(1924) 10 BOM CK 0018

Bombay High Court

Case No: Appeal from Order No. 7 of 1923

Atmaram Sakharam Kalkye		APPELLANT
	Vs	
Vaman Janardan Kashelikar		RESPONDENT

Date of Decision: Oct. 17, 1924

Acts Referred:

- Contract Act, 1872 - Section 25
- Transfer of Property Act, 1882 - Section 123

Citation: AIR 1925 Bom 210 : (1925) 27 BOMLR 290 : 87 Ind. Cas. 490

Hon'ble Judges: Mulla, J; Marten, J; Lallubhai Shah, J; Kincaid, J; Fawcett, J

Bench: Full Bench

Judgement

Lallubhai Shah, Kt., Acting C.J.

1. The questions arising on this reference have been fully and ably argued on both sides. I have already indicated in my referring judgment the view to which I was inclined then, and my reasons for that view. It is not necessary to repeat the facts. I have considered the arguments on both sides and after giving my best consideration to the arguments, my opinion is that question No 1 should be answered in the affirmative, and question No. 2 should be answered in the negative.

2. I shall briefly state my reasons for this view in the light of the arguments which have been urged before us. Chapter VII of the Transfer of Property Act deals with gifts, and Section 122 defines "gift" as " the transfer of certain existing moveable or Immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee." It further provides that " such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

3. Section 123 provides that " for the purpose of making a gift 4 of Immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." In the case of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

4. In the present case, we are concerned with a gift of Immovable property and it seems to me to be the clear effect of these two sections that until the document is registered the gift is incomplete in law even though the other two conditions as to the instrument being duly signed and attested and as to acceptance are satisfied. The essentials of a completed gift, according to these sections, appear to be that a transfer of the property is made voluntarily and without consideration by an instrument which is signed by or on behalf of the donor, and attested by at least two witnesses.

5. To illustrate my meaning with reference to the essential nature of registration to complete a gift, I may put it in this way. If a document has been executed by the donor, and attested by two witnesses, and delivered to the donee, but neither party takes the trouble to get it registered according to the provisions of the Indian Registration Act, and the document remains unregistered, the gift, in my view, is incomplete, and does not take effect. The donor continues to be the owner and the donee would have no rights in the property even though the instrument is duly signed and attested and though the transfer is accepted by the donee.

6. The next step which I take is that so long as the transfer is incomplete, it is open to the donor to resile from it, and to cancel what he may have done. The gift, in my view, is incomplete according to law so long as the document is not registered, and it is open to the donor to revoke it before it is complete. It is a recognised rule of the law of gift that before the gift is complete the donor can revoke it AH to when the gift can be said to be complete must necessarily depend upon the law of the land. For instance, before the Transfer of Property Act, according to the view taken in this Court, the transfer of possession was considered essential to complete a gift by a Hindu, and where transfer of possession is essential, the gift would be revocable, in spite of the delivery of any written instrument to the donee before the transfer of possession is effected, Similarly, after the Transfer of Property Act, the necessity of transfer of possession to validate a gift is dispensed with, but the necessity for an instrument in writing signed by the donor and attested by two witnesses, and registered according to the provisions of the Act, is laid down, It may be mentioned that whatever the necessity for the transfer of possession in order to complete a gift by a Hindu before the Transfer of Property Act, the requirements of a valid gift after the Act came to be applied to this Presidency have to be determined with reference to the provisions of the Act, It is hardly necessary to refer to any authority on this point as the effect of the provisions of the Act is clear I may mention that in Bai Eambai v. Bai Mani ILR (1898) 23 Bom. 234 this effect has been clearly pointed out.

7. In the present case, therefore, we are not concerned with the question as to whether possession of the property has been transferred or not. But we are concerned with the question as to whether there has been a transfer of property within the meaning of the Transfer of Property Act. In Section 5 "transfer of property" is defined. I may also refer to Section 9, upon which Mr. Shingne has relied, as indicating that a transfer of property may be made under the Act without writing in every case in which a writing is not expressly required by law. But in the case of a gift a writing is required by law as stated in Section 123, and it is also required to be registered.

8. I have already stated my reasons in the referring judgment for the proposition that an incomplete gift can be revoked by the donor at any time, before it is completed; or, if the use of the word ''revoke'' appears inapt with reference to an incomplete gift, I would say that the donor can cancel the transaction before the transfer is effected to constitute a complete gift The question is whether until the document is registered the gift can be said to be incomplete in the sense that it leaves the power of revocation in the donor unaffected. It is urged by Mr. Shingne for the respondents that the donor''s power to revoke is at an end as soon as he has executed a document, attested by two witnesses, and delivered it to the donee, and it is accepted by the donee, that the act of registration does not necessarily depend upon the volition of the executant according to the provisions of the Indian Registration Act, and that the donor having done all that he need do according to law, hiss power of revocation is at an end. Though there has been a somewhat elaborate discussion of the provisions of the Indian Registration Act, in my view of the case, it is not necessary to deal with the provisions of the Act in detail. It is clear under the provisions, and I readily accept the proposition, that for the purposes of registration, under the Indian Registration Act, it is not essential that the document should be presented by the executant for registration, or that he should be a consenting party to the registration. The document could be presented by any person satisfying the requirements of Section 32 of the Indian Registration Act, that is, by a person executing it or by any person claiming under the document. It is also clear that registration may be effected even though the executant does not consent to registration.

