ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1906. *June 15.*

RAGHUNATH MULCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* VARJIVANDAS MADANJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Law of Native State—Law in British India—Difference—Burden of proof—Trustee—Cestui que trust—Confidential relation.

It lies on him who asserts it to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.

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.*

Vaughton v. *Noble*[1] and *Liles* v. *Terry*[2] followed.

APPEAL from Chandavarkar, J.

One Jivan Karsanji died at Porebunder in Káthiáwár on the 22nd March 1892, leaving him surviving a widow Mankuvarbai. At the time of his death the deceased was possessed of considerable moveable and immoveable property including eleven shares of the Manekji Petit Manufacturing Company, Limited. The said eleven shares were registered in the name of Mankuvarbai's brother Madanji Sundarji, otherwise known as Madanji Dharamsi, who managed the affairs of the deceased during his life-time at Bombay and continued to do so afterwards for his widowed sister Mankuvarbai. Out of the said eleven shares, two were sold by Mankuvarbai and she appropriated the proceeds thereof to her own use. The remaining nine shares were also sold and with the proceeds of the sale other nine shares of the same Company were purchased at a less price. Out of the said nine shares two stood in the name of Jagjivan Valji, a member of the firm of Valji Ranchod, with whom the deceased had accounts and

* Appeal No. 1414 of 1905 : Original Suit No. 836 of 1901.

(1) (1861) 30 Beav. 34 at p. 39. (2) [1895] 2 Q. B. 679 at p. 686.

the remaining seven stood in the name of the said Madanji Sundarji.

Mankuvarbai died on or about the 24th May 1900 leaving a will dated the 2nd April 1900. On or about the 15th October 1900 the said Madan Sundarji also died and the property of the deceased Jivan Karsanji, which had been in his custody and management for and on behalf of Mankuvarbai including the said shares, remained in the possession of his sons, defendants 1 and 2, who asserted ownership to the property under Mankuvarbai's will. Thereupon the plaintiff as the constituted attorney of his mother Rambhabai, the niece (paternal aunt's daughter) of Jivan Karsanji, who claimed to be the reversionary heir, obtained to himself the grant of letters of administration for her use and benefit to the estate of the deceased Jivan Karsanji and brought the present suit, among other things, to establish title to the said shares alleging that Mankuvarbai had no authority to will them away in defendants' favour.

Defendants 1 and 2 denied that the said shares formed any portion of the estate of Jivan Karsanji at the death of Mankuvarbai and contended that she, during her life-time, that is, in May 1898, gave by way of gift to their father Madan Sundarji the two shares which stood in the name of Jagjivan Valji; that in the month of June following she made a gift of the remaining seven shares to their father for the benefit of himself and the defendants; that out of the nine shares one was sold by their father in February 1900 and the proceeds thereof were spent partly for his own purpose and that they were in possession of the remaining eight shares as owners.

The Manekji Petit Manufacturing Company, Limited, and the Hongkong and Shanghai Manufacturing Corporation were joined as defendants 3 and 4.

The suit was heard by Chandavarkar, J., who dismissed it holding that the gift of the shares to the defendants' father was proved. In the course of the judgment His Lordship observed :—

"Now I come to the most important point in this case and that is as to the gift set up by the defendants 1 and 2. I do not intend to give my reasons at length upon that issue, because the effect of the whole evidence in my opinion

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is that the gift set up is proved. I accept as reliable the evidence of Tulsidas Jugjivan. His demeanour was most satisfactory. He gave his evidence without any bias and with considerable presence of mind, and appeared to speak the truth. He is a disinterested and respectable witness, and has no reason whatever for inventing a story and helping the first and second defendants.

"Then comes the evidence of the two defendants. That also was to my mind satisfactory, especially that of the second defendant Vandravandas, who exaggerated nothing; but in some respects he admitted facts especially as to the account book of his father though he knew that they might possibly go against his case. I regard him too as a reliable witness.

