ALLAHABAD HIGH COURT

Commissioner of Income-tax

Vs.

Smt. Shyamo Bibi

I.T.R. Mis. No. 80 of 1960
(M.C. Desai, C.J. ad S.C. Manchandra, J.)

25.03.1965

JUDGMENT

Desal, C.J.

1. The following question has been referred to this Court for its opinion by the Income-tax Appellate Tribunal, Allahabad Bench, at the instance of the Commissioner of Income Tax, U. P.

> "Whether the entry made by the assessee in her books on 22-12-1953 transferring Rs. 1 lac from her account to the account of her grandson Om Nath amounted to a valid gift when the book balance on that date amounted to Rupees 15-10-0 only."

The facts as given in the statement of the case are as follows :-

The assessee derives income from property and from her share in a partnership firm Kishore Gopal Om Nath which is not a banking firm. The firm maintains its own accounts and the assessee also maintains her personal accounts. Her account books contain a capital account showing her investments and other assets in the firm and elsewhere. On 22-12-1953 her account books showed a balance of Rupees 2,50,000 and odd in her favour; only Rupees 15-10-0 were in cash with her, the rest being investments in the firm and other assets. On that date she made transfer entries in her account books crediting the sum of Rs. 1 lac in the account of Om Nath, her only grandson, and debiting her account by the same amount. She made these entries professing to make a gift of Rs. 1 lac to Om Nath. Om Nath was a major then. She did not execute any registered document of gift but prepared a memorandum on a stamped

paper stating that she orally and on account of natural love and affection had given Rs. 1 lac to Om Nath and delivered the amount to him by the transfer entries made in her personal accounts and placed him in possession and control of the amount and that he had accepted the gift and entered into possession and control of the money. The memorandum was signed by Om Nath and the assessee both. On 31-12-1953 her account books showed a credit balance of Rs. 2,18,000 in her favour, while Rs. 1 lac were deducted. There were additions on account of income from other sources. This was the state of affairs in the calendar year ending on 31-12-53, which was the previous year relating to the assessment year 1954-55 with which we are concerned in this reference. Upto 4-7-1954 the firm Kishore Gopal Om Nath consisted of two partners the assessee and Putli Bibi. On 5-7-1954 her account books showed a credit balance of Rs. 1,03,188 in favour of Om Nath; this consisted of Rs. 1 lac said to have been donated to him and Rs. 3,188 said to have been earned by him by way of interest on that amount, Rs. 150 were said to represent the interest for the period 22-12-1953 to 31-12-1953 and Rupees 3,038 were said to be interest for 1954. There was no contract for payment of interest between the assessee and Om Nath and the assessee out of her own free will credited his account with the amount of interest. On the same date she transferred her liability to Om Nath to the firm and at her instructions the firm in its own account books credited Om Nath's account with the sum of Rs. 1,03,188 and debited her account with the same sum. On the same date the firm was reconstituted, Om Nath becoming a new partner along with three other persons and the amount of Rs. 1 lac and odd credited by the firm in his account become his investment in the firm. In the assessment year 1954-55 the assessee claimed a deduction of Rs. 150 said to have been paid by her to Om Nath as interest from her income. Her claim was rejected by the Income-tax Officer and the Appellate Assistant Commissioner but was allowed by the Tribunal. The Tribunal relying upon *Chimanbhai Lalbhai v. Commissioner of Income-tax,* [1] held that there was a completed gift by the assessee to Om Nath on 22-12-1953 and that consequently she was entitled to deduct the interest paid to Om Nath from her income. Then at the instance of the Commissioner it submitted a statement of the case formulating the question reproduced above.

2. An application has been made by the assessee praying that the reference be returned unanswered to the Tribunal because the question formulated by the Tribunal does not arise out of the order passed by it. The Income-tax Officer had called upon the assessee to prove the gift of Rs. 1,00,000 said to have been made by her to Om Nath in respect of her claim for deducting Rs. 150 paid as interest in the previous year.