9. The question to my mind is whether the provisions of the Indian Registration Act as regards registration can affect in any way the law which would govern transactions by way of gift, or they simply regulate the registration of the document when presented for registration. The provisions of the Transfer of Property Act, as contained in the definition of the word " registered" in Section 3, and in Section 4 of the Transfer of Property Act, have no effect upon the power of the donor to revoke the gift up to a certain stage which exists independently of the provisions as to the necessity for registration of deeds of gift. I do not think that by making these provisions relating to documents requiring to be registered supplemental to the provisions of the Indian Registration Act, the legislature could have meant to lay

down anything more than this, that those documents were compulsorily registrable, though all of them may not require to be registered under the Indian Registration Act. The provisions of the Indian Registration Act, as I understand them, do not and cannot affect the question as to when the power of the donor to put an end to an incomplete gift ceases.

10. In determining the question under the Indian law, it seems to me that all technical rules of English law relating to deeds and delivery of deeds should be left out of consideration. At least they cannot help us in determining this question. In my opinion the question must be determined with reference to the Indian law which is to be found for the purposes of this case in the Transfer of Property Act. The execution of the instrument and the delivery thereof without registration would not have the effect of effecting the transfer or of completing . the gift.

11. I may refer to Section 126 of the Transfer of Property Act, upon which reliance has been placed on behalf of the respondents as indicating that a gift cannot be revoked except as provided in that section. That is perfectly true. But that applies to a case of a completed gift. It does not purport to lay down any rule as to the rights and powers of the donor before the stage of completion is reached.

12. Reference was made in the argument to the consideration that though in the case of sales and mortgages documents are required to be registered, it is not suggested that the executants would have power to revoke up to the time of actual registration. The argument based on the analogy does not, however, seem to me to be well-founded. It is perfectly true to say, with regard to those documents, as with regard to a deed of gift, that the sale is not complete or that the mortgage is not complete until the document is registered, just as a gift would not be complete until the document is registered. But the vendor who has agreed to sell the property and has executed a conveyance not registered or a mortgagor who has executed an instrument duly attested as required by law but not registered cannot be said to have the power to revoke the contract. In the case of a gift, we are dealing with a transaction which is ex hypothesi without consideration, and the right to revoke an incomplete gift in the donor or to cancel his own act before the transfer is effected is an incident of this type of transaction.

13. As regards the decided cases, I do not consider it necessary to refer to them in detail now. I have considered all the cases; and my view is that, so far as they lay down that it is not essential for the purposes of valid registration that it should be with the consent of the donor, I am in complete agreement with them. But I am unable to agree, so far as the observations or the decisions go to show, that as it is not essential that the donor should be a consenting party to registration, the gift is complete so far as he is concerned as soon as he has executed a document and delivered it to the donee and it is accepted by the donee and it cannot be revoked even though registration is not effected. That proposition is largely based upon the rule of English law relating to deeds and delivery of deeds. I am very conscious that

on this point the weight of judicial opinion is against the view which I take In spite of my desire to accept that view if possible, I remain unconvinced: and it becomes my duty to state the opinion which I have formed, 6 As I consider it essential that in the case of a transaction without consideration like a gift, the points arising in this case should be determined with reference to the Indian law; and as I do not feel any doubt in my mind that a gift is revocable on account of the very nature of the transaction, until it is completed according to law, I hold that the donor has the right to revoke the incomplete gift or to resile from his act before the document is registered. To deny that right to the donor is really to import into the provisions of the Transfer of Property Act a stage in the completion of the gift which is not contemplated or provided for by the Act itself, Shortly stated, I am still of opinion, if I may say so with respect, that the reasoning of the learned Chief Justice in Subba Rama v. Venkatsubba is sound and correct

14. As regards the second question, it must depend upon the view which one takes of the first question. It is clear that the document when registered would take effect from the date of its execution. But if it is open to the donor to cancel the transaction before the document is in fact registered, it follows that the fact of registration after revocation cannot affect the revocation.

Marten, J.

15. The questions referred to this Full Bench are in effect whether a donor of Immovable property can at any time before actual registration revoke a gift purporting to have been effected by a registered instrument signed by him and duly attested and accepted by the donee. It is common ground for the purposes of this reference that such an instrument in writing was in fact executed by the plaintiff and attested by two witnesses, and that it was handed to the defendant who accepted the same. It is also common ground that despite the plaintiff''s protests the instrument was subsequently registered under the provisions of the Indian Registration Act, 1908.

16. It is, however, contended by the plaintiff in reliance on Subba Rama v. Venkatasubba ILR (1924) 48 Bom. 435 : 26 Bom. L.R. 427 that he had power to revoke this gift at any time before actual registration, and that he did in fact so revoke it. On behalf of the defendant it is contended that this decision is opposed at any rate in principle to several decisions in other High Courts, and that it cannot be supported if the material sections of the Transfer of Property Act, 1882, and the Indian Registration Act be closely investigated.

17. Turning then first to the Transfer of Property Act, which was applied to this Presidency in 1893, it is material to observe that inSection 3 " registered " is defined to mean " registered in British India under the law for the time being in force regulating the registration of documents," Next, Section 4 provides that " section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian

Registration Act."

18. Next, Chapter II deals with transfers of property by act of parties and it defines a " transfer of property " as meaning " an act by which a living person conveys property, in present or in future, to one or more other living persona, or to himself and one or more other living persons."" Section 9 provides that " a transfer of property may be made without writing in every case in which a writing is not expressly required by law."

19. Then if one turns to Sections 54, 59 and 123, it will be found that in the case of certain sales or mortgages or gifts of Immovable property a registered instrument is required. Section 54 defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." It then enacts that "such transfer, in the case of tangible immoveble property of the value of one hundred rupees and upwards, or in the case of reversion or other intangible thing, can be made only by a registered instrument" It also provides that "a contract for the sale of Immovable property does not of itself create any interest in or charge on such property."

