appellant*

v.

Madan Gopal Bagla and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER, 1928.

Present at the Hearing :

VISCOUNT SUMNER.

LORD WARRINGTON OF CLYFFE.

SIR JOHN WALLIS.

[*Delivered by* VISCOUNT SUMNER.]

The appellant claimed certain sums held at her death by Brijcomari, the widow of a banker and moneylender in Calcutta, Rangoon and elsewhere, named Bhagwandas Bagla, who was an Agarwalla Jain. He is the only son and youngest child of Mahadevi, deceased, a grand-daughter of Bhagwandas and Brijcomari, and the respondents are the surviving executor and the residuary legatee under Brijcomari's will. It is undisputed that, under the Mitakshara law as modified by the customs and usages of the Agarwalla community relating to stridhan, the plaintiff is now entitled to whatever belonged to his mother Mahadevi during her lifetime. Originally the action was brought for an account, but at the trial this was abandoned and the plaintiff elected to rely only on his claim for sundry specific items. The defendants subsequently agreed to this course being taken, relinquishing also any claim to any set-off or account on their side. For several of the relevant years Brijcomari's books of account were not forthcoming, having been, it was said, lost in a

riot or consumed in a fire. This may have deprived the plaintiff of useful evidence and the defendants of circumstances proving a discharge. At any rate the matter rests there, as it was not held that the defendants had made away with the books. The entries relating to Mahadevi were such as might be inserted in a day book and cash book and then by transference in a ledger in the case of a customer, who had placed money to her credit with her agents, with instructions to invest it and collect the interest on the investments for her account and to make disbursements against it as she might from time to time direct. This picture, however, is far from the reality. When the account was opened Mahadevi was a child of eleven. When the gifts to her, on which the claims are founded, are supposed to have been made she was about fifteen. Neither she nor anyone on her behalf gave any instructions or operated on the account at all, and whatever was done was done under the direction of Brijcomari. Of these items only three survive on this appeal. Two relate to sums alleged to have been given by Brijcomari to Mahadevi and the third to a legacy left to Mahadevi by her grandfather, Bhagwandas, under a will of which his widow, Brijcomari, was executrix.

Evidence was given, which may be accepted, that in the Agarwalla Jain community there is a practice on the occasion of adoptions and marriages to make money presents to relatives on a scale that may be called munificent. The first claim in this appeal is in respect of two lakhs of rupees, alleged to have been given to Mahadevi on the occasion when Brijcomari adopted Mahadeo, her grandson and Mahadevi's brother, as her own son in 1901, and of Rs. 31,000 alleged to have been given to her when Mahadeo was married a short time afterwards. The remaining claim is for Rs. 90,000, part of the legacy above mentioned, the remainder of it not being now in dispute. There is also an issue as to the amount of interest to be allowed.

After the death of Bhagwandas his widow carried on his business on her own account, and as it was a business on a large scale it involved a full system of book-keeping. A ledger account in the name of Mahadevi begins in 1896 with a credit of Rs. 24,968. This represents a principal sum carried forward from a previous ledger with periodic amounts for interest, some credited in the lifetime of Bhagwandas, some after his death. In respect of this claim the plaintiff succeeded in India, Brijcomari and another executor of the will of Bhagwandas having made affidavits in connection with it in proceedings in Rangoon that this sum represented a trust created in Mahadevi's favour by the testator. It was on this evidence and not on the mere method of entering these sums in the books that the Courts decided in the plaintiff's favour. Mahadevi's account is continued through the books down to her death in 1904. In 1901 there is an entry in the day book thus :
 " 2,00,000 credited to Bai Mahadevi's account, dated 14th January, 1901, given credit to you on account of Chiranji Mahadeo Prasad."

and in 1903 another entry: "Rs. 31,000 credited to Bai Mahadevi's account, presented on the occasion of Mahadeo Prasad's riding on horse at the time of his marriage ceremony." These are the two alleged gifts. The account of Mahadevi is carried on from year to year. Periodically it is credited with sums received from debtors as interest; occasionally it is debited with sums for legal expenses or payments to her father-in-law, Fulchand, as her guardian. There is no evidence that Mahadevi, who bore her husband Padamraj three children and then died at the age of nineteen, ever knew anything about any of these things, but Padamraj—a witness of whose credibility the trial Judge had but a poor opinion—gave an account of this "riding on a horse," which shows it to have been part of the wedding ceremonial that is often an occasion for making presents. Further entries in the day book relating to Mahadeo show a curious state of things. Two lakhs are debited to him as having been credited to Mahadevi's account on January 17th, 1901, and transferred from his account. This is part of a gross sum of seven lakhs and three-quarters, debited to him, of which the residue, five lakhs and three-quarters, are entered as credited to the father of Mahadeo on the occasion of Mahadeo's adoption, which took place shortly before his marriage. The death of Mahadevi occurred on 17th May, 1904, and in 1913 there are entries in the day book showing that the balance of Mahadevi's account, 4 lakhs and Rs. 69,128, which then stood to her credit, was exhausted by (1) a transfer of 1 lakh and Rs. 39,125 to the firm of Fulchand Padamraj, that is, the firm of Mahadevi's father-in-law and husband, being the amount standing against the name of Fulchand Padamraj in the account books of one Calcutta firm; (2) by purchases of jewellery for the plaintiff, which do not seem to have been in dispute, and, finally, (3) by transferring 3 lakhs Rs. 19,203 in equal thirds to Mahadevi's children, the plaintiff and his two sisters, "under orders of Bai Muni's mother," that is, of Brijcomari, whose death occurred in 1916.

