

Smt. Naraini Vs. Pyare Mohan

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Court : Rajasthan

Decided On : Jul-21-1971

Reported in : AIR1972Raj25

Judge : C.M. Lodha, J.

Acts : [Evidence Act, 1872](#) - Sections 68; [Contract Act, 1872](#) - Sections 23; [Transfer of Property Act, 1882](#) - Sections 122; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2; [Indian Penal Code \(IPC\), 1860](#) - Sections 497

Appeal No. : Second Appeal No. 181 of 1965

Appellant : Smt. Naraini

Respondent : Pyare Mohan

Advocate for Def. : R.K. Rastogi and M.L. Panwar, Advs.

Advocate for Pet/Ap. : K.N. Tikku and; P.N. Datta, Advs.

Disposition : Appeal allowed

Judgement :

C.M. Lodha, J.

1. The suit out of which this second appeal arises was instituted by the plaintiff appellant Smt. Naraini against the defendant respondent Fyare Mohan for

possession of a 'Kotha' described in para No. 4 of the plaint and also for mesne profits for the same amounting to Rs. 102/-. She also claimed future mesne profits at the rate of Rs. 6/-per month. Her case as set out in the plaint was that the house of which the 'Kotha' in question is a part, belonged to one Gopal Lal, who died on 15-6-1956. It was alleged that the plaintiff had been living with Gopal Lal since 10. or 11 years before the latter's death and in lieu of the services rendered by her the deceased Gopal Lal executed a gift deed in respect of the whole house in his (her?) favour. The original gift deed has been put on the record and marked Ex. 1. It was further alleged that after execution of the gift deed the plaintiff was put in possession of the gifted house. The plaintiff went on to state that after the death of Gopal Lal some time in the month of June 1956 she permitted the defendant, who is Gopal Lal's sister's son and the defendant's mother to live in the 'Kotha' in question for a few days but when the plaintiff asked them to vacate the 'Kotha' the defendant refused to do so and wanted to grab it. On these allegations she asked for possession of the house and mesne profits.

2. The suit was resisted by the defendant who denied the gift set up by the plaintiff. He also denied having occupied the 'Kotha' by the permission of the plaintiff and pleaded that the gift was void as its object was past cohabitation, which was immoral and that the house in question had devolved upon him as an heir of Gopal Lal.

3. After recording the evidence produced by the parties, the learned Munsiff, Jaipur city (west) by his judgment dated 30-10-1961 decreed the plaintiff's suit for possession of the 'Kotha' and also granted a decree for Rs. 68/- on account of mesne profits.

4. Aggrieved by the judgment and decree by the trial court the defendant filed appeal which was allowed by the senior Civil Judge No. 2, City Jaipur who set aside the judgment and decree by the trial court and dismissed the plaintiff's suit by his judgment dated 20.10.1964. Dissatisfied with the judgment of the Senior Civil Judge, the plaintiff has filed this second appeal.

5. The first appellate court has held that the 'Kotha' in question was the self acquired property of Gopal Lal, who was therefore competent to make a gift of the

same. He has also found that Gopal Lal was not of unsound mind at the time of making the gift. Here, it may be observed that so far as the execution of the gift deed is concerned the finding given by the trial court in favour of the plaintiff was not assailed before the learned Civil Judge. However, since the learned Civil Judge came to the conclusion that the object of the gift in question was not only past cohabitation but contemplated future cohabitation also, the gift was immoral and illegal, and therefore void. In this view of the matter the learned Civil Judge dismissed the plaintiff's suit.