20. Turning next to mortgages, they are defined in Section 58. Then Section 59 enacts that -"where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

21. Next we come to gifts. Section 122 defines a gift as :-

The transfer of certain existing moveable or Immovable property made voluntarily and without consideration by one person called the donor, to another, called the donee and accepted by or on behalf of the donor. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donor dies before acceptance, the gift is void.

22. Stopping there for a moment, as I have already pointed out, there was an acceptance here by the defendant donee, and moreover the document itself was handed to him. So Section 122 was complied with here.

23. Next we come to Section 123 which rung as follows :-

For the purpose of making a gift of Immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of move-able property, the transfer may be effected either by a registered instrument signed as aforesaid, or by delivery, Such delivery may be made in the same way as goods sold may be delivered.

24. Section 126 provides for revocation of a gift in certain specified events which have not; taken place here, and it ends as follows: "Save as aforesaid a gift cannot

be revoked."

25. The use in Section 123 of the expression "registered instrument" has led to the argument that unless and until the instrument is registered, it is no more an instrument within the meaning of the Act than it would be if it had never been executed at all. But I think the proper way to construe this section is first of all to read the definition of "registered" into the section and then see how it stands. It would then run: "The transfer must be effected by an instrument signed by or on behalf of the donor, and attested by at least two witnesses and registered in British India under the law for the time being in force regulating the registration of document!)." Moreover it is important to observe that Sections 54 and 59 use the same expression "registered instrument." I think, therefore, that that expression should be dealt with in the same way in all these three sections.

26. Now as regards transfers by sale or by mortgage under Sections 54 and 59, it is not contended that a vendor or a mortgagor could revoke a conveyance or a mortgage at any time before registration. And there is one very good reason for that, viz., that the Indian Registration Act does not necessitate the consent of the transferor being obtained to the registration. Under part 12 of the Indian registration Act, the Registrar has power to register a document despite the refusal of the transferor, provided he is satisfied that it has been executed. (See Section 75 (1)). It is only if he refuses to order registration that there is an appeal to the civil Court u/s 77.

27. Consequently Sections 54 and 59 of the Transfer of Property Act are construed as necessitating two things, viz., (a) a transfer executed by the transferor, and (6) registration which may be effected by either of the parties, but which does not depend on the consent of the transferor.

28. Why then should we adopt a different construction in Section 123 ? The Indian Registration Act does not require the consent of the donor to registration any more than it does that of a vendor or a mortgagor. In fact, the document in question in the present case has been registered under part 12 of the Indian Registration Act despite the donor''s active opposition. It is, however, said that we ought to adopt a different construction because the transfers referred to in Sections 54 and 59 are for consideration, but Section 123 refers to a transfer without consideration. I agree that in some cases this distinction may make a practical difference as to whether, quite apart from the validity of the transfer, you can obtain specific performance of any antecedent agreement for such transfer. But I entirely fail to see that it affects the validity of the transfer itself. The Act is here dealing with "transfers" and not with contracts. It indeed expressly excludes contracts of sale in Section 54 from creating any interest in or charge on land,

29. I wish then to emphasize this distinction between transfers or conveyances on the one hand and contracts on the other hand. They are dealt with in separate Acts,

viz., the Transfer of Property Act as to the one, and the Indian Contract Act as to the other; and disregard of the distinction between the two can only result in confusion. Further, since the arguments were concluded, my brothers Fawcett and Mulla have pointed out to me that in India u/s 25 (1) of the Indian Contract Act, a voluntary agreement in writing made on account of natural love and affection between parties standing in a near relation to each other is a binding contract if registered. Consequently one might have a voluntary registered contract to transfer u/s 25 (1), which would be as equally binding as a contract to sell or to mortgage. Whether the transfer to be effected in pursuance of that contract would be validly effected or not would depend on whether the provisions of the Transfer of Property Act were duly complied with. If they were, it would be a valid transfer. If they were not, there would in the eyes of the law be no transfer, and the parties would be relegated to their rights under the contract if any. In either event, the validity of the transfer would not depend on the contract nor on the Indian Contract Act. And even as regards contracts, one might get a binding voluntary contract u/s 25 (1) and en the other hand in most eases of mortgage transactions and in some cases of sales, there would be no binding contract at all prior to the document of transfer, though there would normally be some negotiations.

30. The question then of an antecedent contract or consideration would seem to form no adequate basis for construing the directions as to registration in the sale and mortgage sections in the Transfer of Property Act differently from the corresponding directions in the gift sections of the same Act. In the absence, however, of any argument on Section 25 (1) 1 give no opinion as to whether specific performance could be obtained of such a contract. So, too, as regards mortgages, there may be difficulties in the way of getting specific performance of an agreement to lend on mortgage: see South African Territories Ld. v. Wallington [1898] A.C. 309 and In re Smelting Corporation [1915] 1 Ch. 472 .

