(1981) 02 RAJ CK 0022

Rajasthan High Court (Jaipur Bench)

Case No: Civil Special Appeal No. 462 of 1971

Pyare Mohan		APPELLANT
	Vs	
Smt. Narayani		RESPONDENT

Date of Decision: Feb. 19, 1981

Acts Referred:

- Contract Act, 1872 - Section 23
- Transfer of Property Act, 1882 - Section 123, 3, 6

Citation: AIR 1982 Raj 43 : (1981) RLW 553 : (1981) WLN 616

Hon'ble Judges: Mahendra Bhushan, J; M.L. Shrimal, J

Bench: Division Bench

Advocate: R.K. Rastogi, for the Appellant; P.N. Datt and K.N. Tikku, for the Respondent

Final Decision: Dismissed

Judgement

Mahendra Bhushan, J.

This Civil Special Appeal u/s 18 of the Rajasthan High Court Ordinance, 1949, arises out of a suit which was instituted by the plaintiff-respondent, Smt. Narayani, against the defendant-appellant, pyare Mohan, for possession of a ''Kotha'''' described in para No. 4 of the plaint as well as for mesne profits amounting to Rs. 102/-.

2. The case of the plaintiff-respondent, as set out in the plaint, was that the house described in para No, 1 of the plaint of which the suit ''Kotha'' is a part belonged to one Gopal Lal, who died on June 15, 1956. The respondent had been living with said Gopal Lal since 10 Or 11 years before the latter''s death and in lieu of services rendered by the respondent, the deceased Gopal Lal executed a Rift deed Ex. 1 in respect of the whole house in her favour. It was also the case of the respondent that after the execution of the gift deed Ex. 1 she was put in possession of the gifted house. After the death of Gopal Lal, some time in the month of June. 1956, the plaintiff permitted the appellant who is Gopal Lal''s sister''s son and the appellant''s mother to live in the suit ''Kotha'' for few days. But when the respondent asked the

appellant and her mother to vacate the suit ''Kotha'', they refused to do so. The respondent on the aforesaid allegations filed a suit for possession of the house and mesne profits.

3. The suit was contested by the appellant, who denied the gift set UD by the respondent. It was also denied by him that the suit ''Kotha'' was occupied by him under the permission of the respondent and the appellant pleaded that the gift was void as its object was past cohabitation, which was immoral and further that the suit ''Kotha'' and the entire house of which it was a part had devolved upon him as a heir of Gopal Lal.

4. After framing necessary issues and recording evidence, the learned Munsiff; Jaipur City (East), by his judgment, dated October 13. 1961 decreed the respondent''s suit for possession of the suit ''Kotha'' and also granted a decree for Rs. 68/- on account of mesne profits. The appellant filed first appeal to the District Judge, Jaipur City, who transferred it for disposal in accordance with law to the Senior Civil Judge No. 2, Jaipur City, who allowed the appeal of the appellant, set aside the judgment and decree of the trial Court and dismissed the respondent''s suit by his judgment, dated October 12. 1964. Aggrieved against the aforesaid judgment, and decree of the first appellate court, the respondent, Smt. Narayani, filed a second appeal in this Court. The learned single Judge of Court allowed the appeal of the respondent, set aside the judgment of the first appellate court and restored that of the trial Court. The defendant-appellant has preferred this civil special appeal in this court.

5. Before us, the learned counsel for the appellant hag raised two points of law. The first is that the gift-deed, Ex. 1. has not been proved to be validly executed inasmuch as its attestation as per Section 3 of the T. P. Act has not been proved The second point is that the past cohabitation in between Gopal Lal and Narayani, respondent, was adulterous and as such was an offence u/s 497 I. P. C. Therefore, the consideration or object of Ex. 1, the gift-deed, being such which the Court regards as immoral or opposed to public policy, the same being unlawful, is void.

