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confining its application to a person against whom "a complaint" has been made under section 200 of the Code. Persons proceeded against under Chapter VIII of the Code are persons against whom there is an accusation in the ordinary acceptation of the word. The word "discharged" is also not defined in the Code, and there is no valid ground for departing in respect of it from the rule of construction that, where in a Statute the same word is used in different sections, it ought to be interpreted in the same sense throughout, unless the context in any particular section plainly requires that it should be understood in a different sense. We think that we should follow the rulings of the Allahabad High Court, *Queen-Empress* v. *Mutasaddi Lal*(1) and *King-Emperor* v. *Fyaz-ud-din*(2), which follow the decision of this Court in *Queen-Empress* v. *Mona Puna*(3); and not the rulings in *Queen-Empress* v. *Iman Mondal*(4) and *Velu Tayi Ammal* v. *Chidambaravelu Pillai*(5). The rule is accordingly discharged.

Rule discharged.

R. R.

(1) (1898) 21 All. 107.
(2) (1901) 24 All. 148.
(3) (1892) 16 Bom. 661.
(4) (1900) 27 Cal. 662.
(5) (1909) 33 Mad. 85.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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April 12.

BAI MAHAKORE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BAI MANGLA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Deposit—Husband depositing money in wife's name in his shop—Interest allowed over the amount—Depositee allowed to withdraw—Husband acknowledging trust—Creation of trust—Trusts Act (II of 1882), sections 5 and 6—Transfer of Property Act (IV of 1882), sections 5, 54.

D. made a credit entry of Rs. 20,000 in his books in the name of his wife H. carrying interest at 4½ per cent. The entry was made on the 1st November 1891 as of the 30th November 1890. The amount of Rs. 20,000 was treated as belonging to H. in the *Sarvaya* (balance sheet) in the *Samadaskat* book

* First Appeal No. 223 of 1908.

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(account book of deposits, &c.) and in the *Vyajavahi* (interest account book). In November 1895 H., on the occasion of her going on pilgrimage, withdrew some money from the account. H. died on the 2nd March 1901. On the 29th July 1901 D. wrote a letter to his four daughters by H. saying that the money above referred to was given by him to H. as a gift, that the four daughters had equal right to take the money, but that it was to be divided after his death. In February 1903 D. debited the whole amount to H.'s account and credited the same to the sons of M., one of the daughters of D. and H. This he confirmed by his will which he made shortly afterwards wherein he stated that the money was always his own and never belonged to his wife H. After D.'s death, which took place in March of the same year, the three remaining daughters of D. and H. sued to recover their share of the money :—

Held, that the plaintiffs were entitled to recover their share in the amount.

Held, by CHANDAVARKAR, J., that the circumstances proved showed that D. intended a trust in favour of his wife H., and that that trust was carried into effect legally by him.

Held, by HEATON, J., that there was no trust, but that, in the circumstances of the case, D. conferred on H. a right to the money though he did not actually give her money, and this right he by his own acts and words made perfect by those means which were appropriate to the purpose.

APPEAL from the decision of Vadilal Tarachand Parekh, First Class Subordinate Judge at Broach.

Suit to recover a sum of money.

One Damodardas had a wife Harkore, by whom he had four daughters : Mangla, Kashi and Dhankore (plaintiffs) and Mahakore (defendant No. 1). Mahakore had three sons : Dhirajlal, Pranlal and Ratilal (defendants Nos. 3 to 5).

On the 1st November 1891 Damodardas made a credit entry of Rs. 20,000 in his account books in the name of Harkore. The entry was made as of the 30th November 1890 and interest was calculated at the rate of 4½ per cent. This amount together with the accumulated interest was shown in Harkore's name in the *Samadaskat* book (*i. e.*, book showing the deposits, &c.) in the *Vyajavahi* (interest account) and in the *Sarvayas* (annual balance sheets). In November 1895, when Harkore went on pilgrimage, she withdrew from the account a sum of Rs. 150 odd, and she further withdrew in small sums another amount of Rs. 350 from the same account. Harkore died on the 2nd March 1901.