The assessee had relied upon the memorandum, and the transfer entries made in her account books dated 22-12-1953. The Income Tax Officer had rejected the alleged gift because there were only book entries, the cash in her hands on 22-12-1953 was only Rupees 15-10-0 and she had retained full control over the money and also utilized it in her business. No question had been raised before him about the allow ability of the amount of Rs. 150 even if there had been a gift of Rs. 1,00,000; he had not held either that she had not actually paid Rs. 150 as interest or that even if she had paid it the amount was not deductible from her income either under Section 10(2)(iii) or under Section 10(2)(xv) of the Income Tax Act. The question whether she had paid the money as interest on capital borrowed for her business or to defray business expenditure had not been gone into by him at All. His order was maintained by the Appellate Assistant Commissioner; he held that there had been no delivery of Rupees 1,00,000 by the assessee to Om Nath and that consequently there had been no gift within the meaning of Section 123 of the Transfer of Property Act. From these findings he had concluded that the deduction of Rs. 150/- had been rightly disallowed. Before him also the question whether the deduction was allowable under Section 10(2) or not had not been raised. The Tribunal disagreed with the view taken by the Income Tax Officer and the Appellate Assistant Commissioner, and held that a gift of money can be made by transfer entries in account books and that in the instant case the gift was completed on 22-12-1953 when the assessee made the transfer entries in her personal accounts. It held that in view of its finding that there was a valid gift the amount of Rs. 150/- was rightly deducted from the income. It cannot be doubted that the question of law that arises from the Tribunal's order is whether there was a valid gift on 22-12-1953. The question framed by it mentions not only the facts which are said to constitute a valid gift but also the fact which was relied upon by the Income Tax Officer and probably also by the Appellate Assistant Commissioner, along with other facts, for holding that there was no valid gift. I see nothing wrong in its mentioning in the question the fact that cash in the assessee's hands on 22-12-1953 was only Rs. 15/10/-. I see no substance in the objection made by the assessee that the question does not arise out of the order passed by the Tribunal. Sri Jagdish Swarup also contended that the answers to the question depends upon whether the assesee had in some bank a balance of at least Rs. 1,00,000 on 22-12-1953 or not. His argument is that even though she had cash balance of Rs. 15/10/- only if she had a balance at her credit of Rs. 1,00,000/- in a bank she could make a gift of it. He contended that this question whether she had money at her credit in any bank or not had not been gone into and that consequently the question cannot be answered as it stands. We see no

force in this contention also. In the first place if the assessee had a bank balance of at least Rs. 1,00,000 in some bank it was for her to place this fact before the income-tax authorities (at least before the Appellate Assistant Commissioner after knowing that one of the reasons given by the Income Tax Officer for rejecting her claim was that with a cash of Rs. 15-10-0 only she could not validly make a gift of Rs. 1,00,000). If it was her own case that the answer to the question depended upon whether she had a bank balance of Rupees 1,00,000 at least or not and if she had a bank balance of Rs. 1,00,000 at least she would have brought the fact to the notice of the Income-tax authorities. Further the question then would have arisen why she selected this particular mode of gift instead of issuing of cheque for the amount in favour of Om Nath. If she had a bank balance of Rs. 1,00,000 at least the simplest and also normal method of giving the money would have been to issue a cheque. It would have been a serious question why instead of delivering possession over the money by means of a cheque she thought of delivering possession over it simply by making transfer entries in her own account books. I have no doubt that in this case the question whether she had a bank balance of Rs. 1,00,000 at least or not simply does not arise and that we have to answer the question without regard to any bank balance.

3. In this reference we are concerned with only one question, it being whether there was a valid gift by the assessee of Rs. 1,00,000 to Om Nath on 22-12-1953 or not. We are not concerned with the question whether a valid gift came into existence later, i.e. after 22-12-1953 or even after 31-12-1953. What happened on 5-7-1954 is irrelevant for considering whether in the previous year ending on 31-12-1953 there was a valid gift or not. The amount of Rs. 150 was credited as interest because of the gift; so the gift must have been in existence before the interest was credited. It is not the case of the assessee that something happened after the transfer entries made by her in her personal accounts and before 31-12-1953 on account of which a valid gift came into existence in this period; her case solely is that a valid gift came into existence by the very fact of the transfer entries made by her in her personal accounts on 22-12-1953. So if there was no valid gift on 22-12-1953 it is not her own case that a valid gift came into existence later. In order to answer the question, therefore, we have to consider only what happened on 22-12-1953.