6. We will take the above points in the order in which they have been framed.

POINT No. 1:--

7. A look at Ex. 1, the gift-deed will show that it was scribed by Hari Narain, P. W. 5 and it was attested by two witnesses, namely, Narayan Sahai, P.W. 6, and one Manohar Datt Mathur. The learned single Judge on the evidence of P. W. 6, Narayan Sahai, has held that due attestation of the gift deed by Narayan Sahai as well as by Manohar Datt Mathur has been proved. The trial Court also reached to a finding that the execution of the gift-deed, Ex. 1, had been proved to the hilt and though this finding of the trial court does not appear to have been challenged before the first appellate Court as well as before the learned Single Judge, but on the strength of Section 123 read with Section 3 of the T. P. Act, an argument was advanced before

the learned Single Judge that the attestation in accordance with law has not been proved. The learned Single Judge, as stated earlier, after review of the evidence, held that the attestation has been proved in accordance with law. Mr. Rastogi, learned counsel for the appellant, contends that the learned Single Judge has misread the evidence of Narayan Sahai, P. W. 6. who, according to the learned counsel, does not prove the attestation of Ex. 1. the Rift-deed by Narayan Datt, who had not been examined. According to learned counsel, when Narayan Sahai did not prove the attestation of Ex. 1 in accordance with law, it was necessary for the respondent to examine Manohar Datt, the other attesting witness, and failure to examine Manohar Datt, in the facts and circumstances of this case is material and on the evidence on record the attestation. in accordance with Section 123 read with Section 3 of the T. P. Act, is not proved. In support of his contention Mr. Rastogi has placed reliance on M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, Balappa Tippanna v. Asangappa Mallappa; AIR 1960 Mys 234. Kali Charan v. Surai Ball; AIR 1941 Oud 89 and AIR 1939 117 (Privy Council)

8. Learned counsel for the respondent contends that if the evidence of scribe Hari Narayan, P. W. 5, is read along with the statement of Narayan Sahai, P. W. 6, the attesting witness, the finding of the Courts that the gift-deed was attested in accordance with law does not call for interference. He submits that while sitting in special appeal, this Court is slow to interfere with the finding of fact arrived at by the Courts unless the same is perverse. It is further contended that Ex. 1, the Rift-deed, provides intrinsic evidence and the fact that the signatures of scribe Hari Narain appeared at the bottom after the signatures of attesting witnesses goes to show that all series of acts of Ex. 1 including attestation by two witnesses were completed at one and the same time. In support of his submission learned counsel has placed reliance on Modilal v. Kanhiyalal 1966 R LW 197 , Smt. Ladhi Bai Vs. Thakur Shriji and Others, and Narayan, v. Chamber of Commerce Ltd., Kishangarh 1969 RLW 107 which were approved by the Division Bench of this court in D. B. Misc. Appeal No. 37 of 1970, Kanwarlal v. Mahesh Chandra, decided on November 20, 1980.

9. The learned counsel further contends that the proof contemplated in Section 68 of the Indian Evidence Act can also be furnished by the scribe of the document if the scribe signed the document as a scribe after the attesting witnesses had affixed their signatures. In case the scribe deposes that he saw not only the executant affixing his signatures but the attestation as well. In support of this submission the learned counsel has placed reliance on M. Venkatasubbaiah v. M. Subbamma AIR 1956 AP 195.

10. We have considered the rival contentions of the learned counsel for the parties and have gone through the authorities referred to above cited before us. u/s 3 of the Transfer of Property Act to attest is to bear witness to a fact. The essential conditions of a valid attestation, u/s 3 of the T. P. Act are; (1) Two or more witnesses have seen the executant sign the instrument or have received from him a personal

acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them, has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment 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. (See M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, Therefore, in view of this position of law the scribe Hari Narayan, P. W. 5, who put his signatures as a scribe, though at the bottom of the document Ex. I, cannot be said to be an attesting witness. Narayan Sahai, one of the two attesting witnesses who appeared as P. W. 6, has stated that Gopal Lal signed Ex. 1. in his presence and he too signed it at the instance of Gopal Lal. He has further stated that Manohar Datt also signed Ex. 1 as a witness. Though he does not remember as to whether Manohar Datt was- already present when he (Narayan Sahai) reached. He also does not remember as to whether Manohar Datt signed in his presence or not. But to our mind- that does not go to make any difference when the statement of Narayan Sahai P. W. 6, is read along with the statement of scribe, Hari Narain, and the other evidence on record. Circumstantial; evidence as a mode of proof of execution of a document cannot be excluded and in a given case such an evidence can prove the due execution which as already stated earlier includes attestation, of document, in accordance with law. We have already said earlier that such, circumstantial evidence may consist of the internal evidence contained in the document itself, and in our opinion, it can be in another form also. In a given case the presence of both of the attesting witnesses at the time of execution of the will, and the attestation by each of them can be inferred. Hari Narayan, P. W. 5. the scribe of EX. 1, has stated that Gopal Sahai signed EX. 1 at every page in his presence. Narayani accepted the gift and in token thereof signed each and every page of the gift He further states that Narayan Sahai and Manohar Datt hid attested the deed. From his statement it can be said that all series Of acts, namely, the scribing of Ex. 1, signatures of Gopal Lal, the signatures of the witnesses and the signatures of Narayani in token of acceptance of the gift, took place at one and the same time, i.e., all series of acts towards the execution of Ex, 1 took place at one and the same time. Merely because, Narayanj Sahai, p. W. G, perhaps due to lapse of: memory, could not say as to whether Manohar Datt, the other attesting wit ness, also signed in his presence, it cannot be said that the attestation of Ex. 1 did not take place in accordance with Section 123 read with Section 3 of the Transfer of property Act. That apart, a look at Ex. 1, the gift deed, will show that H has been written in the same ink. The signatures of Hari Narayan as scribe appear at the bottom, i. e., after the signatures of Gopal Lal, the thumb mark of Smt. Narayani and the signatures of two attesting witnesses, namely, Narayan Sahai. p. W. 6 and Manohar Datt. This circumstance also leads to an inference that the entire document Ex. 1 was executed at one and the same time. The result of this discussion is that the finding of the learned single Judge as well as of the two Courts

below that execution of the deed Ex. 1 hag been proved to the hilt, does not call for an interference in this special appeal. POINT No. 2:--

11. The proposition that if the consideration or object of the gift is held to be the past cohabitation, the gift would not be void as being immoral or opposed to public policy, is so well settled that it hardly needs any reference to any decided case. But it will suffice to refer to Dwarampudi Nagaratnamba Vs. Kunuku Ramayya and Another, wherein it has been held that past services as a concubine could not be treated u/s 2 (d) of the Indian Contract Act as a subsisting consideration for his subsequent promise to transfer the properties by paramour to his concubine Similarly, 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 is settled. Mr. Rastogi. learned counsel for the appellant, has no quarrel with either of the two aforesaid propositions of law. His contention is that because the past cohabitation between Gopal Lal and Smt. Narayani amounted to adulterous intercourse which is an offence u/s 497 L P. C. the object of the gift was forbidden by law and at any rate was such which the Court regards immoral or opposed to public policy and as such it is void u/s 23 of the Contract Act Thus, according to the learned counsel cases where the consideration or object Of the gift is such past cohabitation which is adulterous intercourse and as such an offence u/s 497 I- P. C. have to be distinguished from those cases where the consideration or object of the gift is only past cohabitation not amounting to an offence. In support of his submission Mr. Ragtogi, learned counsel for the appellant, has made a reference to Manicka Gounder Vs. Muniammal, and Mt. Mahtab-un-Nissa Vs. Rafaqat Ullah and Others, In Manicka''s case (supra) the consideration for the agreement Ex. A. 1, a promissory note, was past cohabitation amounting to adulterous intercourse. In para 9 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 Rood consideration. But, even so, the difficulty is obvious that, though this consideration is not forbidden by any law, nevertheless, it fills 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."

