(1945) 10 BOM CK 0012

Bombay High Court

Case No: None

Istak Kamu Musalman	APPELLANT
Vs	
Ranchod Zipru Bhate and Others	RESPONDENT

Date of Decision: Oct. 12, 1945

Acts Referred:

- Contract Act, 1872 - Section 23
- Transfer of Property Act, 1882 - Section 6(h)

Citation: AIR 1947 Bom 198

Hon'ble Judges: Lokur, J

Bench: Division Bench

Judgement

Lokur, J.

This appeal arises out of a suit filed by the plaintiff for a declaration that certain gifts were void, for recovering one-third share in the properties conveyed by them and for other ancillary reliefs. The main facts in this case are undisputed. Chunilal, a wealthy but profligate Bania of Dharangaon, died without issue on 12th April 1938. In 1908 when he was forty years of age, he brought defendant 1, a Mahomedan prostitute girl of fifteen, from Aurangabad, and kept her as her mistress. He kept her in a separate bungalow till the death of his wife Kasabai in 1931, and thereafter they lived together in the same house. On 5th January 1914, six years after defendant 1 became his mistress, Chunilal gave her a bungalow worth Rs. 1000 and two lands worth Rs. 3000 by two gift deeds, Exs. 181 and 183, and another house worth Rs. 500 in 1926 by the gift deed, Ex. 188. He then passed four more deeds of gift in her favour in 1929 and 1931, and two in favour of her brother, defendant 2, in 1931 and 1932. The properties thus gifted were given into their possession and are in their enjoyment. The plaintiff and defendants 3 and 4 are the grandsons of Chunilal''s separated uncles and claim to be his nearest heirs. The plaintiff brought this suit to recover by partition his one-third share in Chunilal''s property, alleging that all the gift-deeds passed by him in favour of defendants 1 and 2 were void, as

their consideration was past and future cohabitation with defendant 1. The lower Court held that the plaintiff and defendants 3 and 4 were the nearest heirs of Chunilal, and the gifts were void, but the claim to recover the properties given under Exs. 182, 183 and 188 was time-barred. A preliminary decree for partition of the properties conveyed by the other six gift deeds was passed in favour of the plaintiff. This is an appeal against that decree by defendant 1 alone. Defendant 2 has not appealed, and thus we are concerned in this appeal only with four gift deeds, Exs. 185, 189, 184 and 186.

2. There is no substance in the contention of defendants 1 and 2 that the plaintiff and defendants 3 and 4 are not the nearest heirs of Chunilal. It was suggested in the plaintiff''s cross-examination that Chunilal had five sisters and it is urged that the plaintiff has not proved that none of them left any male issue at the date of Chunilal''s death. Chunilal was taken in adoption by Laxmandas and the said sisters are the daughters of Laxmandas including Chunilal''s own mother Tapabai. Of the five sisters it is admitted that Ramabai and Chaturbai had no issue. The plaintiff admitted that Tapabai, Chunilal''s mother, Mathurabai and Bhimabai had issue and the plaintiff says that he did not make any inquiries about these. It is contended, therefore, that the burden of proving that there were no nearer relations to Chunilal at the date of his death lay on the plaintiff, and as the plaintiff on his own showing did not make any enquiries about the sons of Chunilal''s sisters, who would be his legal heirs in preference to himself and defendants 3 and 4, he is not entitled to any relief. There is some force in this contention. But defendant 1 who was examined on commission herself admits that on Chunilal''s death she had sent a motor car to invite the plaintiff, his son and defendant 3 and that they were the only nearest relatives of the deceased. She frankly admits that she does not know that deceased Chunilal had any other nearer relative. She has nowhere suggested that any of Chunilal''s sisters had issue living at the date of his death. No son of Chunilal''s sisters is mentioned or coming forward. Defendant 4 says that deceased Chunilal had no heirs of his sisters and that himself, defendant 3 and the plaintiff are his heirs and the nearest bhaubands. He, however, says that when Chunilal died none of his sisters nor any of their sons was alive. His evidence has been believed by the lower Court. The plaintiff''s witnesses do not help the plaintiff since they speak of only two sisters of Chunilal and therefore, do not know anything about the other three sisters and their sons. But on the evidence of defendant 4 and the admission of defendant 1 we hold that the plaintiff and defendants 3 and 4 are the nearest heirs of deceased Chunilal. The plaintiff having died during the pendency of the suit his sons were brought on record and they continued the suit.

3. Two questions arise with regard to the claim for the properties conveyed by Chunilal to defendant 1, whether the four deeds of gift are void, and if they are, whether Chunilal''s heirs are estopped from seeking to recover them as the deeds of gift were acted upon. The lower Court has found in favour of the plaintiff on both these points.