4. It has to be remembered that the subject-matter of the gift is Rs. 1,00,000/-, i. e. movable property and not the assessee's interest in any assets in the firm or in the capital invested by her in the firm or money due to her from the firm. In answering the

question we have absolutely nothing to do with the firm or the assessee's interest in the capital or assets of the firm or any money lying at her credit in the accounts of the firm. Under Section 123 of the Transfer of Property Act a gift of movable property may be effected either by a registered instrument signed by or on behalf of the donor or by delivery which may be made in the same way as goods sold may be delivered. Under Section 33 of the Sale of Goods Act delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer (or of any person authorised to hold them on his behalf). In the instant case there was no agreement between the assessee and Om Nath as to the manner of delivery; the memorandum recited the fact of delivery and did not contain any agreement as to the method of delivery. Consequently there was gift only if it could be said that the assessee had done something having the effect of putting the money in the possession of Om Nath. The only acts that she had actually done are executing the memorandum and making transfer entries in her own accounts. After hearing arguments of Sri Jagdish Swarup and Sri Gulati I am left in no doubt that these two acts did not have the effect of putting the money in the possession of Om Nath or of any person authorized by him to hold them. No money changed hands; whatever money the assessed had either in cash or in the form of assets or bank balance remained where it was. She was not authorized by Om Nath to receive the money on his behalf; consequently by her detaining possession of the money even if she had in her possession Rs. 1,00,000/- it could not be said that the money was put in possession of her as authorised to hold it on Om Math's behalf.

5. Section 123 of the Transfer of Property Act lays down the law govering all gifts made for whatever purpose and it is to be applied whenever the question arises whether there was a gift or not. Regardless of whether the question arises in a suit by a done to recover possession or in a suit to define his title or in an income-tax assessment proceeding it has to be answered with reference to the provisions of Section 123 T. P. Act. There is no warrant for saying that the law contained in Section 123 T. P. Act does not apply when an income-tax authority has to decide whether there was a gift or not. Consequently there has to be a delivery, if a gift is not made by a registered document. A question may arise whether a certain act done by the alleged donor amounts to delivery of property to the alleged done but it cannot be said that delivery is not required at All. With great respect I am unable to agree with the following statements of Chagla C. J. in the case of Chimabhai Lalbhai, 1958-34 ITR

259 (Bom.) (supra).

> "Let us forget these technicalities and look at this matter simply as an ordinary transaction which would take place in the city of Bombay between a constituent and his banker..... Transfer of property is very well in its proper place, but it seems to us to be completely out of place in this transaction." (p. 263).

These statements have not been approved of in any other case and nowhere has it been held that an Income-tax officer, in deciding whether there is a gift or not, is not concerned with the law contained in the Transfer of Property Act regarding gifts. On the other hand Rajgopalan and Srinivasan JJ. who approved of Chimabhai Lalbhai in *South Indian Lucifer Match works v. Commissioner of Income-tax, Madras*[1,2] laid down that a gift of moveables, unless effected by a registered deed, must be accompanied by delivery, vide P. 328. In other cases where gifts were upheld it was not on the ground that Section 123 of the Transfer of Property Act did not apply but on the ground that certain acts were held to amount to delivery within its meaning. The question before the Income-tax Officer was whether Om Nath was the owner of the money (Rs. 1,00,000/-), which was left with the assessee; if the assessee was the owner there arose no question whatsoever of her paying interest for her use of it. She would have been liable to pay interest only if it belonged to Om Nath. When the question arose whether Om Nath was the owner or not, it could be answered only after considering the law contained in the Transfer of Property Act. It made not the slightest difference that it arose before an Income-tax Officer. The question was one of title and had to be decided in accordance with law. The law did not vary with the authority deciding the question. There was only one law regarding the ownership of the money and the question, wherever it arose, had to be decided in accordance with it. Consequently, Om Nath could not be held to be the owner of the money unless it was found that possession over it had been delivered to him.