The learned Judge further in para 10 observed:

"But, in any event, there can be no doubt whatever that where the illicit connection is adulterous intercourse and, therefore, it is opposed to law, it cannot possibly sustain a promise to pay, or constitute a valid consideration."

It may be stated here that the learned Judge was dealing with a caw of pronote Ex. A. 1 for Rs. 810/- for which there was no cash consideration ex facie and the consideration admittedly was past cohabitation between the parties which admittedly amounted to .adulterous intercourse. So far as the gift is concerned it is a transfer without consideration and as observed by their Lordships of the Supreme Court in Dwarampudi Nagaratnamba Vs. Kunuku Ramayya and Another, the gifts are not hit by Section 6(h) of the T. P. Act. Therefore, to our mind, the cases of gifts cannot be equated with the cases of pronotes which are executed for one consideration or the other.

12. In Mt. Mahtab-un-Nissa Vs. Rafaqat Ullah and Others, the eminent Judge Sulaiman J, observed as follows.

"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 co-habitation in future the contract is obviously illegal, but if in order to compensate the woman far 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 hi 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."

13. Section 23 of the Contract Act only deals with a consideration or object of an agreement We have already said earlier that a gift is a transfer without ''consideration'' and therefore, the question of ''consideration'' does not arise jn the case of gift. The word object'' in "Section 23 of the Contract Act means purpose or design. Past cohabitation, even if adulterous, to our mind, cannot be an object of an agreement in case of gifts, and u/s 28 of the Contract Act is only an object of the agreement and not the motives of the parties that has to be considered. In Dwarampudi Nagaratnamba Vs. Kunuku Ramayya and Another, their Lordships observed;

"Venkatacharyulu and the appellant were parties to an illicit intercourse. The two agreed to co-habit, pursuant to the agreement each rendered services to the other. Her services were given in exchange for his promise under which she obtained similar services. In lieu of her services, he promised to give his services only and hot his properties. Having once operated as the consideration for his earlier promise, her past services cannot be treated u/s 2(d) of the Indian Contract Act as a

subsisting consideration for his subsequent promise to transfer the properties to her. The past cohabitation was the motive and not the consideration for the transfers under Exts. A-1 and A-2".

In the instant case as a result of perusal of Ex. A-1, a settlement deed executed earlier; the gift by Gopal Lal in favour of Narayani and the other material on record, in disagreement with the learned single Judge, we are of the opinion that Gopal Lal knew that Narayani was a married wife and her husband was alive. There is no pleading or material on record that the intercourse in between Narayani and Gopal Lal was with the consent of the husband of Smt. Narayani. We are also unable to agree with the learned single Judge that no plea of the , cohabitation in between Gopal Lal and Smt. Narayani amounting to an offence of adultery, was raised by the defendant in the written statement. A look at para 15 of the additional plea of the written statement will show that a plea has been clearly raised therein that the services of Narayani which have been referred to in the gift-deed, are immoral and also amount to adultery because the husband of Narayani was alive. But we have said earlier that Section 23 of the Contract Act will only apply in such cases where the consideration or object of an agreement is such which the Court regards as immoral or opposed to public policy. The agreement to cohabit in between Gopal Lal and, Narayani had been arrived at much earlier than the execution of the gift. Each rendered services to the other pursuant to the aforesaid agreement. The past cohabitation, which though was adulterous, was only motive and not the consideration or object of the gift. Therefore, we are of the opinion that Section 23 of the Contract Act is not attracted to such cases as it only applies to the consideration or object of an agreement which the court regards immoral or opposed to public policy. In the present case the deed of gift was executed with the motive of recompensating Smt. Narayani for past cohabitation as well as for further services rendered by her to Gopal Lal in his house.

14. No other point has been canvassed.

15. We are, therefore, of the opinion that this special appeal has no force and is dismissed with costs.