4. All the four documents, Exs. 185, 189,184 and 186, are described as deeds of gift, pure and simple, and were passed by Chunilal when defendant 1 was in his keeping as his mistress. This fact is recited in the deeds, but there is no reference in them to the continuance of the cohabitation in future. Mr. Shah, the learned Counsel for the plaintiff, contends that although they are nominally gifts, they are really transfers, having for their object or consideration past cohabitation, and that they are void u/s 6(h), T.P. Act, read with Section 23, Contract Act.

5. u/s 23, Contract Act, the consideration or object of an agreement is unlawful if the Court regards it as immoral or opposed to public policy, and every agreement of which the object or consideration is unlawful is void. Clause 2 of Section 6(h), T.P. Act, says:

No transfer can be made for an unlawful object or consideration within the meaning of Section 23, Contract Act, 1872.

6. There is no doubt that a transfer in consideration of future illicit cohabitation is for an immoral consideration and is, therefore, void. But there is a difference of opinion as to whether past cohabitation can or cannot be a valid consideration for a transfer. It is said that while the High Courts of Allahabad, Patna and Madras regard it as a valid consideration, this Court has taken a different view. No one is likely to say that illicit cohabitation ceases to be immoral when it is a past act. An analysis of the different cases shows that each depended on the nature of the transfer and some excuse was found to get over this difficulty.

7. In the oft-cited case in 3 ALL. 7871 past cohabitation was not held to be the "consideration" for the agreement. The learned Judges observed, when a man promises to pay a woman a certain allowance in consideration of past cohabitation, it simply comes to this that he undertakes to compensate the woman for past services voluntarily rendered to him, for which no consideration would be necessary. Thus this was a case of an agreement, and it was held to fall within the exception contained in Section 25, Clause (2), Contract Act. In 26 Bom. 1632 Chandavarkar J., cited this case with approval and adopted the principle laid down in it. The same view was taken by the Allahabad High Court in AIR 1925 ALL. 4743 and also by the Madras High Court in AIR 1943 Mad. 253 and by the Patna High Court in 17 Pat. 308

8. This High Court has, however, distinguished the cases where past illicit cohabitation is the consideration or object of a transfer from those where it is only a motive for it. In 44 Bom. 5427 Macleod C.J., observed in general terms that past cohabitation would not be good consideration for transfer of property. He did not discuss the point further, as the gift was held void on another ground. He discussed it at some length in 25 Bom. L.R. 2528 and refused to agree with the view that a promise to pay a woman an allowance on account of past cohabitation could be regarded as an undertaking by the promisor to compensate the promisee for past

services voluntarily rendered. The word "voluntarily" must necessarily exclude anything done at the request of the promisor and it is impossible to consider the service of cohabitation rendered by a mistress to her paramour except as service rendered at his request. According to the definition given in Section 2(d), Contract Act, past cohabitation can be consideration but it would not be good consideration by reason of its immorality. On p. 261, Macleod C.J., observed:

It cannot be said that the object; of an agreement to provide for the future maintenance of a mistress after the connection has ceased is unlawful.

9. In 17 Pat. 3086 Courtney-Terrel C.J., cited this passage in support of his finding that a contract to compensate a woman for past services as a mistress is not void, but he overlooked the next observation where Macleod C.J., pointed out the difference between "object" and "consideration". In the very next sentence he said:

But the consideration for an agreement is quite separate from the object and both must be lawful to make the agreement enforceable at law.

10. This distinction is still more clearly brought out by Patkar J. in 35 Bom. L.R. 345 In that case one Sabu had sold certain lands to his mistress Sabawa for Rs. 800 in 1903, and made a gift of certain other lands in 1917 when he was ill and he died within a few months thereafter. As regards the sale-deed it was found that there was really no cash consideration but it had been passed for past and future cohabitation. Patkar J., observed (p. 350):

Ordinarily the consideration for a sale is a valuable consideration or price, and it is difficult to hold that past cohabitation, besides being immoral, is a valuable consideration. The sale-deed might, therefore, amount to a gift.

11. He was, therefore, not prepared to hold the transfer void on the ground of the immorality of its consideration, but holding that the "object" of the deed was either past or future cohabitation, he observed (p. 350):

The word ''object'' in Section 23, Contract Act, is distinct from ''consideration'' and means something aimed at, and has been held to mean purpose or design.... If the object of a transfer of property is immoral, the transfer is void. The object of the sale-deed in the present case was future cohabitation and might also be Maid to be a reward for past cohabitation.