31. Turning then to the gift sections once more, what are the requisites for a valid voluntary transfer ? We have first to see whether we have an instrument duly signed by the donor and attested Next, if we have, then is it registered V If it is not registered, then u/s 49 of the Indian Registration Act, the document will not affect any Immovable property comprised therein, nor can it he received as evidence of the transactions, But if it is registered, then u/s 47 it is to "operate from the time from which it would have commenced to operate, if no registration thereof had been required or made, (that is, the date of the document) and not from the time of its registration,"

32. This, again, is an important point. If the plaintiff is correct, registration is really analogous to execution or attestation; and until all the three requisites are watisfied there is no complete document If that argument is sound, then the document ought to operate from the date of registration, and not from the date of its execution. In this respect the fact that Section 4 of the Transfer of Property Act directs Section 123

to be read as supplemental to the Indian Registration Act is material. It assists the view that while the ordinary law as to transfer is stated in Chapter II of the Transfer of Property Act, the provisions as to registration are to be effected in accordance with the provisions of the Indian Registration Act, which are the governing provisions and which in no way necessitate the continuing consent of the transferor.

33. I am accordingly unable to agree with the judgment of Sir Norman Macleod in Subba Ratna v Venkatsubba (1924) 26 Bem. L.R. 427 where he says (p. 430):--"Therefore a gift is a transfer, and the transfer of Immovable property gifted cannot be effected except by a registered instrument. It must follow that the gift is incomplete until the document is registered." The answer to this contention I have endeavoured to give above, but it is more pithily expressed by Sir Edward Chamier in Parbati v. Baij Nath Pathak (1912) 9 A.L.J. 300 where he says (p 305):-" Registration is not the act of the donor but the act of an officer appointed by law to register documents." No doubt in one sense a gift is incomplete until registration, just at) transfers on wale or mortgage may in a broad sense be said to be incomplete before registration. But they are not incomplete in the sense that the transferor can annul the transaction. It might equally be argued that an unstamped transfer is incomplete because until it is duly stamped it cannot be put in evidence having regard to Section 85 of the Indian Stamp Act. But it could not be contended that that would enable a vendor or a mortgagor to cancel the instrument before it was stamped, and I do not see why a donor should be in a different position. Stamping like registration does not depend on the donor''s will and pleasure, but rests with the assignee and the officers appointed by law for those purposes.

34. The above decision of Sir Edward Chamier, who subsequently became the Chief Justice of Patna, was afterwards adopted on appeal in preference to the judgment of his dissenting colleague : see Parbati v. Baij Nath Pathak I.L.R.(1912) All. 3 . The Allahabad appellate Court included the Chief Justice Sir Henry Richards, and in the course of their judgment it was stated as follows (p. 4):-

The sole question to decide, therefore, is whether or not it is necessary in order that there should be a valid gift of Immovable property not only that the instrument should be duly executed and attested in the manner provided by Section 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at letter with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered, to our opinion a document registered in accordance with the provisions of the Registration Act is registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor.

35. Turning, again, to Subba Rama v. Venkatsubba (1924) 26 Bom. L.R. 407 there is no reference in the judgments to the corresponding sections of the Transfer of

Property Act dealing with sales and mortgages. We are consequently without the advantage of knowing the exact grounds on which the learned Chief Justice would distinguish the operation of as, 54 and 59 from Section 123. But, speaking for myself, I entirely agree with and respectfully adopt the judgment of the present Chief Justice of Madras in Venkati Rama Reddi v. Pillati Rama Reddi I.L.R.(1916) Mad. 204 where, after setting out in detail the more material sections of the Transfer of Property Act and the Indian Registration Act, he proceeds as follows (p. 208) :-

It seems to me that the whole of this machinery for compulsory registration can only apply to cases where in substance the executant of the document or the representative of the executant does not wish to hare the document registered. The enquiry will not serve any purpose except on the assumption that the executant desires to withdraw the document from registration. But if the argument to which effect is given in Itamamirlha Ayyan v. Gopata Ayyan I.L.R.(1896) Mad. 433 is right, in all such cases an enquiry would be wholly beside the point, because all that the donor or his representative has to say is that nothing is to be inquired into. '' I do not think the Registrar is to go at length into the question as to whether I did or did not execute this deed. It is sufficient for me to say that I decline to act upon it and I refuse to register it.'' If that is right, of course, it involves this, that the whole of Part XII which is perfectly general in its terms must be confined to transactions other than transactions of gift. There is nothing to indicate any such intention on the part of the legislature, and, for my part, I see no reason at all for the distinction suggested between transfers by gift and transfers by sale. As it is pointed out in some of the text books, the effect of the decision in Samamirtha Ayyan v. Gfopala Ayyan is to draw a distinction which is nowhere indicated in the Act between documents registered with the consent of the executant in the first instance and documents registered with the consent of the representatives...now that the matter has been raised directly before us, my own opinion emphatically is that it is contrary to principle and cannot be supported; and it would create hopeless difficulties and inconsistencies in the matter of registration.

36. The point was, however, referred to the Full Bench who agreed with the opinion expressed by Mr. Justice Courts Trotter, and in the course of their judgment it was said (p. 211).-

The doctrine that a donor who has left his gift incomplete cannot be compelled to complete it, has no application to a case like this; for so far aa he is concerned he has by executing the deed done all that he need do, for registration can be effected even without his co operation.

37. Speaking for myself, I think that the policy of the Transfer of Property Act is to substitute written documents and registration for oral evidence as regards certain descriptions of transfers. But if a written document duly registered like the one in the present case is to be liable to be upset on some alleged revocation before registration, one main object of the Act is frustrated. The argument advanced by the

plaintiffs does not confine the alleged right of revocation to revocation by a written and registered instrument. If then it may be oral, there is at once an opening for a false oral story which will be easy to concoct and difficult to check-an opening which I have no doubt would be seized on with avidity by many a litigant. And as to how many years must elapse before it would be safe to accept any title depending on a voluntary transfer, supposing the Transfer of Property Act be construed in that way, I would leave to those skilled in the Indian Limitation Act to consider.

