**AIR 1924 Bom 88 : 87 Ind. Cas. 312**

**Bombay High Court**

**Case No:** None

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| Natha Gulab and Co. | | APPELLANT |
| | Vs | |
| W.C. Shaller and G.I.P. Railway Company | | RESPONDENT |

**Date of Decision:** March 27, 1923

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 123

**Citation:** AIR 1924 Bom 88 : 87 Ind. Cas. 312

**Hon'ble Judges:** Mulla, J

**Bench:** Single Bench

**Judgement**

Mulla, J.
After stating the facts of the case His Lordship proceeded: ]

It was argued on behalf of the plaintiff, that there was either a completed gift, or if there was no completed gift there was at least a trust created for, the defendant in respect of the said sum of Rs. 7,700.

2. As regards a retiring gratuity there does not seem to be any doubt that it is in the nature of the gift. There is no obligation whatever upon the Board to grant any such gratuity. The gratuity being in the nature of a gift, it must be completed either by a registered document or by-actual payment as required by Section 123 of the Transfer of Property Act, 1882. The delivery of the cheque by the Railway Company to the Mercantile Batik though coupled with the request to send the amount to their London Office was not'' equivalent to delivery to the defendant. The London Office was not the defendant''s agent, but the agent of the Railway Company. Until payment to the defendant the Railway Company could have countermanded the order for payment. The result is that the contemplated gift to the defendant-was not completed on the date of attachment I hold, therefore, that there, was no completed gift of Rs. 7,700 or any part thereof to, the defendant on the date of the attachment and that the said sum could not be attached as

property belonging to the defendant. In this respect the present case is on all fours with Janki Das v. East Indian Railway Company 6 A. 634 : (1884) A.W.N. 210 : 4 Ind. Dec. 247.

3. As regards the contention that the moneys were held by the Railway Company on trust for the defendant I" do not think that there is any substance in it. It is now well-established that a transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee, in other words, an imperfect gift will not be construed as a declaration of trust. For an intention to create a trust is essential to the creation of one, and when a man purports to make a gift, he cannot reasonably be supposed to have intended to declare himself a trustee--a character which assumes that he retains the property: Milroy v. Lord (1852) 4 D. G.F & J. 264 : 31 L.J. Ch. 798 : 8 Jur. 806 : 7 L.T. 178 : 45 E.R. 1185 : 135 R.R. 135 and Richards v. Delbridge (1874) 18 Eq. 11 : 43 L.J. Ch. 459 : 22 W.R. 584. The principle of these decisions was followed by the High Court of Bombay in Sir: Jamsetji Jijibhai v. Sonabai 2 B.H.C.R. 133 and Ashabai v. Haji Tyeb Haji 9 B. 115 : 5 Ind. Dec. 77. In Ashabai"s case 9 B. 115 : 5 Ind. Dec. 77 Sir Charles Sargent said:

Now the principle to be drawn from the authorities--at any rate the more recent authorities--is that, in order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself to be a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it, exclusively in the character of a trustee.

4. It was not suggested in the present case that the Railway Company expressly declared itself to be a trustee. But it was said that the language used in the correspondence "was such that taken in connection with its act,?, namely, the sending of the cheque to the Mercantile Bank with instructions to the Bank to remit the amount to the Railway Company"s London Office, showed an intention on the part of the Railway Company to divest itself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. I do not think any, such intention can be gathered from the correspondence and from the acts of the Company. The directions that were given by the Company to the Bank were as an intending donor and not as a trustee. The Company did not at any time prior to the attachment assume the position of a trustee. It certainly meant to make a gift, but the gift was not completed when the fund was attached. It is unthinkable that the Company had an intention to create a trust All that it intended to do was to make a gift. The gift was incomplete when the attachment was levied. The notice, therefore, is discharged with costs. Counsel certified.