6. Learned counsel for the appellant has urged that it was not the defendant's case that the object of the gift was contemplated future cohabitation, and therefore, the learned first appellate court was not justified in making out a new case at the appellate stage and thereby defeat the plaintiff's suit. He has also urged that there is no material on the record on the basis of which it can be said that the object of the gift was future cohabitation also. Learned counsel contended that Gopal Lal made the gift in favour of the plaintiff in lieu of the services rendered by her and at any rate even if it be held that Gopal Lal's object in making the gift was the sexual relationship he had with the plaintiff, even then, he argued, the gift would not be void. In support of his contention learned counsel relied on *Sita Devi v. Gopal Saran* AIR 1928 Pat 375. *Godfrey v. Mt. Parbati* AIR 1938 Pat 502. *Mt. Balo v. Mt. Parbati* AIR 1940 All. 385. *Laxshminarayana Reddyar v. Subhadri Ammal*. (1903) 13 Mad. LJ 7; *Rama Rao V. Javamma* AIR 1953 Mys 33, *Lakshmi Amma v. Kunji Pillai*, AIR 1954 Trav Co. 348. *Sita Devi v. Gopal Saran Narayan Singh* 111 Ind. Cas. 762 = (AIR 1928 Pat 375) and *Nagaratnamba v. Kunuku Ramayya*, AIR 1968 SC 253.

7. On the other hand learned counsel for the respondent argued that intended future cohabitation was also the object of the gift and at any rate the service referred to in the gift deed Ex. 1 was none other than past cohabitation which amounted to an offence of adultery as the husband of the plaintiff was alive and the deceased Gopal Lal very well knew that he was having sexual relationship with Naraini who was a married woman without the consent or concurrence of her husband. In support of his argument learned counsel for the respondent Mr. Rastogi relied on *Alice Mary Hill v. William Clarke*, (1905) ILR 27 All. 266; *Manicka*

v. Muniammal. AIR 1968 Mad. 392, Surasaibalini v. Phanindra Mohan, AIR 1965 SC 1364. Immani Appa Rao v. G. Ramalingamurthi, AIR 1962 SC 370 and Husseinali v. Dinbai, AIR 1924 Bom 135. He has tried to support the judgment of the first appellate court on another ground also which was not canvassed before it, namely that the gift deed Ex. 1 cannot be given effect to as it was not proved to have been attested by at least two witnesses as required by Section 123 of the Transfer of Property Act. In support of this contention he relied upon Dondapani Goudo v. Hrushikesh, Patnaik, (1969) 35 Cut. LT 821. Bithaldas v. Chandratan AIR 1955 Raj. 39, and Abdul Jabbar v. Venkata Sastri, AIR 1969 SC 1147.

8. I may first dispose of the objection raised by Mr. Rastogi with respect to want of evidence regarding due attestation of the gift deed Ex. 1. It may be noticed that the finding of the trial court that the execution of the gift deed had been proved to the hilt was neither agitated before the first appellate court nor has been challenged before me. However, the argument raised before me in this respect is that under section 123 read with Section 3 of the Transfer of Property Act it was the bounden duty of the plaintiff to have proved that the gift deed was attested by two witnesses each of whom had seen the executants sign or had received from the executant a personal acknowledgement of his signature, and further that each of them had signed the instrument in the presence of the executant. I am not impressed by this, argument: firstly because this objection was not raised in any of the two courts below. Apart from that, I do not find any substance in it on merits either.

The scribe of the gift deed is p. w. 5 Hari Narayan and the attesting witnesses are p. w. 6 Narayan Sahay and one Manohar Datt p. w. 5 Hari Narayan has stated that he wrote the gift deed Ex. 1 at the request of Gopal Lal, who signed it before him, and Narayan Sahay and Manohar Datt also attested the gift deed in his presence, p. w. 6 Narayan Sahay has stated that he put his attestation on the gift deed at the request of Gopal Lal, who appended his signature to the same in his presence. He has further stated in cross-examination that Ex. 1 was written in his presence and Manohar Datt also attested it. From the trend of the statement of this witness it appears that he was present throughout the time when the document was written and completed.

9. In AIR 1969 SC 1147, it was held that it is essential that the witness should have put his signature *animo at-testandi*, that is for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. Consequently, p. w. 5 Hari Narayan may not be treated as an attesting witness, but it is proved by the statement of p. w. 6 Narayan Sahay that both the attesting witnesses put their attestations on the gift deed in the presence of the executant Gopal Lal, who signed the same in their presence.

The mere fact that the other attesting witness Manohar Datt has not been produced, does not detract from the testimony of p. w. 6 Narayan Sahay. All that Section 68 of the Evidence Act says is that if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. In this case one attesting witness p. w. 6 Narayan Sahay has been called and he has proved due attestation of the gift deed by himself as well as by Manohar Datt. In this view of the matter I do not find any substance in the contention, and overrule it.