"Next the probabilities also, in my opinion, are in favour of the gift. Mankuvarbai and Madanji were sister and brother. The sister had no children. They lived together in Bombay. It seems to me quite in the nature of things that she made the gift in favour of her brother and his sons. In her will there is no express mention of the shares. By itself this circumstance would not be of importance because Mr. Vicaji (for the plaintiff) rightly pointed out the lady owned one share in the Coorla Mills and one in the Sassoon Mills, and there is no express reference to them either in the will. But the circumstance such as it is appears to me seems to tell in favour of the gift. The reason why the two shares, one of the Coorla and the other of the Sassoon Mill, were not mentioned might be that the number was so small and insignificant that it was considered hardly worth specific mention. Had she been still owner of eleven shares she would have made it a point to mention them in the will. Under these circumstances the fact that there is no reference to the shares in the will is evidence in favour of the gift. The evidence also satisfies me that Madanji Sundarji has dealt with the shares as his own after the date of the gift. He realized the first dividend. He paid one dividend into the account of Jivan with Runchhod Walji. That substantially corroborates the evidence of the witnesses to the gift. It is also clear that Jivan's indebtedness to the firm of Runchhod was reduced so that a balance of Rs. 41 was left. Afterwards Madanji Sundarji sold these shares and purchased new shares in his own name. Upon the whole I have no hesitation in holding that the gift is proved and that it was completed by the fact that Madanji Sundarji dealt with the shares as his own.

"With reference to Mr. Vicaji's argument that after the gift Rs. 200 were debited to Jivan's account, I do not attach any importance to that fact because neither of the defendants was cross-examined as to this. It must be remembered that Madanji continued to be the manager of this lady Mankuvarbai and he must have debited to that account the said sum.

* * * * *

"Then Mr. Vicaji, for the plaintiff, contended that the gift was not valid and binding because it is a gift by a lady to her brother who was her agent. His argument is that Madanji, the donee, stood in a fiduciary relation to the

donor, his sister, and that, therefore, the gift should not be upheld because the onus being upon them, the defendants have not proved that the lady fully understood what she was doing, that it was explained to her and that she had independent advice. As to this contention, I should observe at the outset that it was only in his concluding address in reply to the Advocate General's that Mr. Vicaji intimated his case. I never understood till then that that was the case of the plaintiff. It was not so put in the opening of the case by the learned counsel and during the whole hearing or when the 9th issue was raised no specific ground was given except that the gift even if proved was not completed by possession. But even supposing that the issue was raised in that particular sense which Mr. Vicaji attaches to it, the first question is—has the plaintiff proved that Madanji Sundarji stood in a position of active confidence to Mankuvarbai so as to throw the burden of proving the good faith of the transaction on the defendants? All that I find proved is that they were brother and sister, that the brother had her shares in his name and managed her affairs for her. He was, in short, her manager or agent for the purpose of realizing the dividends and paying them to her or accounting for them to her. There was no special confidence created to bring the transaction within the principle of section 111 of the Indian Evidence Act. See *Boo Jinatboo* v. *Sha Nagar Valab Kanji*[1]. But assume that section 111 applies. The evidence as it stands leaves no doubt about the good faith of the transaction. Mankuvarbai was a widow without children. She lived with her brother and to her his children were hers. She makes the gift after deliberation; there is no secrecy or haste about it. The evidence as it stands suggests nothing suspicious. There was nothing confused or complicated about the transaction. Mankuvarbai was not a *pardanashin*. So far as can be judged, she was intelligent though uneducated. The transaction originated from her; not from her brother. There was no inducement held out to her. The only thing is that there is no evidence that any professional adviser was consulted. But what was there for the professional adviser to advise in a transaction so simple and so natural? What undue influence was used? There was no cross-examination whatever suggesting anything of bad faith in the gift. Under these circumstances I find as a fact that defendants have discharged the onus that lay on them under section 111 of the Evidence Act, assuming that the onus did so lie."

The plaintiff appealed urging *inter alia* that the lower Court should have held that Madan Sundarji stood to Mankuvarbai in a fiduciary relation and a position of special confidence, and that under such circumstances the said alleged gift (if made) having been made without independent advice and it not having been shown that she properly understood the effect of the alleged gift,

(1) (1886) 11 Bom. 78 at p. 83.