6. Though a moveable can be delivered by manual delivery, i.e. by taking it in a hand and giving it to the other person, that is not the sole manner of delivery. A case in which the parties agree that a certain act shall be treated as delivery being left aside (because in this case there was no such agreement between the assessee and Om Nath), any act which has the effect of putting the moveable in the possession of the donee is delivery. So the question in the instant case resolves into this was Om Nath put in possession of the money on 22-12-1953 by the two acts done by the assessee? I

have no hesitation answering it in the negative.

7. The assessee's own case that she retained possession over the money and, therefore, had to pay interest to Om Nath, proves that there was no delivery by her. If she had delivered possession to Om Nath, she would not have found the money in her possession (and use) unless it had been redelivered to her by Om Nath and not only is there no evidence, but also there is no allegation, of any such redelivery. The memorandum does not mention any act which Om Nath might have done amounting to redelivery of the money to the assessee, nor do her accounts show that Om Nath, after taking delivery, redelivered it to her whether as a loan or deposit or otherwise. If the assessee retained possession over the money, which fact is admitted, and there was no redelivery of the money to her by Om Nath, it is a very plain deduction that she had never parted with possession over the money and that Om Nath had never been put in possession of it in any manner whatsoever. In Other words, there was no delivery of the money to Om Nath. Sri Jagdish Swarup referred to Salmond on Jurisprudence 11th Edition, p. 338 which deals with delivery by agreement, i.e. without physical dealing mediate possession being with the transferee, immediate possession relating with the transferor with his agreement. There is, however, an utter lack of such an agreement in this case and no such agreement has been relied upon by the assessee. Whether such an agreement exists or not is a question of fact and the Tribunal has not answered it in the assessee's favor. Then he referred to the law regarding gifts contained in 33 Corpus Juris Secundum. It is stated at page 797 :

> "No absolute rule can be laid down as to what conduct will constitute a sufficient delivery to support a gift in all cases .... Delivery, sufficient to support a gift, may be actual, constructive, or symbolical, according to the circumstances..... the delivery must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit.....the delivery must in every case,.....consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift.....conduct has been held insufficient to constitute a delivery where more direct and effective methods were available to vest done with possession, dominion, and control of the property."

8. This law does not support the assesee's contention that there was a gift. In the first

place she did not have Rs. 1,00,000 at all which could be delivered by her to Om Nath. Her cash balance consisted of only a few rupees. She might have had assets in the partnership but she did not transfer them or any interest in them. The partnership might have been owing money to her but she did not transfer any money out of that to Om Nath; she did not instruct the partnership to transfer Rs. 1,00,000 out of the money due to her to the account of Om Nath. If she wanted to make a gift of the money due to her from the partnership the most reasonable way was to instruct the partnership to debit her account, and credit that of Om Nath, with the amount of the money. Simply making transfer entries in own accounts cannot be said to be the most direct and effective method of vesting him with possession, dominion and control. As the account books were in her own possession, dominion and control, so were the entries, and simply by making entries in them she did not vest Om Nath with possession, dominion and control over the money. It was open to her to delete or reverse the entries at any time she liked subsequently. Merely because she made the entries Om Nath did not obtain possession, dominion and control of the money. If she had been carrying on a banking business and had made the entries in her gooks on account of the business it might have been said that thereby Om Nath obtained possession, dominion and control of the money. We were also referred to 18 Halsbury's Laws of England, "Gifts" paragraph 729. There may be constructive delivery, but only where the moveable's cannot be actually delivered owing to their bulk. Neither can it be said that there could not be actual delivery of Rs. 1,00,000 in the instant case nor could it be said that making transfer entries in personal accounts is constructive delivery.