10. Now it is to be considered whether the gift is valid? It is mentioned in the gift deed that the donor Gopal Lal had become 56 years' old and had no issue of his own. It is further stated that his wife had died and Smt. Naraini (plaintiff) had been serving him continuously for the last 10 years and consequently in lieu of her services the house was being gifted so that Naraini and her children may comfortably reside in the house. P. W. 1 Naraini has stated in her deposition that she had been knowing Gopal Lal since 10 or 15 years before his death and that Gopal Lal had taken her from her husband's house and she started living with him. She has further deposed that Gopal Lal made a resolve (*Sanklap*) at Galta (a place of pilgrimage in, the city of Jaipur) that he had accepted her as his wife and thenceforth Gopal Lal and she began to live as husband and wife. When further cross-examined on the point, she stated that when Gopal Lal made the aforesaid '*Sanklap*', her husband was alive, but was insane.

11. From the contents of the gift deed coupled with the statement of Naraini and the circumstances of the case the learned Civil Judge came to the conclusion that the service mentioned in the gift deed was no other than the past cohabitation and the object of the gift was also contemplated future cohabitation. He also found that the object of the gift was immoral inasmuch as Mst. Naraini whose husband was alive was living in adultery with Gopal Lal. In this view of the matter he held the gift to be invalid.

12. Learned counsel for the appellant has no quarrel with the proposition that if the object of the gift is held to be future cohabitation the gift would be void as being immoral or opposed to public policy. What he contends is that the object of the gift was not the past cohabitation but some other services and at any rate past cohabitation even if it be there was not an immoral consideration. I may observe straightway that the contention that past cohabitation was not at all a consideration for making the gift is devoid of substance- In the first place, this case was not put before any of the Courts below. It was not raised even in the grounds of appeal filed in this Court. It was in fact not relied upon by the learned counsel in his opening address and a faint attempt was made at the fag-end of the arguments to substantiate this aspect of the case.

Even on merits the contention holds no water for the simple reason that Smt. Naraini has herself admitted in her statement that after Gopal Lal had brought her from her husband's house they both began to live as man and wife. It is, therefore, too late in the day to argue that it was only in lieu of certain domestic services such as cooking etc. that the gift was made. In partial agreement with the courts below. I, therefore, hold that the object of Gopal Lal in making the gift in question in favour of Mst. Naraini was past cohabitation, as well as other services, which Smt. Naraini had done to Gopal Lal by living with him as his wife.

13. The question of future cohabitation being within the contemplation of the parties at the time of making the gift has of course not been pleaded. Learned counsel for the respondent has, however, submitted that the court itself upon the illegality appearing upon the evidence should take notice of it even though it has not been pleaded by the defendant. In support of his contention he has relied on

the following passage from Law of Evidence by Taylor reproduced by their Lordships of the Supreme Court in AIR 1962 SC 370:

'Although illegality is not pleaded by the defendant nor sought to be relied upon by him by way of defence, yet the Court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action *Ex turpi causa non Oritur* action. No polluted hand shall touch the pure fountain of Justice' (P. 93).

14. Again in AIR 1965 SC 1364 it was observed that,

'Where a contract or transaction *ex facie* is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and mould its relief according to the circumstances.'

Lack of pleading therefore on this point would not preclude the defendant from relying on this ground of illegality provided the facts brought out on the record clearly disclose this illegality, namely contemplated future cohabitation. In the case on hand it appears from the statement of D. W. 1 Pyare Mohan that Gopal Lal was an indoor patient from 11-7-55 upto the date of his death i.e. 15-6-1956. The gift in question was made during this period that is on 16-3-1956. This circumstance, in my opinion, negatives the theory of contemplated future cohabitation being the object and purpose of the gift. The fact that in the gift deed it is mentioned that Mst. Naraini and her children may live in the gifted house cannot lead to the conclusion that the donor had future cohabitation in his contemplation at the time of making the gift. On the other hand, it appears to me that Gopal Lal saw his end in sight and therefore he hastened to make the gift in favour of Mst. Karaini who had lived with him and served him as his wife for a long period extending over about 10 years. I therefore, hold in disagreement with the learned Civil Judge that contemplated future cohabitation was not the object or purpose of the gift.