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Some time after Harkore's death, Damodardas started on pilgrimage. On that occasion he wrote a letter to his four daughters, which ran as follows :—

(To) Ben Mangla and Mahakore and Kashi and Dhankore ; written by Shah Damodardas Tulsidas. To wit: You are my daughters and your mother Bai Harkore is dead. There are her ornaments worth about (Rupees) five (or) six thousand. As to the said (ornaments) and as to the money (which has been) given by me as a gift to your mother Bai Harkore (and) which is placed to (her) credit in my Sarafi (*i.e.*, money lending) shop—you all the four sisters have equal right to take the said money and ornaments. After my death you should take (the money) and should divide and take the ornaments or as stated by me in the will (you) should keep the same (*i.e.*, ornaments) as joint (property) and wear them on necessary occasions and as to the money, whatever the same may come to with interest, you all the four sisters should divide the same into shares and keep (the respective share) credited in the shop in the name of each or should divide and take the same. I am going on pilgrimage and hence I have written this note. You should act in accordance with what is written therein (herein). This is all.

Thereafter Damodardas changed his mind. In February 1903, he debited the Rs. 20,000 and interest (Rs. 31,740) to the name of Harkore and credited it to the names of the three sons of Mahakore. And in his last will which he made about that time he referred to this change of entries, and stated that the money never belonged to his wife, but was all along his own. Damodardas died on the 23rd March 1903.

On the 5th March 1904, the three daughters of Damodardas and Harkore filed this suit to recover their share in the amount aforesaid, treating it as belonging to Harkore. The claim was resisted by the fourth daughter Mahakore and her three sons, who contended that the money ever belonged to Damodardas who had gifted it away to the sons.

The Subordinate Judge held that Damodardas had made a gift of the money to Harkore and that the plaintiffs were entitled to recover their share in the same.

The defendants appealed to the High Court.

Raikes, with *G. S. Rao*, for the appellants.

Strangman (Advocate-General), with *L. A. Shah*, for the respondents.

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CHANDAVARKAR, J.:—The facts which are admitted are shortly these. On the 1st of November 1891, the deceased Damodardas made a credit entry of Rs. 20,000 in his books in the name of his wife, Harkore, carrying interest at 4½ per cent. The entry was made as of the 30th of November 1890. He also treated the amount of the entry as belonging to his wife in his annual balance sheet showing his assets and liabilities, in his *Samadaskat* book, and in his *Vyajavahi* which contained his interest account, and in which interest was calculated on the amount at varying rates. In November 1895, Harkore went on pilgrimage and from the entries in Damodardas's books it appears that before going she had withdrawn Rs. 150 odd from her account. Harkore died on the 2nd of March 1901. On the 7th of February 1903, Damodardas debited Rs. 15,000 to her account and credited the same amount to the three sons of his daughter, Mahakore. On the 23rd of February 1903 he made a will, in which he stated that the amount was his own and had never belonged to his wife.

These facts standing by themselves may be insufficient to show that Damodardas intended to create a trust in respect of Rs. 20,000 in favour of his wife, and that he had constituted himself her trustee as to that amount. But the respondents rely on a document, (Exhibit 447), purporting to be a declaration of the trust and written to his daughters by him six months after the death of his wife, Harkore. The genuineness of the document has been questioned for the appellants, but I see no reason whatever to doubt it. The signature on it purporting to be that of Damodardas is admitted as his. What is alleged is that, before going on pilgrimage, he had left a number of blank papers signed by him with one of his sons-in-law; but of this there is no satisfactory proof. Were that true, the appellants should have found no difficulty in producing a few such blank papers or adducing credible evidence in support of their allegation. It is true that the document in question was passed on the very next day after Damodardas had asked his pleader, Mr. Ambashankar, whether he could dispose of the money in his wife's name, and the pleader had told him that "he had no authority to do so as he was not the heir of his wife". But

I can see no improbability in the fact of Damodardas acknowledging the trust in favour of his wife to his daughters. His pleader the day before had pointed out to him that they were the heirs entitled to the amount standing in his wife's name and it is not strange, rather it is very probable, that, acting on the pleader's opinion, he made the declaration. The time when it was made is important. Damodardas was about to go on a pilgrimage. Naturally he would be anxious to settle all his affairs, and make definite arrangements about his property and his wife's. It is usual with Hindus proceeding on pilgrimage to do that.

If the document, Exhibit 447, is proved, as I hold it is, there can be no question that Damodardas intended a trust in favour of his wife. The only question, then, is whether that trust was carried into effect legally by him. It is contended for the appellants it was not, because (it is urged) Damodardas did not comply with the requirements of section 5 of the Trusts Act, the second clause of which provides that "no trust in relation to trust property is valid unless declared as aforesaid" (*i.e.*, as in the first clause), "or unless the ownership of the property is transferred to the trustee". According to the contention, there must be either "a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered", or a transfer of the property to the trustee. In this case there was neither.