9. In *Hariram v. Madan Gopal,* [3] one Brijcomari carrying on banking business credited certain sums in her account books in the name of her grand-daughter Mahadevi who was a minor. It was not pretended that Mahadevi received any money and then deposited it in her grand-mother bank or that she ever accepted the gifts, nor did Brijcomari make herself the bailee of Mahadevi by any unequivocal act changing the character of her own continuous possession. No accounts were rendered and no correspondence passed. Brijcomari always retained the power to cancel all that she had done, whenever she changed her mind. So the Privy Council held that, "the accounts in themselves are mere book-entries and do not confer or determine rights ..... do not show completed gifts to Mahadevi." The facts in the instant case are very similar, the only difference being that here there is also a memorandum. The mere fact of recital of the delivery and the acceptance by Om Nath does not, however, add

anything material to the circumstances of the case. It is not understood how Om Nath could enter into possession and control of the money when it did not exist at All. The assessee was not a banker and there was no question of her allowing an overdraft to Om Nath. When a banker allows an overdraft to a customer he does it out of the money belonging to other customers; all money deposited with him by his customers belongs to him for the time being. So there is actually money with him when he allows an overdraft to a customer. The same cannot be said of the assessee; she did not have any money belonging to anybody which she could hand over to Om Nath. This was a case of gift of money and if the money does not exist transfer entries in the accounts do not amount to delivery merely because the donor has a claim for money against a third person. *Cochrane v. Moore,* [4] is an authority for the proposition that in ordinary English language, and in legal effect, there cannot be 'a gift without a giving and taking (per Lord Esher, M. R. at p. 76). In *Milroy v. Lord,* [5] Turner L. J. pointed out that in order to render a voluntary settlement valid and effectual, the settlor must have done every thing which, according to the nature of the property, was necessary to be done in order to transfer the property. This statement was approved of by Leach C. J. and Horwill, J. in *Mrs. Ida L. Chambers v. K. H. Chambers,* [6] There was an intention to make a gift; still the learned Judges held that the entries in the books did not complete the gift. They pointed out that if the donor had paid the money by way of interest on the alleged gift there would have been a completed gift. In the instant case also no money had been paid by the assessee to Om Nath in the accounting year. This decision was confirmed by the Privy Council vide *Chambers v. Chambers,* [7]In *E. M. V. Muthappa Chettiar v. Commissioner of Income Tax,* [8] Leach, C. J. and Patanjali Sastri, J. said that as no assets or funds corresponding to the credit entries in the accounts were actually set apart or allocated at any time and the whole funds of the firm were used in the business as before the credit entries did not operate as valid gift. Similar view was taken by Stone, C. J. and Kania, J. in *Hanamantram Ramnath v. Commissioner of Income-tax, Bombay,* [9] they relied upon the decision in the case of Chambers, AIR 1941 Madras 154 (supra) Ramaswami C. J. and Untwalia, J., in *S. P. Jain v. Commissioner of Income-tax,* [10] relied upon the cases of Hanmantram, 1946-14 ITR 716 : AIR 1947 Bombay 115 and Chambers, AIR 1941 Madras 154 and distinguished that of Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom) the gift was said to have been made through entries by the assessee in his own account books.

10. The assessee relied upon a number of authorities. The first and foremost is 1958-34 ITR 259 (Bom) (supra). The facts in that case were essentially different. Firstly the

donor after making entries in own account books directed his bankers to debit his account, and credit that of the done, with the amount donated and the banker carried out the instruction. Then the done drew upon the account in respect of the sum donated to him. It was not disputed that there was a bona fide gift and that it was actually effected. It was in these circumstances that Chagla, C. J. held that there was a gift. Actual delivery of possession was not required because the transfer was made by the banker at the instruction of the donor. The donor could have himself gone to the bank, withdrawn the money and handed it over to the done and the done could have then deposited it in the bank and exactly the same was effected by what had been done. The banking system is intended to serve the very purpose of obviating the necessity of one person's going to the bank, withdrawing money and delivering it to another person and the others going and depositing it in the bank in his own name. The donor did not have sufficient money at his credit in the bank but this was held not to prevent the gift from coming into effect because an overdraft was allowed to him by his banker. The lack of necessary funds at his credit was a matter between him and his banker; as far as the done was concerned he got all possession, control and dominion over the money through the credit entry made in his favor by the banker. All that was necessary was that the banker should have had the money, not that the donor should have had the money at his credit. In the instant case the transfer entries were made by the assessee in her own accounts, she was not a banker, she did not instruct the partnership to make entries of the gift in its account and the partnership also was not a banking firm. The law applied by Chagla, C. J. and Desai, J. in that case is not applicable to the facts or the instant case.