14A. This brings me to the consideration of the last point, namely, whether past cohabitation between the parties amounted to adulterous intercourse which is an offence under Section 497 of the Indian Penal Code and consequently the object of the gift was forbidden by law and at any rate was one which the court regards

as immoral was opposed to public policy.

15. In (19051 ILR 27 All 266 it was found that the consideration of the agreement was past cohabitation as well as contemplated future cohabitation. Aik-man J. observed that in England a covenant founded on past cohabitation, even though adulterous, is valid in law. But in England, adultery is not an offence under the criminal law. whereas in India it is. If then adultery past or future, is the consideration or an indivisible part of the consideration for an agreement entered into in India, this would make it not merely an immoral but an illegal agreement, and the contract would be void. I may state, here that in the agreement in that case the words were 'with a view that she may continue in my service'. From these words it was inferred that future cohabitation was a part of the consideration which involved the commission of an offence, to wit, adultery.

16. In AIR 1968 Mad 392 the consideration for the agreement Ex. A-1 was found to be past cohabitation between the parties which admittedly amounted to adulterous intercourse. The contention that any part of the consideration could possibly refer to future cohabitation was rejected. After noticing the divergence in the judicial opinion on the question of past cohabitation the learned Judge observed as follows:--

'In my view, where the consideration relates strictly to past cohabitation which is illicit, in the sense that it is outside matrimony, but which otherwise does not constitute any offence, it could be conceivably held, on the circumstances, that the promise to pay is supported by good consideration. But, even so, the difficulty is obvious that, though this consideration is not forbidden by any law, nevertheless, it falls under the interdict that it may be 'immoral or opposed to public policy'. For I think it is indisputable that the Courts must by every means in their power, promote matrimony, and the incurring of lawful sexual relationship alone, and Courts ought not to give sanction or approval even in an implied form to irregular sexual relationships outside the bond of matrimony, even where they may constitute no offence or infringement of the Penal Law.

On these premises the learned Judge held the agreement to be invalid.

17. In AIR 1938 Pat 502 it was observed by Courtnev-Terrel C. J., that 'the contract to enter into the relationship of protector and mistress is undoubtedly immoral and unenforceable and void, yet a contract to compensate a mistress for what she has lost on account of past association and so long as that loss shall continue, cannot be regarded as unmoral and that is the consideration and the object of the agreement to compensate. The learned Judge further brought out the distinction between the consideration in the case of a contract to enter into the relationship and the consideration and object in the case of the agreement to compensate and held that past consideration under the Indian Law is a good consideration and the fact that a woman has rendered service in the past whether immoral or otherwise, and has suffered an injury of a kind and continues to suffer from that injury, forms a perfectly good consideration for the contract to compensate her.

18. In AIR 1940 All 385 it was held that past cohabitation is not an unlawful consideration, and hence if in order to compensate the woman for the past illicit connection the offending party gives her some property, the consideration for it is not illegal- Reference may also be made to the observations of Sulaiman J., in Mt. Mahtab-un-Nissa v. Rifaqat Ullah AIR 1925 All 474 which are as under;--

'I would further like to point out, that adultery though an offence on the part of the man is not an offence on the part of the married woman. It cannot therefore be urged that the consideration passing from her is necessarily illegal though of course it is indisputably immoral. Bigamy, however, is an offence committed both by the married woman and the man. But in the present case the question is not whether such a contract can be specifically enforced in a Court of Law, but the question is whether an out and out transfer already effected in lieu of a consideration for immoral and even illegal, cohabitation is a nullity. When the agreement is that parties are to live in adulterous cohabitation in future the contract is obviously illegal, but if in order to compensate the woman for the past illicit connection, the offending party gives her some property I would not be prepared to say that the consideration for it is illegal. The offence had already been committed. Payment of compensation for a past criminal offence cannot be deemed to be illegal, even though under certain circumstances it may be immoral.