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the said alleged gift should not be given effect to or held binding or operative.

The appeal was argued before Jenkins, C. J., and Batty, J., who, on hearing arguments, settled the following issues for determination :—

(1) Whether at the time of the alleged gift of the two shares Nos. 3523 and 3760 by Mankuvarbai to Madanji the said Madanji was not trustee of the said shares for, or otherwise in a fiduciary relation with regard to the same to, the said Mankuvarbai and the person claiming under Jivan Karsan or any and which of them?

(2) Whether, if so, the alleged gift was valid in law and conferred any and what rights in the said shares on the said Madanji?

(3) Whether at the time of the alleged gift of the seven shares Nos. 1684 to 1690 by Mankuvarbai to Madanji the said Madanji was not trustee of the said shares for, or otherwise in a fiduciary relation with regard to the same to, the said Mankuvarbai and the person claiming under Jivan Karsan or any and which of them?

(4) Whether, if so, the alleged gift was valid in law and conferred any and what rights in the said seven shares (*a*) on the said Madanji and (*b*) on the defendants 1 and 2?

(5) Whether if and so far as the said gift was intended to confer a beneficial interest on the defendants 1 and 2, it was not invalid in law having regard to the relationship between the said Madanji and the defendants 1 and 2 and the position in which the said Madanji stood with regard to the said seven shares to the said Mankuvarbai and the person claiming under Jivan Karsan?

(6) Whether the said alleged gift was not invalid in law as an attempt by Mankuvarbai to make a trust of a merely beneficial interest under a subsisting trust and without transferring the trust property to the trustee?

Evidence on the said issues was recorded by Batty, J., and the case came on for argument before the Court of Appeal.

Strangman with *Raikes*, acting Advocate General, for the appellant (plaintiff):—We first contend that the factum of the gift is not proved. There is no documentary evidence to establish the gift and the gift is inconsistent with the will of Mankuvarbai. Further it is inconsistent with the previous statements of Tulsidas on whose evidence the lower Court held that the gift was proved. Granting that the gift was made, it is void because the donee was the trustee of the shares. Under section 53 of the Trusts Act, the trustee cannot purchase the trust property or

become a mortgagee or lessee without the sanction of the Court; *a fortiori*, therefore, he cannot take a gift The point does not admit of any elaboration: *Vaughton* v. *Noble*[1], Lewin on Trusts, p. 805 (10th Edn.). Assuming section 53 does not apply, the gift is void in equity because no independent and competent advice was taken by the *cestui que trust* before making the gift: *Liles* v. *Terry*[2], *Wright* v. *Carter*[3], *Hatch* v. *Hatch*[4], *Rhodes* v. *Bate*[5]. The onus lies on the defendants: section 111 of the Evidence Act, section 16 of the Contract Act. The evidence produced only shows that Mankuvarbai expressed her intention to several persons of making the gift, but mere expression of such intention cannot amount to taking independent and competent advice. We further contend that the evidence with respect to the expression of the lady's intention is not reliable.

Padshah with *Inverarity* for the respondents (defendants):—No ground has been made out to disturb the finding of fact that the gift of the shares is proved. Section 53 of the Trusts Act does not expressly refer to gifts and does not apply: Anglo-Indian Codes, Vol. I, p. 832. Even if it applies to gifts, the gift of two shares standing in the name of Jagjivan Valji is not affected because in respect of them our father was neither trustee nor in active confidence, nor in any fiduciary relation. Our father was not in possession of those shares for many years before the gift was made. With respect to the remaining seven shares our father was not in active confidence so as to bring the case within the pale of section 111 of the Evidence Act.

[JENKINS, C. J.:—Is not the transaction now governed by the amended section 16 of the Contract Act?]