S. T. Desai and K. T. Desai, JJ. applied it in *Commissioner of Income-tax, Ahmedabad v. New Digvijaysinghji Tin Factory,* [11] The learned Judges agreed that "mere book entries could not result in a valid gift" but held that there was a gift because the entries were made with the knowledge and consent of the donees. The firm paid interest to them and allowed them to withdraw the money from time to time. The firm, which was the assessee and in the account bosks of which the entries were made, had no sufficient cash in hand and it was argued that there could be no delivery of the money to the donees. The learned Judges repelled the argument observing that no actual or physical delivery was necessary and that delivery could be symbolicial and relied for this view upon the case of Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom). With great respect I think that the law applied on Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom) to entries of an overdraft allowed by a banker could not be applied to entries in a non-banking firm. The learned Judges with respect, did not notice the essential distinction

between the facts of the two cases. Chagla, C. J., had based his judgment on the material facts that an overdraft was allowed by the banker and that the question of overdraft was a matter between him and the donor to whom the overdraft was allowed. It was by applying the banking law that he had held that there was a transfer of the money from the donor to the donee. There was no question of applying the banking law to the facts in the New Digvijaysinhji Tin Factory's case, 1959-36 ITR 72 : AIR 1959 Bombay 556. I, therefore, respectfully disagree with the view taken by the learned Judges. In *K. P. Brothers v. Commissioner of Income-tax, Delhi,* [12] Ranawat and Bhandari, JJ. followed the case of Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom) and distinguished the cases of Chambers, AIR 1941 Madras 154; Muthappa Chettiar, 1945-13 ITR 311 : AIR 1945 Madras 513 and Hanumantram, 1946-14 ITR 716 : AIR 1947 Bombay 115. The facts in this case were similar to those in the case of Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom). The learned Judges distinguished the cases of Hanumantram, 1946-14 ITR 716 : AIR 1947 Bombay 115; Chambers, AIR 1941 Madras 154 and Muthappa Chettiar, 1945-13 ITR 311 : AIR 1945 Madras 513 on the ground that they dealt with entries made by donors in their own account books and there was no evidence to show that the corpus of the property was set apart and delivered to the donees. The argument that was advanced before them was whether there could be a gift of Rs. 1,00,000 by transfer entries when the cash in the hands of the banker was only Rs. 603. The learned Judges rightly relied upon Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom) to answer the question in the affirmative. For the very reason for which they distinguished the cases of Chambers, AIR 1941 Madras 154 etc. I must distinguish the case of K. P. Brothers, 1961-42 ITR 650 : AIR 1962 Rajasthan 152 from the instant case. In the case of South Indian Lucifer Match Works, 1961-43 ITR 319 (Mad) (supra) Rajagopalan and Srinivasan, JJ. merely followed the decision in the case of New Digvijaysinhji Tin Factory, 1959-36 ITR 72 : AIR 1959 Bombay 556 which was found to have similar facts. In *Ratnaswamy Nadar and Sons v. Commissioner of Income-tax,* [13] the facts were that Ratnaswamy, a manufacturer of matches debited his personal account in the business with Rs. 27,000 and credited each one of his six sons with Rs. 4,500 on 31-3-1955 and on 1-4-1955 a partnership deed was executed between him and his sons, the donated sums being the capital invested by his sons in the partnership. The learned Judges were influenced by "the contemporaneous formation of a partnership between the donor and the donees" in holding that there was a valid gift. They relied upon the case of South Indian Lucifer Match Works, 1961-43 ITR 319 (Mad). The distinguishing feature of the case was that the donor was in a position to make the gift of Rs. 27,000 to his sons and the donated

amounts were intended to be the capital to be invested by them in the partnership business. The question in what year the gift was completed did not arise before the learned Judges because they had to deal only with the question of registration of the partnership. They conceded that transfer entries in own accounts may not conclusively establish a gift and treated them as evidence in support of the gift when considered along with other evidence. The only other evidence that could be relied upon in the instant case is the memorandum but I do not think it suffices to prove gift. The observation of Lord Esher, M. R. in Cochrane's case, (1890) 25 QBD 57 (supra) throw light on the effect of the memorandum; he said at page 75 :