38. It was argued by the learned pleader for the plaintiff that the decisions of Parbati v. Baij Nath Pathak ILR (1912)All. 3 and Venlcati Rama Reddi v. Pillati Rama Reddi ILR (1916) Mad. 204 can be distinguished on the ground that in those cases there was merely an absence of consent by the donor to the registration whereas in the present case there was an act of positive withdrawal or revocation. But I am unable to see that in principle there is any essential difference in this particular class of case. The mere use of the word " revoke," as used in the formal questions submitted to us, implies that a gift has already been effected, and not that there is an absence of one of those continuing conditions of consent which are necessary for the efficacy of a transaction before it can be said to be completed. Consequently we are asked to treat the instrument much as if it contained an implied power of revocation in the donor prior to actual registration. If the donor wished to retain any such power, or for the matter of that a more extensive power of revocation, it could easily have been inserted in the instrument. But in fact the instrument contains nothing of the sort, nor in my opinion is there anything in the Act which on its fair construction reserves any such power of revocation in the donor, any more than it does in cases of sales or mortgages. On the contrary, Section 126, as I read it, would appear expressly to negative any such right on the part of the donor. It provides that "save as aforesaid a gift cannot be revoked."

39. Some reference was made to the fact that the parties are Hindus, and that under Hindu law, as laid down in these Courts prior to the application of the Transfer of Property Act to this Presidency, possession would have been essential for a gift whether or no a writing was required. But the learned pleader for the plaintiff evidently found it difficult to contend that prior to the Transfer of Property Act, a Hindu donor could revoke his gift before registration, provided possession had been given. Consequently there seems all the less reason for contending that he should now be given such a power merely because an instrument in writing duly attested is substituted for the possession formerly required under the Bombay decisions for the validity of a gift, and that registration is also required just as it was before if the gift was in writing. I say the Bombay decisions because subsequent rulings of the Privy Council have thrown some doubt upon the point. But I need not pursue the matter further, nor consider the question of possession in the present case which I understand is a disputed point of fact, because as I read Section 129 of the Transfer of Property Act, the validity of a gift is now determined by the Transfer of Property Act under which possession is not essential (or the validity" of the gift in the present

case

40. Reference was also made during the course of the able arguments to the English law of gifts. One of the clearest statements I know of on that subject is the well known judgment of Sir George Jessel in Richards v. Delbridge (1874) L. R. 18 Eq. 11 . He there points out the difference between a valid gift and a declaration of trust and states that an incomplete gift will not necessarily be treated as a valid declaration of trust. His exact words are (p. 14):-

The principle is a very simple one. Amim may transfer his property, without valuable consideration, in one of two ways : ho may either do such acts aa amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by the so acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without in actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person....The true distinction appears to me to be plain, and beyond dispute : for a man to make himself a trustee there must be an expression of intention to become a trustee whereas words of present gift show an intention to give over property to another, and not retain it in the donor''s own hands for any purpose, fiduciary or otherwise.

41. In India, as has been pointed out to me by my brother Fawcett after the conclusion of the arguments, Section 5 of the Indian Trusts Act 1882 requires a trust of Immovable property to be in writing and registered. We have heard no argument on this section, and therefore .1 give no definite opinion on it. But to me it would seem difficult to argue that the declarant has a locus pcenitentice or an implied power of revocation at any time after execution and before actual registration. Here, again, registration could be effected even if he actively dissented.

42. Kekewich v. Manning (1851) 1 De G.M. & G. 176 is another leading case on the subject of gifts or voluntary settlements. There Lord Justice Knight Bruce had to determine whether an alleged gift or settlement was complete or merely inchoate, and he stated the question in the following terms (p, 187) :-

The present case has raised, necessarily or unnecessarily, a question which on several occasions, under different aspects, and in various circumstances, has been brought before this Court, especially since the time of Lord Hardwioke the question, namely, whether an act or intended act of bounty,-whether a gift or a promised or intended gift, was in truth a perfect net, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention.

43. Milroy v. Lord (1862) 4 De G.F. & J. 264 which is cited in the referring judgment of Mr. Justice Fawcett, is another leading case on the subject of English gifts.

44. It has been argued before us that 011 the principles laid down in those decisions the donor here has not done all that he could do to perfect the gift, because he himself might have got it registered. But I think that would be stretching the principles of the English law of gift much too far. If sound, the same argument might also equally apply to a document which was not stamped by the vendor. The answer to it is that it is sufficient if the donor has done all that he need do to enable the donee to get the fruits of the intended gift. The cases of In re Patrick [1891] 1 Ch. 82 and In re King (1879) 14 Ch. D. 179 would tend to show that it will suffice for a valid gift if the settlor has done what is necessary on his part for a voluntary assignment, and has thus enabled his assignees to take any further steps that may be necessary to obtain the subject matter of the gift Mallott v. Wilson [1903] 2 Ch. 494 decides that the mere disclaimer by a voluntary assignee, e. g., the trustee will not render a voluntary settlement inoperative, nor give the settlor any power to revoke the gift unless an express power of revocation has been reserved in the instrument.