Section 5 of the Trusts Act must be read with section 6. Section 5 lays down what may be called the extrinsic conditions necessary to create a trust. In other words, it prescribes the mode of its creation. Section 6 lays down the intrinsic conditions necessary for a valid trust; in other words, given an instrument in writing or transfer of the kind mentioned in section 5, it prescribes what is necessary to make out a trust from the words used in the instrument or the act denoting the transfer. The question must naturally have occurred, I presume, to the draftsman of the sections in this way. Section 5 prescribes transfer as one of the two alternative modes for creating a trust of moveable property. But the word *transfer*, as defined in the Transfer of Property Act (section 5), excludes the conveyance or delivery of property by a man to himself. When

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a man creates a trust and constitutes himself its trustee, there can be no transfer. Hence, I apprehend, the exception was made in section 6 that in such a case there need be no transfer. Section 5, clause 2, lays down a general rule; section 6 creates an exception in the case of a trust of moveable property.

But it is argued that this construction is inconsistent with the plain language of section 6, which requires that it should be read "subject to the provisions of section 5". I do not see the inconsistency. Section 5, clause 2, requires transfer for a valid trust of moveable property, where it is not created by a non-testamentary instrument of the kind mentioned in the first clause; and section 6 virtually declares that where a person is himself the author of a trust, there is a transfer, if the other conditions prescribed in section 6 are complied with.

Then it is said that, in that case, upon this construction of section 6, a transfer is necessary for a valid trust of immoveable property except where the trust is created by a person of his own property and he is himself the trustee; but section 5 requires nothing of that kind in the case of such a trust. Here, again, I fail to perceive any contradiction between the two sections on the construction above stated. "Transfer of property" as defined in section 5 of the Transfer of Property Act, "means an act by which a living person conveys property"; and seeing that by section 54 of the Act, the Legislature has made it plain in the case of a sale that a transfer of immoveable property can be made by a registered instrument, the intention of the Legislature appears to me clear that in the case of a trust of immoveable property, such an instrument would operate as a transfer. When sections 5 and 6 of the Trusts Act are read, as they should be read, by the light of the relevant provisions of the Transfer of Property Act, I venture to think that the words of section 6 of the former Act, which have given rise to difficulty of construction, must be construed as meaning that, though as a rule transfer is one of the conditions necessary for a valid trust, whether in the case of moveable or immoveable property, no transfer is required where the trust is declared by a will or where the author of the trust is himself to be the trustee; and

that one of the modes of transfer is a non-testamentary instrument in writing which is registered.

For these reasons I am of opinion that in this case there was a valid trust in favour of Harkore. As to the ornaments, it is admitted that, if the document Exhibit 447 is held proved, the respondents are entitled to them.

The decree is confirmed with costs.

HEATON, J. :—The plaintiffs sue as some of the heirs of one Harkore kom Damodardas Tulsidas to recover a three-fourths share of her property. Assuming that she left property of her own, the plaintiffs are entitled to three-fourths of it. This is not denied.

The property alleged to be Harkore's comprises a sum of money and certain ornaments. Her husband was a trader and in certain respects a banker also, as clients sometimes deposited money with him. In such cases he showed these deposits in his accounts and in his annual balance sheets and sometimes he had a *Samadaskat*, a kind of pass book, made out in the depositor's name. In November 1891 Damodardas caused the sum of Rs. 20,000 to be entered in his business accounts in the name of his wife as if she had deposited that sum with him. Thereafter up to the time of Harkore's death and for some time afterwards, that sum with accumulated interest, appeared in the accounts and the balance sheets exactly as if Harkore had been a depositor with Damodardas. This is the sum of money three-fourths of which the plaintiffs claim. Defendants denied that either the money or ornaments were Harkore's. The First Class Subordinate Judge, who heard the suit, decided all the main points in favour of plaintiffs, holding that both the money and ornaments were Harkore's. He decreed the claim. Defendants have appealed.

The facts are fully stated in the judgment of the lower Court. I concur with his conclusions as to the facts in dispute. The difficulty arises in connection with the inferences to be drawn from those facts.

I will first deal with the ornaments. The determination whether they were or were not Harkore's depends largely on

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the genuineness or falsity of an alleged signed and attested declaration purporting to be made by Damodardas on the 28th July 1901 (Exhibit 447). This was some months after Harkore had died and the day after he added a codicil to his original will, made in 1900 some months before his wife Harkore died. At this time, July 1901, no disputes had arisen. We have heard all that has to be said against this signed declaration and hold it to be genuine. Admittedly it bears Damodardas's real signature and we cannot discern any indications, extrinsic or intrinsic, in appearance or matter or circumstances which with any degree of clearness or probability point to fabrication. I think the Subordinate Judge has satisfactorily disposed of what is alleged against it. In this declaration it is admitted that Harkore had ornaments. That being so the number and identity of those ornaments are not disputed and to that extent the decree of the lower Court must be affirmed.