12. It may be noted that he did not regard past cohabitation to be the object of the sale-deed. He made this clear when dealing with the deed of gift of 1917. He said (p. 354):

A deed of gift does not require any consideration. According to Section 122, T.P. Act, a gift is a transfer made voluntarily and without consideration. The question is whether the object is immoral or unlawful within the meaning of Section 23, Contract Act. In the present case, I think that the deed of gift was passed with the

motive of recompensing defendant 1 for past cohabitation and with the object of maintaining the immoral relation with defendant 1 in the future. The object, in my opinion, is something which is to be aimed at contemporaneously or in future as being some purpose or design for which a transfer is made. The object means the end to which the effort is directed or the thing aimed at, that which one endeavours to attain or carry out. In the present case there was the immoral object so far as the future cohabitation with defendant 1 was contemplated by Sabu.... The past cohabitation may be a motive for the gift, but, in my opinion, cannot be said to be an object which implies something aimed at simultaneously or in the future. Past cohabitation would be consideration for an agreement u/s 2(d), Contract Act, but is not good consideration for a transfer of property.

A gift does not require consideration. It is difficult to hold that past cohabitation can be an object of a gift. Future cohabitation can be considered to be an object of the gift.

13. We respectfully agree with this view. According to Webster''s International Dictionary "object" means "that on which the purposes are fixed as the end of action or effort; that which is sought for", whereas "motive" means that which incites to action; anything prompting the will; reason. A gift does not require any consideration, and past cohabitation may be its motive, but cannot be its object. Hence a transfer made out of gratitude for or with the idea of recompensing past cohabitation is not per se void u/s 6(h), T.P. Act, read with Section 23, Contract Act.

14. In the case of such gifts there is another aspect which cannot be lost sight of. That aspect was considered by Barlee J. While admitting the view of Patkar J. that a gift needs no consideration, and that past cohabitation cannot be its "object" but only a "motive", he differed from his finding that the gift in question had for its object future cohabitation since Sabu was admittedly very ill and was only making arrangements for the time when his mistress would be left alone. Had the matter stood there, he would have held the gift to be valid. But he examined the evidence with a view to find out whether the past cohabitation was merely the motive for the gift or whether a promise had been previously made by Sabu to Sabava in return for it so as to constitute an agreement. On the evidence of the writer of the deed of gift he held that there was such an agreement preceding the deed, and observed (p. 359):

If there was an agreement it would obviously have been unenforceable; and since Section 23, Contract Act, has been incorporated in the Transfer of Property Act, the conveyance made in discharge of the agreement was invalid. If on the other hand there was no promise which linked the past concubinage with the conveyance, the latter is unimpeachable.

15. The principle underlying this reasoning was applied in the earlier case in 30 Bom. L.R. 451 In that case, the plaintiff''s deceased brother had passed an

unregistered document, styled as a deed of gift, conveying some property to the defendant, who had attended upon him during his last illness. The plaintiff contended that the document was a deed of gift and required registration. The defence was that it was not a transfer without consideration, but the consideration consisted of the services rendered by the defendant during his illness so as to be good consideration u/s 2, Clause (d), Contract Act. There was no allegation that at the time the defendant was attending on the deceased, there was any promise or agreement of payment, much less of payment by transfer of land, and that "while there was hope on the part of the defendant, there was no promise or agreement on the part of the deceased." Hence the transfer was held to be a gift without consideration. The same view was taken by Chandavarkar J. in 12 Bom. L.R. 9 where he observed (p. 12): "The rendering of the services was not the consideration but merely the motive of the grant."

16. As observed in 28 Mad. 41312 the question whether what is transferred has in truth been transferred by way of gift or not must depend on the actual intention of the parties and the facts of the particular case.

17. Although a document is styled as a gift, yet under proviso (6) to Section 92, Evidence Act, it is open to a party to prove that there was a consideration for it or that it was passed in the discharge of an antecedent agreement. u/s 25, Contract Act, an agreement made without consideration is void, but under Clause (2) of that section an agreement is valid if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor. As held in 20 Bom. 75513 this covers cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertakes to compensate him for it. Such service is not consideration within the definition in Section 2(d). But service rendered at the request or desire of the promisor is consideration under that section. Past illicit cohabitation is service of the latter class, since in the words of Macleod C.J., in 25 Bom. L.R. 2528 "It is impossible to consider the service of a woman rendered as a mistress to her paramour except as services rendered at his request." Hence Section 25, Clause (a), Contract Act, is inapplicable to an agreement in consideration of past illicit cohabitation, and as such consideration must be regarded as Immoral, the agreement is void u/s 23.