45. Further, no ease has been cited to us to the effect that under the English law of gift a donor can withdraw a gift at any time before registration, supposing the land is in a county where registration is compulsory. So far aa my own recollection goes, there is no such authority, nor have I any recollection of its being- customary on sales to frame requisitions asking whether a donor had revoked his gift before registration, as might have been the case if the plaintiff''s present contentions are sound in law. There are, however, material differences between the English and the Indian laws of registration, as is pointed out by their lordships of the Privy Council in Tilakdhari Lal Vs. Khedan Lal, . That decision does not, however, refer to Section 20 of the English Land Transfer Act, 1897, which provides that on sales of land in compulsory districts a purchaser does not get the legal estate unless and until the document is registered under that Act. Registration under that Act is quite distinct from registration under the Middlesex or Yorkshire Registry Acts. But I have not thought it necessary to refresh my memory by making any extensive search of the English authorities on the subject, as after all the case which we have to deal with is a case of Indian land and is governed by an Indian statute. The real question we have to decide is what is the true effect of that statute or rather of the two statutes, the Transfer of Property Act and the Indian Registration Act.

46. Summarizing then the rival arguments, I find that the plaintiff has to concede that neither a vendor nor a mortgagor can revoke a transfer at any time before registration and that even voluntary transfers do not require the active consent of the donor to the registration. Further, a voluntary transfer may in some cases be in pursuance of a binding contract u/s 25 (1) of the Indian Contract Act, just as a transfer on sale or mortgage may be in pursuance of an antecedent contract. But

we are asked by the plaintiff to draw a distinction in the case of certain gifts between passive and active dissent to registration, and to say that while the former is immaterial, the latter invalidates the transaction. Speaking for myself I think that this distinction is nowhere to be found in the Acts, and should not be drawn; and that on the contrary the Acts were intended to shut out the very class of evidence on which this distinction if once allowed would normally be based-I mean oral evidence.

47. After giving then my best consideration to the several contentions put before us in the referring judgments and at the bar, I have arrived at the conclusion that the decision of the Division Beach in Subba Rama Hegde Vs. Venkatsubba Hegde, cannot be supported; that the correct principles are those enunciate 1 in Venkati Rama Reddi v. Pillati Rama Reddi ILR (1916) Mad. 204 and Parbati v. Baij Nath Pathetic ILR (1912) All. 3 ; and that accordingly the first question submitted to us should be answered in the negative. Consequently the second question does not arise.

Fawcett, J.

48. I retain my former opinion and agree with the judgment of my brother Marten.

49. I think there is a fallacy in the view that a gift is not "completed" till the required instrument has been registered. Section 123 does not use the word "completed" but the word "effected." The distinction to my mind is that a gift may be "complete" so far as the donor is concerned, when he has executed and handed over to the donee, who accepts it, the requisite instrument; but the gift is not legally "effective" as a valid transfer of the Immovable property until the instrument has been registered.

50. As a similar case, J may refer to the law regarding a, non-testamentary and voluntary settlement of Immovable property, tinder Section 5 of the Indian Trusts Act 1882, this can only be done by an "instrument in writing signed by the author of the trust or the trustee and registered." Section 78 provides that when the trusts of the settlement have been "declared by a non-testamentary instrument, they can only be revoked in exercise of a power of revocation expressly reserved to the author of the trust. If the author of the trust gave the instrument to the beneficiary and the latter got it registered, the language of Section 78 Neems to me to be against the supposition that the author of the trust could revoke it before it is actually registered. If that had been intended, one would expect the word "registered" before "non-testamentary instrument": el. (b) of Section 78.

51. I agree with my learned brother Marten that the fact of a gift being without consideration makes no difference. This point was discussed in Behari, Lal Ghose v. ftindhubala, Dasi I.L.R.(1917) Cal. 434 and-the learned Judges say (p. 439):-"The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances."

52. It is to be noted that Section 59 of the Transfer of Property Act uses the same work "effected," as is used in Section 123, yet it is not contended that the mortgagor has a "locus pcenitentics" to resile from the transaction before the instrument of mortgage is registered. It is, however, said that the case of a gift is different, because Section 25 of the Indian Contract Act allows the intending donor, in the case of an agreement to make a gift, to withdraw it at his will unless the agreement has been registered, as stated in Section 25 of the Indian Contract Act. But this seems to me to beg the question at issue before us. Thus take illustration (b) to Section 25, viz.:-

A, for natural love and affection, promises to give his son, B, Rs. 1,000, A puts his promise to B into writing and registers it. This is a contract." To my mind, the words of Clause (J) of Section 25 equally apply to a case like that before us, and the illustration might be altered by substituting for the words "and registers it" the words "and hands the document to B, who gets it registered under the provisions of the law in force for the registration of documents." It begs the whole question to assume that, unless A himself registers the document or assents to its registration, there is no valid contract.

53. The difference of opinion between the members of this Bench seems to turn ultimately on the question whether the requirement of registration is per se essential, irrespective of the consideration that the donor, by handing the document to the donee, has put it out of his power to prevent registration. I can see nothing in the rule as to loaus pcenitentica laid down in Maddison v. Alderson (1883) 8 App. Cas. 467 which extends the locus to such a case. On the contrary Lord Selborne''s quotation from Bell''s principles at p. 476, viz., "from an obligation to which writing is requisite and has not yet been admitted in an authentic shape," refer prima facie merely to the requirements of execution of a proper instrument and not to any subsequent production of the document or other act of that kind, independent of the will of the executant.

54. I would also draw attention to the fact that the rule of Hindu law that a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee was not construed to allow the donor a locus penitential, up to actual delivery, provided the donor had done all that he could to complete the gift : Kalidas Mullick v. Kanhaya Lal Pundit I.L.R.(1884) Cal. 121 and Joitaram v. Ramkrishna I.L.R.(1902) 27 Bom. 31. This is, in my opinion, weighty authority in favour of applying the same principle to the requirement of registration, in any case where the donor has done all he need to complete the gift and by handing the instrument to the donee has put it out of his power to prevent its registration.