That section lays down the law inunciated in *Hunter* v. *Atkins*[6]. We admit that the amended section 16 of the Contract Act applies and the onus lies on us to prove that there was no undue influence. The cases relied on are distinguishable from the present. The gift was made by a sister to her brother and his sons who were in needy circumstances and whom she wished

(1) (1861) 30 Beav. 34, 39.
(2) [1895] 2 Q. B. 679.
(3) [1903] 1 Ch. 27.
(4) (1804) 9 Ves. 292.
(5) (1866) L. R. 1 Ch. 252.
(6) (1832) 3 Myl. & K. 113 at pp. 134, 135.

to provide for during her lifetime. Long before the gift was made she spoke about the matter to several of her relations who all approved of the intended gift. All this time the donee was away from the donor and was not in a position to influence her mind. These circumstances rebut the presumption of undue influence: *Huguenin* v. *Baseley*[1]. In *Vaughton* v. *Noble*[2] the bargain was an immoral one and the observations that trustees cannot accept gifts from *cestui que trust* was a dictum. In the present case there was delivery in fact. The share certificates were actually handed over to the donee.

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

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 Karsanji'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.

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

Jivan Karsanji died on the 22nd of March 1892 intestate and without issue at Porbunder in Káthiáwár, leaving a sole widow named Mankuvarbai.

Part of his estate consisted of eleven shares in the Maneckji Petit Manufacturing Company, Limited.

Two of these shares were sold by the widow Mankuvarbai 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 Company, Limited, bought with the proceeds of sale of the nine shares which had belonged to Jivan Karsanji in his lifetime.

(1) (1807) 14 Ves. 273. (2) (1861) 30 Beav. 34, 39.

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.

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

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 Sundarji in the month of May 1898, and that the seven shares standing in Madanji Sundarji'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.

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

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

On the 2nd of May Jagjivan Walji executed a transfer of these shares in favour of Dharamsey Sheshkaran.

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

It now appears that this transfer was, by way of security, for moneys advanced to the firm of Walji Ranchhod, 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 Sundarji.

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 Sundarji by way of gift, and that the legal transfer was the completion of this transaction.

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.

According to the case of the first two defendants the certificates of the seven shares were in like manner delivered by

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Mankuvarbai to Madanji Sundarji 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.

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.

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 Sundarji was in a position of confidence towards his sister who had no independent advice.

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

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.

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

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.

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 Sundarji.

Before Chandavarkar, 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 Mankuvarbai."

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."

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.

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.

Both sides claim that the surrounding circumstances aid them.

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.

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

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 Mankuvarbai.

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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.

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 Mankuvarbai.

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

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.

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 Native 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.

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

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

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 Mankuvarbai, and the evidence which 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.

On the other hand the two shares were not vested in Madanji before the gift to him nor can I find that he received the di-

vidends, managed the two shares, or in respect of them stood towards Mankuvarbai in a fiduciary relation.

What then is the legal result of this position? It was said by Lord Romilly in *Vaughton* v. *Noble* (1) 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 cannnot 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 persons 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* (2); see too *Wajid Khan* v. *Ewaz Ali Khan* (3).

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 Mankuvarbai.

So far then as the seven shares are concerned I am of opinion that the gift cannot prevail. But the gift of the two shares is not open to the same objection, for the mere 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* (4).

I have not overlooked the fact that it is not the donor who impugns the gift but the reversioner, who became entitled to Jivan Karsanji'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.

Nor has it been suggested before us that it is a circumstance in favour of the gift that his sons, the first and second

(1) (1861) 30 Beav. 34 at p. 39.

(2) [1895] 2 Q. B. 679 at p. 686.

(3) (1891) 18 Cal. 545.

(4) (1849) 2 Mac. & G. 10 and 2 H. & Tw. 308.

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defendants, were associated with the trustee as donees of the trust property.

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

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. 2,000 and the plaintiff agrees to accept this Rs. 2,000 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.

There will also be a decree in the plaintiff's favour against the first two defendants for Rs. 2,000 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.

The decree should be prefaced with a declaration that the seven shares, notwithstanding the gift, formed part of the estate of Jivan Karsanji.

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

There will be liberty to apply.

Attorneys for the appellant:—*Messrs. Nanu, Hormasji & Co.*

Attorneys for the respondents:—*Messrs. Bicknell, Merwanji & Romer.*

G. B. R.