18. The following propositions emerge from all this discussion: (1) An agreement or transfer of property, whose object or consideration is future illicit cohabitation, is void; (2) a gift requires no consideration and past illicit cohabitation can be a motive for a gift but not its object or consideration; and does not render the gift void, (3) u/s 2(d), Contract Act, past illicit cohabitation can be the consideration for an agreement or a transfer of property other than a gift and such an agreement or transfer is void; and (4) if such a void agreement precedes a gift and the gift is made in discharge of that agreement, then the gift also is void.

19. Applying these principles to the four deeds of gift with which this appeal is concerned, we find that Exs. 185, 189 and 184 fall under the fourth proposition, while Ex. 186 falls under the second. In every one of the deeds Exs. 185, 189 and 184, the donor says:

For about... years now you have been living with me and until this day you have been conducting yourself according to my desire and have lived according to my advice. Hence as I agreed with you, I voluntarily make in your favour a gift of the following property.

20. This expressly refers to a previous agreement to make a gift, and the gift was made in discharge of that agreement. The agreement was obviously made in consideration of past illicit cohabitation, and was, therefore, void. Hence these three deeds of gift (Exs. 189, 185 and 184) must be held to be void. But there is no such recital in Ex. 186. On the other hand it says:

For twenty-two years now you have been living with me, and you have served me well in various ways. In my illness and on various occasions of my wants, you have made yourself useful to me in various ways. For this reason (in Marathi (SIC)) I voluntarily make a gift of the following property to you.

Here the past cohabitation and useful service are mentioned as the motive for the gift, and there was no antecedent promise or agreement that such a gift would be made. We, therefore, hold this gift to be valid.

21. Mr. Coyajee contends on behalf of defendant No. 1 that although the gifts under exhibits 189, 185 and 184 be void, they were acted upon and on the equitable principle laid down in the leading case in (1873) 16 Eq. 27514 the plaintiff is estopped from claiming possession of the properties conveyed by them. In that case Mr. Hardinge, a widower of mature age, having agreed with Isabella Buckton, his deceased wife''s sister, to cohabit with her under colour of a fictitious marriage, (a marriage between them being invalid), he made certain settlements on her for her immediate, absolute and unconditional benefit. That settlement was not understood to be binding her to the fulfillment of the promise of cohabitation previously made. Two days thereafter they went through the form of a marriage ceremony, and lived together till his death, which happened four months thereafter. She enjoyed the benefits of the settlements for nine years and then married another without any settlement, relying on the provision made for her by Mr. Hardinge. Two years later Mr. Hardinge''s legal representative sued to have the deed of settlement set aside, as founded on illegal consideration and, therefore, void. In throwing out the claim, Lord Selborne L.C. observed (p. 283):

In the present case relief is sought by the representative, not merely of a particeps criminis, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that not against a bond or covenant or other obligation resting in fieri, but against a completed transfer of specific chattels, by

which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires, or authorizes, a Court of Equity to give assistance to such a plaintiff under such circumstances.

In explaining this Lord Selborne L.C. said (p. 283):

If public policy is opposed (as it is) to vice and immorality, it is no less true,... that the law, in sanctioning the defence of ''particeps criminis,'' does so on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection.

22. Mr. Coyajee relies upon 44 Mad. 329l5 where this doctrine was applied, and Abdur Rahim J. observed that when a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the particeps criminis to relieve him from the legal effects of the transaction. This would be certainly true of a transaction which is voidable on the ground of fraud, undue influence and the like. Such a case would be governed by the propositions laid down by my learned brother in the Full Bench case in 43 Bom. L.R. 68118 . Abdur Rahim J. has copiously quoted passages from Ayerst''s case but has omitted to refer to the passages which indicate the in applicability of the doctrine to transactions which are forbidden by law and are void. On p. 283, Lord Selborne, L.C., says:

It is a maxim of law not opposed to any equity, that ''in pari delicto melior est conditio possidentis;'' and it is a principle of equity that long delay in seeking to rescind a transaction originally voidable, on the faith of which other persons have irrevocably made their arrangements in life, may operate as a bar to relief.

That this does not apply to void transactions is made still more clear in the following passage on the same page:

When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of one''s own property by one particeps criminis to another, is in itself neither fraudulent nor prohibited by law;

23. But in India a transfer for an unlawful object or consideration within the meaning of Section 23, Contract Act, is expressly prohibited by Section 6(h), T.P. Act. If the doctrine be extended to such transfers, the prohibition would be meaningless. This distinction has been emphasized by Lord Selborne on p. 284, where he says:

.... I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the defendant''s trustees to be), and a bond or covenant for an illegal consideration, which has no effect

whatever in law.