55. I would, therefore, answer the reference as proposed by my brother Marten,

Mulla, J.

56. The facts which have given rise to the present reference are shortly as follows : -

57. On September 17, 1917, plaintiff No. 1 executed an instrument of gift in favour of the defendant of certain moveable and Immovable properties belonging to him, and handed it to the defendant. On September 26, 1917, the defendant presented it for registration. Plaintiff No. 1 did not appear before the Sub-Registrar, and the Sub-Registrar refused to register the deed. The defendant appealed to the Registrar, During the course of the proceedings before the Registrar the plaintiff appeared before the Registrar and declared his intention not to abide by the writing and denied execution. The Registrar ordered it to be registered, and it was accordingly registered on December 18, 1917. Subsequently: plaintiff No. 1 adopted plaintiff ''No, 2 and they both filed the present suit on August 7, 1920, to set aside the alleged gift and for possession of the properties.

58. The questions referred to the Full Bench are :-

(1) Was it competent to the donor to revoke the gift of Immovable property before the instrument was in fact registered ?

(2) If so, whether the subsequent registration of the document against the wishes of the donor makes the revocation ineffective ?

59. The provisions of the Indian law bearing on gifts are contained in Chapter VII of the Transfer of Property Act, IV of 1882. "Gift" is denned in Section 122 as a "transfer of property made voluntarily and without consideration by one person, called the donor, to another, called the donee."

60. Section 123 of the Act is as follows :-"For the purpose of making a gift of Immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

61. By Section 126 it is provided that "the donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked....A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked."

62. "Transfer of Property" is defined in Section 5 as meaning an act by which a living person conveys property to another living person. By Section 9 it is provided that "a transfer of property may be made without writing in every case in which a writing is not expressly required by law." The expression "registered" is defined in Section 3 as meaning "registered in British India under the law for the time being in force regulating the registration of documents." The law in force regulating registration at the date of the writing in this case was the Indian Registration Act XVI of 1908.

63. The point involved in the first of the two questions referred to the Full Bench is whether an intending donor who has executed an instrument of gift, attested as

required by Section 123 of the Transfer of Property Act, and handed it to the intending donee, has a locus pcenitentioe or implied power of revocation prior to registration of the instrument, or whether after he has executed and handed the instrument as aforesaid, the plea of loous pcenitentice is barred.

64. The limits of the rule aa to locut pcenitentice were thus stated by Lord Selborne in Maddison v. Alderson (1883) 8 App. Cas. 407 :

It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, '' written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; or those, required by statute to be in writing '' To constitute any such contract there must be a ''final engagement''; and as a corollary to that rule ft ''locus pcenitentics'' is given; i.e., ''a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape '' But to this '' rd interventua raises a personal exoeptioi, which excludes the plea of locus ptenitentice. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivooably referable to the contract, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable.'''' Ball''s Principles, sections 1H, 25, 26.

65. Portions of the passage cited above were cited with complete approval by their lordships of the Privy Council in Mahomed Musa v. Aghore Kumar Ganguli (1915) L.R. 42 I.A. and also in Malrajy, Lakshmi Venkayyamma v. Venkita, Narasimha Afjpu Rao (1916) L.R. 44 IndAp 18. In the former case their lordships observed that there was nothing in the law of India inconsistent with the law as stated by Lord Selborne, but upon the contrary, that that law followed the same rule.

66. Reading Sections 122 and 123 together, a "gift" is a transfer which must be "effected" by registered instrument signed by the donor and attested by at least two witnesses. It follows from these two sections that a gift cannot be said to be "effected" unless the transfer which constitutes the gift is itself "effected" in the manner prescribed by Section 123. In the present case there is an instrument signed by the donor and attested by two witnesses: but before the instrument was registered, the donor declared his intention not to be bound by it, and he actually denied execution before the Registrar, The position then is this, that at the date on which the donor repudiated the transaction, there was no transfer "effected" in the manner prescribed by law and there was no valid and complete gift, in other words, there was no gift at all: see the observations of their lordships of the Privy Council in Sadik Huaain Khan v, Hashim Ali Khan (1918) L.R. 43 IndAp 212 where their lordships

said that "transfer" within the meaning of Section 122 meant prima facie a valid transfer. It is true that in the present case the donor did "all that he need do" towards completing the gift, namely that he executed the writing and handed it to the donee, but it cannot be said, having regard to the language of Section 128, that because he did so, there was a transfer "effected" by way of gift, for a transfer by way of gift under that section can only be "effected" by a registered instrument. It is also true that having regard to the provisions of the Indian Registration Act; the registration could be effected without the co-operation of the donor and even against his consent, and further, that on the instrument being registered, it operates from the date of its execution as distinguished from the date of registration, but it cannot be inferred from this that a transfer by way of gift had been "effected" in the manner prescribed by Section 123 before the date on which the donor drew back from the transaction. It is also true that when the donor executed and handed over the document to the donee, there was a clear intention expressed on his part to give, and a clear intention on the part of the donee to take, but that does not conclude the case. The intention must be expressed in the manner prescribed by law, that is, by a registered instrument signed by the donor and attested by at least two witnesses. Thus prior to the enactment of the Transfer of Property Act, delivery of possession was necessary in the case of Hindus, to complete a gift, where possession could be delivered. If a donor prior to that Act executed an instrument of gift attested by witnesses and even if he got it registered, there was no gift if the transfer was not accompanied by delivery of possession, though the intention to give and to take was unequivocally expressed by the instrument; the reason being that the condition prescribed by the law, namely, delivery of possession, had remained unfulfilled. And the same was held of a Mahomedan gift in Sailik Husnin Khan''s case referred to above. It seems to me that the registration prescribed by Section 123 is not mere evidence of the gift, but is part of the gift itself, It is, I think, a necessary part of the proposition that a gift has been " effected " It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift. For the above reasons, I have come to the conclusion that at the date on which plaintiff No 1 resiled from the transaction, no transfer by way of gift had been " effected " as required by Section 123 of the Transfer of Property Act, in other words, there was no gift in law. Whether a transfer by way of gift is effected or not is a question to be determined exclusively with reference to the provisions of Section 123. You cannot split the requisites prescribed by the section into two parts, namely, (1) a writing signed and attested, and (2) registration, and say that because according to the English law a gift is effected when the donor executes a deed of gift, there is a gift " effected " in the present case also, the donor having signed a document attested by two witnesses, and having handed it to the donee. According to the English law, in the case of a voluntary deed, the donee is entitled to possession of the Immovable property immediately on the execution of the deed. It cannot be suggested that in cases governed by the Transfer of Property Act, a donee is entitled to possession