The same declaration speaks of "the money given by me as a gift to your mother Bai Harkore and which is placed to credit in my money-lending shop". This is of some importance as confirming the account entries and showing that Damodardas consistently regarded that money (the Rs. 20,000) as his wife's.

A *Samadaskat* book was produced relating to it which the defendants allege is also fabricated. It is unnecessary to say more than that the Subordinate Judge has given good reasons for holding it to be genuine and that after a scrutiny of the evidence and hearing the arguments we agree with him.

The Subordinate Judge held that the money had become Harkore's in virtue of a gift. It was at one time contended that she had herself deposited the money, but that was not proved and has not been urged in appeal. The facts are simply that Damodardas credited Rs. 20,000 to his wife and thereafter treated her as a depositor for that amount. This does not indicate a gift of money: if a gift at all it is a gift of a right to money. The money remained a part of the capital of the shop. It was as much Damodardas's after the credit entry as before. Money deposited in a bank becomes the property of the bank and ceases to be the property of the depositor. The

latter becomes a creditor and the Bank is a debtor. So here, Damodardas became a debtor and Harkore a creditor. There was no gift of money, nor is it argued in appeal that there was such a gift. Therefore the conclusions of the lower Court as to the money cannot be supported on precisely the grounds taken by the First Class Subordinate Judge.

But it is argued on behalf of the plaintiffs, respondents in appeal, that there was a trust. To see whether this is so we have to look to sections 5 and 6 of the Indian Trusts Act. According to section 5 no non-testamentary trust in relation to moveable property is valid unless declared by a registered document or unless the ownership of the property is transferred to the trustee. Here there is not a registered document and there was, I think, no transfer of ownership. The property, the money, was and remained in the ownership of Damodardas.

If we turn to section 6 we find that "a trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust, etc.". In this case I do not think the author of the alleged trust, Damodardas indicated an intention to create a trust. It seems to me he indicated an intention to treat Harkore as a depositor and nothing more. The proved facts appear to me precisely to fit this conception of the case and to be irreconcileable with any other. A depositee is not a trustee for the depositor in respect of the deposit and the position here is that of depositor and depositee and nothing more. Therefore I think there was not a trust.

Nevertheless Damodardas was a debtor and Harkore a creditor. The evidence to my mind conclusively proves that Damodardas intended her to have the rights of a depositor and never wavered from that intention until disputes arose some time after Harkore's death. Long before that time the positions of depositor and depositee were established and confirmed by the continued and unvarying treatment of Harkore as a depositor; by the regular addition of interest to her deposit amount; and by the debiting to that amount of money spent on the expenses of Harkore's pilgrimage. It had become too late for Damodardas

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by any act of his to annul the relations of depositor and depositee. Therefore I think the Subordinate Judge was substantially right in his conclusions, though he referred to the matter as a gift. Damodardas conferred on Harkore a right to the money though he did not actually give her money. This right he by his own acts and words made perfect by those means which in the circumstances were appropriate to the purpose.

Therefore I would confirm the decree of the lower Court with costs.

Decree confirmed.

R. R.

CRIMINAL APPELLATE.

Before Sir Basil Scott, Kt., Chief Justice, on reference from Mr. Justice Chandavarkar and Mr. Justice Heaton.

1911.

April 12.

EMPEROR *v.* B. H. DESOUZA.*

Bombay District Municipal Act (Bombay Act III of 1901), sections 3 (7), 96†—Notice of new buildings—Reconstructing side wall of a house on its old foundation not necessarily new building—Building, interpretation of.

The accused owned a house, one of the side walls of which had fallen down. He rebuilt it on its old foundation, without having previously obtained

* Criminal Appeal No. 472 of 1910.

† The Bombay District Municipal Act, sections 3 (7) and 96, so far as they are material to this report, run as follows:—

Section 3 (7).—'Building' shall include any hut, shed, or other enclosure, whether used as a human dwelling or otherwise, and shall include also walls, verandahs, fixed platforms, plinths, door-steps and the like.

Section 96.—Before beginning to erect any building, or to alter externally or add to any existing building, or to re-construct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a removal or set-back, the person intending so to build, alter, or add shall give to the Municipality notice thereof in writing.

Notice of new buildings.

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