So far as concerns the two disputed items of two lakhs and Rs. 31,000, alleged to have been given to Mahadevi in connexion with the adoption and subsequent marriage of Mahadeo, the story is therefore as follows. The books of Brijcomari's firm show her entering these sums, not in any cash book as sums received from and deposited by Mahadevi or on her account, but as credits under her grand-daughter's name, which afterwards are divided by Brijcomari's directions among Mahadevi's children long after her death. Brijcomari had no right to adopt any son during the lifetime of Lachmi Narayan, already adopted by her deceased husband, and least of all a boy, who was grandson to Bhagwandas already. She appears by these entries to have laid hands on the fortune thus supposed to accrue to Mahadeo, in order to buy off his natural father by one large payment and to endow his sister with another, and then again to have seized on the deceased Mahadevi's estate, applying a large part of it to satisfy her own

claims on the embarrassed firm of Fulchand Padamraj, and dividing the residue between Mahadevi's children, with as little regard for legal rights as she had shown in the adoption proceedings some years before. The recital in the deed of 24th February, 1920, to which the respondents were parties, stating that "certain sums of money" given by Brijcomari to Mahadevi, out of which Gigi Bai, the plaintiff's sister received a third share, does not in itself prove a completed gift by Brijcomari, since she was dead years before the payment, and it is not relied on as an estoppel. The accounts in themselves are mere book-entries and do not confer or determine rights, but, whatever else they show, they do not show completed gifts to Mahadevi. It is not pretended that Mahadevi received any money and then deposited it in her grandmother's bank or that she ever in fact accepted these gifts. Nor did Brijcomari make herself the bailee of Mahadevi by any unequivocal act, which changed the character of her own continuous possession. Though there are loans made to debtors and credits of interest received from debtors in the accounts under Mahadevi's name, she is charged no commission as upon an investment of her moneys, nor does she draw on the income, of which an appearance of ownership is thus created. No accounts were rendered; no correspondence passed. When Brijcomari is so minded, she manipulates the account and makes transfers exactly as she pleases, and, finally, being admitted to have been in control of the whole business and keenly interested in it, she divides up the account and brings it to a close as to her seems good. The Courts below correctly appreciated and applied the rules of law relating to imperfect gifts, and their conclusion that neither of these sums was ever the subject of a completed gift at all must be affirmed. There was no pleading nor contention before the trial Judge that Brijcomari had made any declaration of trust in Mahadevi's favour in respect of either of these sums, and, though it was admitted in the High Court that, if a declaration could be proved the want of the proper pleading ought not to disentitle the plaintiff to recover, it is clear that no such proof was possible. Every step taken towards proof of a gift was in itself *pro tanto* a negation of a trust, for a trust retains the actual ownership in the trustee, while an endeavour to make a gift is an endeavour to divest the property and pass it away to the donee. All that was proved was a series of acts, which might, if carried far enough, have amounted to completed gifts, but in fact stopped short of completion. Brijcomari always retained the power to cancel all that she had done, whenever she changed her mind, and that change did eventually take place in 1913.

The claim relating to the legacy stands thus. Brijcomari laid out Rs. 90,000 in buying a house for Mahadevi, which was actually bought and in which she resided till she died. The question is, was this sum provided out of gifts, which were otherwise incomplete, or out of the legacy of a lakh, to Mahadevi

under her grandfather's will, which formed part of his estate in Brijcomari's hands? The presumption is strong that Brijcomari paid for the house out of the legacy, for which she clearly was liable, and not out of inchoate gifts, for which she had not yet made herself liable at all. Her interest was to discharge old obligations, not to perfect new ones. There was, however, ample evidence to establish the conclusion at which the High Court arrived on appeal, that this purchase money was a part satisfaction of the legacy. At the trial Brijcomari's solicitors were ready to give formal evidence of what had happened, refreshing their memory with the entries in their office diary. By consent of counsel the diary was read instead, as if it had been formally proved. Thus, what is for the purpose of this case the evidence of Brijcomari's solicitors showed, that they were instructed to investigate the title to the house in furtherance of an investment of nine-tenths of the legacy in its purchase. They did so; were satisfied; and carried the purchase through. This was conclusive. An attempt was made to contend that their evidence as to the investment was hearsay and irrelevant in itself, and inadmissible under the Indian Evidence Act, Section 21. Their Lordships do not accept this and the contention fails.

The remaining point is a challenge of the course taken by the trial Judge in applying the rule of *damdaput* to the interest allowed. This peculiar Hindoo rule is applicable to matters of contract, and the contention was that the claim for the legacy was not a matter of contract. As, however, the plaintiff had claimed to have the benefit of a course of business, under which, so far as the accounts of Brijcomari's business go, all the items were treated as invested in commercial speculations for Mahadevi, he cannot both approbate and reprobate, nor can he, on finding that the claim to the benefit of that course of business with its resulting contractual obligations, is not sustainable, claim that Brijcomari was a mere executrix, who had failed to apply assets which had come to her hands in discharging legacies, and was not a merchant-banker, liable in contract to a customer for interest on the balances in her hands.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

HARIRAM SEROWGEE

v.

MADAN GOPAL BAGLA AND ANOTHER.

DELIVERED BY VISCOUNT SUMNER.

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