immediately on execution of the instrument of gift and before it is registered. The present case seems to me to be pre-eminently a case in which the analogies of English law ought not to be applied in construing an Indian enactment; nor can you say their-in cases governed by the Transfer of Property Act, a transfer by way of gift may be deemed to be "effected" for the purpose of excluding the plea of locus pcsnitentice, and not yet "effected" for the purpose of making it a valid gift. It seems to me that the distinction sought to be drawn in this case between a "complete" transfer and a "valid or effective" transfer is far-fetched, and it cannot be supported either in principle or on authority, I readily accept the proposition that a donee under an instrument of gift-can have the document registered without the consent and even against the wishes of the donor, but that does not, in my view, justify the proposition that registration in not an essential part of n transfer by way of gift. The gift in the present case, when it was withdrawn, was inchoate, and plaintiff No. 1 had therefore a locus pcenitentiai, I do not think that the locus pcunitentias was barred by anything done by him subsequent to the execution of the writing. There is no such rei interuentm in the present case as could raise a personal exception, which excludes the plea of locus putnitenticu.

67. Such being my view of the case, H. 12(J does not apply. It applies only to a "gift," that is a gift made In the manner prescribed by Section 128. In the present case, there was no "gift" on the date 011 which plaintiff No. 1 resiled from the transaction.

68. It was contended on behalf of the defendant that Section 54 of the Transfer of Property Act which relates to sales and Section 59 of the same Act which relates to mortgages are in terms similar to Section 123, and that if a vendor or a mortgagor cannot after execution of the instrument of sale or mortgage resile from the transaction before the instrument of sale or mortgage is registered, a donor also cannot resile after execution of the instrument of gift and before registration thereof. I feel myself unable to accede to that contention. The reason why a conveyance or a mortfaee cannot be revoked after execution and before registration is not because registration may be effected in spite of the donor''s protest but because in the case of sales and mortgages once a contract of sale or mortgage is made; neither a vendor nor a mortgagor could rescind it at his pleasure, while in the case of an agreement to make a gift, the intending donor may withdraw it at his will except in the rare cases where an agreement to make a gift is made in favour of a near relation out of love or affection and it has been registered, as provided in Section 25 of the Indian Contract Act, 1872. Even in that case the agreement, according to the view I take of the law, may be terminated by the donor at his pleasure at any time before it is registered.

69. There are two other sections of the Transfer of Property Act to which I may here refer. One of them is Section 9 which provides that is a transfer of property may be made without writing in every case in which a writing is not expressly required by law." The other is Section 107 by which it is provided that all leases of immoveablo

property other than those mentioned in the first paragraph of the section may be made ""'either by registered instrument or by oral agreement accompanied by delivery of possession." It was argued on behalf of the defendant that as no mention was made of registration in Section S), registration did not form Dart of a "transfer," and the transfer in the present case was therefore "effected" when plaintiff No. 1 executed and handed the instrument of gift to the defendant, Now it is to be observed that just as there is no mention made of registration in Section 9, so there is no mention made of delivery of possession in that section. If the argument addressed by the pleader for the defendant were sound, it would follow that a lease of the kind mentioned above could be made merely by an oral agreement, and delivery of possession should be treated, as registration is sought to be treated, as mere evidence of the lease as distinguished from part of the lease itself. Such a proposition in, on the face of it, untenable. The fact of the matter is that Section 9 does not deal with the essentials of a transfer. It indicates only two modes of transfer, namely, a transfer in writing and an oral transfer. Transfer by delivery which is one of the alternative modes of transfer in the case of n gift of moveable property is not mentioned in the section, and yet transfer by delivery is undoubtedly one of the modes of transfer. Section 9 does not purport to deal with the various modes of transfer. The modes of transfer arc prescribed in as. 54, 59, 107 and 123. Section 9 says no more than this that where a writing is not expressly required by law, a transfer may be made without writing. It simply recognises oral transfers. The marginal note to the section, namely, "Oral transfer," indicates the scope and intent of the section. Upon long consideration, I have reached the conclusion that the first question must be answered in the affirmative and the second question in the negative. Before concluding this judgment I feel I ought to say that the case was argued with remarkable ability by the learned pleaders on both sides Indeed, it could not have been argued better.

Kincaid, J.

70. I agree with the judgment given by my learned brother Marten, and would answer the reference in the manner indicated by him,

Lallubhai Shah, Kt., Acting C.J.

71. In accordance with the opinion of the majority, the answer to the first question will be in the negative There will be no answer to the second question as being unnecessary.