(1869) 06 CAL CK 0014

Calcutta High Court

Case No: None

Kumara Upendra Krishna Deb Bahadur		APPELLANT
	Vs	
Nabin Krishna Bose and Another		RESPONDENT

Date of Decision: June 17, 1869

Judgement

Sir Barnes Peacock, Kt., C.J.

There is no doubt in my mind that certain Government Promissory Notes were given and delivered to the plaintiff by his father Raja Apurva Krishna Deb at a time when he was in possession of his faculties and capable of making a gift. The Notes have been produced and identified by the plaintiff. The gift was one which, in my opinion, cannot be governed by the strict principles of English Law, the parties to the transaction being Hindus. I am not convinced that in fact the deceased contemplated deaths or that he intended the gift to be conditional upon his decease, for if the evidence of the plaintiff is believed, his father, on being asked to endorse the Notes, said: "As soon as I get a little better, I" will sign them; what cause have you for being anxious, seeing I have "given them in the presence of so respectable a man as Dr. Baillie, and " in the presence of my worshipful mother." From this it appears that the deceased manifested some hope of recovery and an intention that the gift should take effect even if he should recover from his illness. The Notes were given during the last illness of the deceased, and only two or three days before his death. II the strict rules of English law were applicable to a gift of this nature by one Hindu to another, the gift would probably be presumed by law to have been in contemplation of death, and also upon condition that the gift was to hold good only in the event of the donor"s dying of that illness. See the cases cited in note to Ward v. Turner 1 Wh. and Tu. L.C. 721. I am of opinion that presumptions of English law are not, like presumptions of fact, applicable to this case, which must be governed as to the legal effect of the transaction by Hindu law. In the absence of any presumption of law, I should find as a fact, upon the evidence that the gift was not upon the condition that it was to hold good only in the event of the deceased dying of that illness. If the case is governed

by English law, I have no doubt there was a valid donatio mortis causa--Veal v. Veal 27 Beav. 303. I do not think that this was a case of a nuncupative will; for if the gift was not a donatio mortis causa, it was intended to take effect immediately and not after death; whereas a gift by nuncupative will is not to take effect until after death--Duffield v. Elwes 1 Bligh. N.S. 639 (530) : 1 Sim. and S. 239. Even if what was said amounted to a nuncupative will, the gift was valid between Hindus, whose dealings are not governed by the English Statue of Frauds. But assuming that this was intended as a gift inter vivos, end not as a donatio mortis causa, I am of opinion that according to Hindu law, the gift was valid; and that the debt and interest secured by the Government Notes, and not the mere papers, were given. The Statute of Frauds is not applicable to Hindus, and a conveyance may be made verbally without deed and without writing. The distinction which has been made between trusts created by donatio mortis causa and gifts inter vivos that the one is a trust created by operation of law, and the other one to which the Statute of Frauds applies (as to which see Duffield v. Elwes 1 Bligh. N.S. 639 (530) : 1 Sim. and S. 239) is not applicable to cases between Hindus. If the gift were to be governed by the English law and treated as a voluntary gift without condition, and not as donatio mortis causa. I think the relation of trustee and cestui que trust was created between the donor and donee. Speaking generally, the Government is not bound to pay to the holder of a Government Promissory Note, unless he is the payee or the personal representative of the payee, or unless a valid order by endorsement has been made, which brings the holder within the term "or order." But the rule is as general that the Government is not bound to pay either the payee or his order, or his executor, or administrator, without production of the Note, as that it is not bound to pay the holder or producer of the Note unless be is the payee or legal representative of the payee, or a person who derives title through the payee by valid endorsement or endorsements. Assuming that there was a valid gift of the Government Notes that is to say, of the documents, it is necessary to see whether that gift constituted a gift of the money secured by the Notes or only a gift of the documents. I am of opinion that it constituted, as between the donor and donee, a valid gift of the principal and interest secured by the Notes, and not merely a gift of the papers on which the securities were written and printed. Though there may not have been such a complete transfer of the debt as to enable the donee, without some further act, to enforce the securities against Government in his own name, it is clear that the donor, if he had lived, or his representatives after his death, could not at law have compelled the plaintiff to return the Government Papers; and if they could not have compelled the donee to return the Notes, and could not have compelled payment of the Notes without producing them, the effect would be that Government would not have to pay either the donor or the donee, unless some course were open in equity for one party or the other. I doubt whether equity could order the donee to return the Notes. In the case of a bond given as a donatio mortis causa. Lord Hardwieke held that the donee might cancel, burn, or destroy the bond.--Ward v. Turner 1 Wh. and Tu. L. C. 721. If he could cancel a bond, why should he not cancel a Government Note, or even give it to Government, or release Government from payment, even though he might not be able to sue in his own name on the Notes? In the case of a