> "..... actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery .....The giving and taking.....are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift."

The memorandum merely contains a statement of the assessee and Om Nath about the giving and the taking, i.e. professes to be evidence of the alleged giving and taking and does not itself constitute the acts of giving and taking and is useless without a subsequent actual delivery. *Hajee Abdul Kareem and Sons v. Commissioner of Income-tax,* [14] was another decision of Jagadisan and Srinivasan, JJ. who followed Chimanbhai Lalbhai, 1958-34 ITR 259 (Bom) and distinguished Ratnaswamy Nadar and Sons, 1962-46 ITR 1148 (Mad). There was an oral declaration of a gift in the presence of respectable persons immediately followed by entries in own account books of Transfer of the money to the donees and payment of interests to the donees year after year. On account of the payment of the interest the learned Judges observed that a right was created in the donees to the money and that "in the nature of things.....it was impossible for the assessee to deliver physically any part of the subject matter of the gift." *Juggilal Kamlapati v. Commissioner of Income-tax,* [15] was a case to which my learned brother was a party. The assessee there was a banking

firm, one of its partners instructed the Accountant of the firm to debit his account and credit charity account, with a sum of rupees 5 lacs, the Accountant carried out the instruction by making necessary entries in the account books of the firm and Jagdish Sahai J. with the concurrence of my learned brother held that there was a valid trust even though the balance at the credit of the partner in the account books of the firm was less than 5 lacs of rupees. The only question raised before the learned Judges was whether the partner could create a trust of 5 lacs of rupees when he did not have so much money at his credit; no question of delivery arose before them. They relied upon the banking system and Chimanbhai Lalbhai's case, 1958-34 ITR 259 (Bom) and answered it in the affirmative. I respectfully agree with the answer; it was open to the bank to allow an overdraft to the partner. After the overdraft was allowed by the bank the question of there not having been sufficient balance at the credit vanished. It was open to the bank to allow an overdraft and after it was allowed the position became what it would have been if the amount of the overdraft had already been included in the balance of the creator of the trust. The decision does not deal with the question of delivery by book entries and as regards the question whether a gift of money can be made by book entries when the credit balance is of a smaller amount, it is to be distinguished from the instant case because there is no overdraft here to make up the deficit in the credit balance. Therefore, none of the authorities relied upon by the assessee is relevant or helpful.

11. My answer to the question is in the negative. A copy of the judgment shall be sent to the Tribunal under the signature of the Registrar and the seal of the Court as required by section 66(5) of the Income-tax Act. The Commissioner of Income-tax, U. P. shall get his costs of the reference which we assess at Rs. 200. Counsel's fee is assessed at Rs. 200.

Reference answered in the negative.

Cases Referred.

1. 1958-34 ITR 259 (Bom)
2. 1961-43 ITR 319 (Mad)
3. AIR 1929 PC 77
4. (1890) 25 QBD 57
5. (1862) 4 De G. F. and J. 264

6. AIR 1941 Mad 154
7. ILR (1944) Mad 617
8. 1945-13 ITR 311: AIR 1945 Mad 513
9. 1946-14 ITR 716: AIR 1947 Bom 115
10. 1964-51 ITR 6 (Pat)
11. 1959-36 ITR 72: AIR 1959 Bom 556
12. 1961-42 ITR 650: AIR 1962 Raj152
13. 1962-46 ITR 1148 (Mad)
14. 1964-50 ITR 396: AIR 1964 Mad 239
15. (1964) 52 ITR 811 (All)