In my opinion there is a clear distinction between a mere contract to pay an allowance in future in order that an illicit connection be continued, and a transfer of property in favour of the woman for cohabitation which has already taken place. In the former case I would have no hesitation in saying that the agreement is illegal but in the latter case I would not be prepared to say that it is so.'

19. In AIR 1954 Tray-Co. 348 one Krishna Panicker had executed a gift deed in favour of the plaintiff in respect of the plaint property. The trial Court held that the plaintiff was not the legal wedded wife of Krishna Panicker, and the consideration of the gift deed was immoral. One of the questions raised before the High Court was whether the gift was void under Section 6(h) of the Transfer of Property Act on the ground that the object of the gift was immoral? It was held that the deed of transfer being a gift no question of consideration arises as gift is a transfer without consideration (vide section 122 of the Transfer of Property Act).

The learned Judge further observed that so long as Krishna Panicker regarded the plaintiff as his lawful wedded wife, it cannot be said that the object for executing the gift deed in her favour was illegal cohabitation with her.

20. As already stated above the present is not a case where future cohabitation can be considered to be an object of the gift. The question of consideration also does not arise in the present case because the impugned transaction is a gift and consequently a transfer without consideration. The only question, therefore, for decision is whether the gift in question should be considered as invalid on account of its object being immoral or opposed to public policy or is otherwise unlawful within the meaning of Section 23 of the Indian Contract Act, 1872? The word 'object' obviously refers to some purpose or decision for which a transfer is made or as observed by Patkar J., in *Sabava v. Yamanappa* AIR 1933 Bom 209.

'The object means the end for which the effort is directed or the thing aimed at, that which one endeavours to attain or carry out.'

Consequently, it cannot be said in the present case that the object of the donor was immoral or unlawful. It would have been so if the purpose or design for which the gift was made was future cohabitation between the donor and the donee. In

the present case. I think that the deed of gift was passed with the motive of recompensing the plaintiff Smt. Naraini Bai for past cohabitation as well as other services rendered by her as a mistress in the house to Gopal Lal. In this view of the matter. I find myself unable to hold that the object of the gift was illegal.

21. It has been pressed by the learned counsel for the respondent that past cohabitation in the present case amounted to an offence of adultery as provided in Section 497 of the Indian Penal Code. No such plea was raised by the defendant in the written statement nor any effort was made during the trial to prove that Gopal Lal knew or had reason to believe that the plaintiff was lawfully wedded wife of another man and that the sexual relationship which Gopal Lal had with her was without the consent or with the connivance of that man. The point which is sought to be argued is a mixed question of fact and law and in absence of clear evidence it would not be just and proper to uphold such a plea. Strong reliance has been placed by the learned counsel for the respondent on that part of the statement of Smt. Naraini where she has stated that after the 'Sanklap' at the Galta she and Gopal Lal began to live as man and wife and that her husband was alive at that time but was mad.

It is not clear how long the madness lasted and what sort of madness it was? On the basis of this evidence, the possibility of there being consent--express or implied or the concurrence of the plaintiff's husband in the act of her living as mistress of the deceased Gopal Lal cannot be altogether excluded. This statement, in my opinion, does not necessarily lead to the conclusion that Gopal Lal was committing offence of adultery as defined in Section 497 of the Indian Penal Code. All that can be said in the facts and circumstances of the case is that the motive behind making the gift was to recompense the plaintiff for her services as a wife including the past cohabitation. It cannot be said with any definiteness that the past cohabitation was adulterous as provided in Section 497 of the Indian Penal Code- The plaintiff has not come forward to enforce a contract the validity of which the defendant was impugning. The question is whether an out and out transfer by gift already effected in lieu of the plaintiff's services as a wife to the deceased Gopal Lal is a nullity? In the facts and circumstances of the present case, I am not prepared to hold that it is so.

22. The result is that I allow this appeal, set aside the judgment and decree by the Senior Civil Judge, No. 2 City, Jaipur and decree the plaintiff's suit for possession of the 'Kotha' in question and Rs. 68/- on account of mesne profits. However, in the circumstances of the case. I direct the parties to bear their own costs throughout

23. Learned counsel for the respondent prays for leave to appeal to Division Bench. Leave is granted.

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