gift of a bond as a donatio mortis causa, the donee cannot sue the obligee at all in his owe name, but equity allows the donee to use the name of the donor''s legal representative; so, if a bond or mortgage deed is given and delivered as a donatio mortis causa, the debt passes, and a trust is raised by operation of law, which entitles the donee to the assistance of a Court administering equity as well as strict law, to compel the executors and heirs of the donor to do that which will make the gift effectual for all purposes.--Duffield v. Elwes 1 Bligh N.S. 511, 549 and 613 : 1 Sim. and S. 239. A good donatio mortis causa is as good as a gift by will, and I apprehend that a bequest of Government Paper would pass not only the paper, but the principal and interest secured by it. So a conveyance by deed and delivery of Government Paper to a volunteer would pass the principal and interest as well as the paper as between the donor and donee, although the donee could not sue in his own name without an endorsement. The only difference that I can see even under English law between the transfer of a bond and the transfer of a negotiable instrument is, that, if the latter is transferred by instrument, the transferee may sue upon it in his own name, whereas the transferee of a bond cannot--a bond and a Bill of Exchange and a Promissory Note are all chooses in action. A bond under English law cannot be assigned so as to give the assignee a right to sue at law, in his own name, but the endorsee of a Bill of Exchange or Promissory Note, according to the Law Merchant in the one case, and the Statute of Anne in the other, may each sue in his own name. Both Bills of Exchange and Promissory Notes may be pledged by delivery as security without endorsement, and such pledge gives an equitable lien on the debt secured by the bills and notes and not merely an equitable right to hold the paper. A transfer by deed and delivery of Government Paper would, in my opinion, in the case of Europeans, constitute the relationship of trustee and cestuique trust even in favour of a Volunteer. In this case, the delivery without a transfer by deed was as valid between Hindus, as if there had been a conveyance by deed and a delivery. The Notes, therefore, in my opinion, passed to the donee--Ellison v. Ellison 1 Wh. and Tu.L.C. 199 and note to that case.

2. The delivery without endorsement of a Promissory Note, payable to order, was held to amount to a valid donatio mortis causa. Veal v. Veal 27 Beav. 303; but that must have been on the ground that the delivery was not a mere delivery of the paper, but a delivery of the debt. This case differs from a mere delivery of stock receipts for South Sea Annuities, as to which see Ward v. Turner 1 Wh. and Tu. L.C. 721 and Duffield v. Shoes 1 Bligh N.S. 533 : 1 Sim. and S. 239. They are not documents of title, for stock passes by transfer, and not by delivery or endorsement of stock receipts. The delivery of such stock receipts by the donor to the donee would not prevent the donor from transferring to another. But the donor in this case could not have transferred the Government Securities to any one else whilst they were in the possession of the donee. If the English law is to be applied in its entirety to this case, the plaintiff would be entitled to succeed. It cannot, I think, be applied only in part so as to defeat the plaintiff''s right. I am of opinion that the decree must be affirmed with costs subject to a modification of the numbers of the Notes.

Macpherson, J.

I also think that the decree of Mr. Justice Phear should be affirmed with the amendments proposed. But I am inclined to treat what occurred as amounting to a nuncupative will as to these Government Papers. Raja Apurva Krishna evidently had the matter in his mind for some time, and it appears to me that although he meant to retain the Papers during his own life, he wished to see them actually in the plaintiff''s hands before be died. My opinion is, that what Raja Apurva Krishna did was done by him in immediate contemplation of death. The plaintiff says, that some few days previously his father spoke to him about his having made a will. At the time he gave his son the Government Papers, he had been long ill, and was, in fact, in great danger; and Dr. Baillie who was his medical attendant, says, he believes he was aware of his danger, though he (Dr. Baillie) never told him expressly that he thought he was dying. It appears to me that a gift made under such circumstances must have been made in contemplation of death; and what took place between the plaintiff and his father as to endorsing the Papers is not necessarily inconsistent with this view. The father, when asked to sign, said: "I am very weak now, how can I sign all these Papers? Let me get a little strength, and then I will endorse them." This, however, might well have been said by a man who knew he was dying, but who thought that he would rally temporarily before the end came; and I gee no reason why he should not have said what he did, even though he knew that he could not eventually recover.