24. Following this principle, the Madras High Court held in 28 Mad. 41312 that where a transaction, though completed, was intended to be for consideration, it could be impeached if the consideration was immoral, and it made no difference whether the transaction was executed or executory. We entirely agree with this view.

25. It is argued that if the transfer is for future cohabitation and the donee in consideration of the transfer has allowed cohabitation, a Court of Equity would not help the transferor to recover the property transferred on the ground that the transfer was void. This is quite in accord with the doctrine laid down in (1873) 16 Eq. 27514 and the observations of Patkar J. in 35 Bom. L.R. 345 But it is not necessary for us to consider this contention since in the case of the three transfers effected by exhibits 189, 184 and 185, which are held to be void, there was no stipulation of future cohabitation, and defendant No. 1 did not allow cohabitation by reason of the gifts. Hence we hold that the plaintiff and defendants Nos. 3 and 4 are not estopped from impeaching them and seeking to recover the properties conveyed by them. The plaintiff''s contention that all the gift deeds are vitiated by the undue influence exercised by defendant No. 1 and her brother defendant No. 2 on Chunilal was not upheld by the lower Court and was not pressed in this Court.

26. The plaintiff and defendants Nos. 3 and 4 have put in cross-objections in respect of their claim for the lands conveyed to defendant 1 by exhibits 182, 183 and 188 which has been disallowed by the lower Court as time-barred. By exhibits 182 and 183, a bungalow and two lands were given to defendant 1 on 5-1-1914, and by exhibit 188, a house and a site were given to her on 15-2-1926. She was put into possession immediately on the execution of the deeds and she has been continuously in enjoyment till now. This suit was filed on 3-1-1939, more than twelve years after she took possession of the properties, and if the gifts are void her possession would be adverse against Chunilal. The plaintiff''s claim is, therefore, time-barred under Article 144, Sch. 1, Limitation Act. It is, however, contended on behalf of the plaintiff that Chunilal also was living with defendant 1 and, therefore, her possession cannot be regarded as adverse to him. The evidence shows that Chunilal had kept defendant 1 and her brother in his bungalow and he conveyed that bungalow to her by exhibit 182 in 1914. During his wife''s lifetime he was only going to that bungalow for sleeping. His wife died in 1931 and by that time defendant 1''s adverse possession of that bungalow for more than twelve years had been completed. It is clear from her evidence that she used to let out the lands conveyed to her, take rent-notes in her own name and recover the income of all the properties gifted to her. In the Record of Rights the lands were entered in her name; and the bungalow and the house were entered in her name in the Municipal Register. There is nothing to show that Chunilal partook of any income of any of those properties after he gifted them to defendant 1. We, therefore, agree with the finding of the lower Court that defendant 1''s title to the property became perfected

twelve years after the deeds of gift were passed in her favour. The cross-objections must, therefore, be dismissed.

27. After Chunilal''s death on 12-4-1935, defendant 1 required money for his obsequies and she borrowed Rs. 3500 from defendant 23 by mortgaging the northern half of city survey No. 1898 of Jalgaon which had been gifted to her by Chunilal by exhibit 186. The lower Court held that the plaintiff and defendants 3 and 4 were entitled to recover the properties conveyed by that gift-deed free of defendant 23''s encumbrance. He, therefore, filed appeal No. 140 of 1943 contending that he was a bona fide mortgagee for value and that his mortgage was binding on the property u/s 41, T.P. Act, even if the deed of gift be void. We have now held that the gift made by exhibit 186 is valid and that the plaintiff and defendants 3 and 4 are not entitled to recover the properties conveyed by it. It follows, therefore, that defendant 23''s rights as a mortgagee from defendant 1 remain unaffected. His appeal must, therefore, be allowed.

28. The result is that we modify the decree of the lower Court by substituting the figures "182, 183, 186, 187 and 188" for the figures "182, 183, 187 and 188" wherever they appear in the decretal order and by substituting "serial Nos. 1 to 4 and 9 in schedule c" for "serial Nos. 1 to 4 in schedule B." As regards the costs we modify the order of the lower Court by ordering that defendant 23 shall recover his costs, from the plaintiff, the pleader''s fees being calculated on Rs. 1166-10-8 at which he has valued the claim in appeal No. 140 of 1943. The other parties shall bear their own costs both in the lower Court and in this Court. In other respects the decree of the Court is confirmed. The cross-objections are dismissed with costs.

29. In Appeal No. 140 of 1943 the appellant''s costs shall be paid by the plaintiff and defendants 3 and 4. The other parties will bear their own costs.