

(1986) 10 MP CK 0023
In the Madhya Pradesh High Court
Case No : Second Appeal No. 266 of 1973

Nihal Singh

APPELLANT

Vs

Ram Bai

RESPONDENT

Date of Decision : 03-10-1986

Acts Referred:

Constitution of India, 1950 — Article 13(2), 21, 23
Contract Act, 1872 — Section 23, 65

Citation : AIR 1987 MP 126

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : Arun Mishra, for the Appellant; D.K. Katare, for the Respondent

Final Decision : Allowed

Judgement

T.N. Singh, J.—A woman was sold, mercifully not in an open market. Because the sale failed, the buyer has sued for refund of the consideration. Was sale not traffic in human beings, prohibited by Article 23 of the Constitution? May be, the sale has not attracted, in terms, the Suppression of Immoral Traffic in Women and Girls Act, 1956, for short, the Immoral Traffic Act. But, the moot question is, whether the plaintiff is entitled to the relief claimed, invoking Section-65 of the Contract Act, for short, the "Act".

2. Both the Courts below having decreed plaintiffs suit, defendant has appealed to this Court. The facts of the case lie within a narrow compass. The basis of the suit evidently is a caste-custom. The question, therefore, would also be whether such custom does at all survive after the Constitution came into force. Plaintiffs case was that she was Dangi by caste and had a son named Laxman who could not be married at an early age according to custom prevalent among people of Dangi caste. Because her son, who was aged 24 years, had lost all hopes of marriage, she contracted with the defendant to arrange a Dangi woman for her son who could be kept by him as his mistress. The defendant was paid Rs. 4,000/- for a woman whom he sent to plaintiffs house representing that she was

a Dangi woman. For hardly 20 days, the woman had lived with her son when she got a message from the defendant that a warrant had been issued against the woman from the Court and she should, therefore, be sent back to the village. Thus, she, went back, not to return ever thereafter. Later when it was discovered that the woman was a Bedhni (dancing girl), plaintiff asked the defendant to refund the amount, when he refused to do. Defendant denied all allegations and also pleaded that the contract was void and was unenforceable; and that the suit was not maintainable.

3. Two Courts below concurrently held that the defendant had obtained Rs. 4,000/- from the plaintiff fraudulently on the condition of supplying a Dangi woman for her son. But invoking Section 65 of the Act, the Court of appeal below affirmed trial Court's decree, albeit relying on the decisions reported in P.R. Srinivasa Aiyar Vs. A. Sesha Aiyar and Another, , AIR 1944 159 (Nagpur) and Bhan Singh AIR 1933 Lah 849 (2) to which I shall advert in due course.

4. In this Court, learned counsel for the plaintiff/respondent has tried to support the decrees passed by the two Courts below on the basis of decisions above-referred of. High Courts of Madras, Nagpur and Lahore and has cited two more decisions. Before I proceed to look at those decisions, I would extract below Section 65 of the Contract Act, because judicial opinion on the interpretation of the provision is equivocal and not unanimous :

"65. Obligation of person who has received advantage under void agreement, or contract that becomes void -- when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

5. In P.R. Srinivasa Aiyar Vs. A. Sesha Aiyar and Another, , one of the learned Judges constituting the Bench was definitely of the view that the words "discovered to be void" in Section 65 should be construed to mean "an agreement which was void ab initio, but not then known to the parties to be so, than an agreement of which the illegality must be taken to have been always known to them". The basis of the distinction is difficult to follow because the contract in that case was of "marriage-brokerage" which was held void u/s 23 of the Act. In AIR 1944 159 (Nagpur) , this decision was relied on and the Division Bench took the same view dissenting from the view taken by a Division Bench of Calcutta High Court in the case of Ledu, AIR 1916 Cal 266 even though the Calcutta case did not concern a contract for marriage-brokerage, as was the case before their Lordships of Nagpur and Madras High Courts. Tek Chand, J. in Bhan Singh (AIR 1933 Lah 849 (2)) (supra), in dealing with a contract for marriage-brokerage, even without the aid of Section 65 took the view that the agreement having remained unfulfilled, the plaintiff was entitled to refund of the consideration relying on an earlier decision of the same Court,

6. Another pre-constitution decision relied on by Shri Katare is the case of

Dharnidhar Vs. Kanhji Sahay, which, however, did not deal with contract for marriage-brokerage, but with a marriage contract between parents of Bride and the bridegroom. The Judges constituting the Bench differed, but it was held still, *per curiam*, that the plaintiff was entitled to refund only of that part of the money which had already been expended by the defendant towards the purpose for which it was given. Manoharlal, J. observed that in an earlier decision of a Division Bench of the same Court, the view expressed by the Calcutta High Court in the case of Bashi Das (1905) 1 Cal LJ 261 was approved that although "marriage-brokerage" was opposed to public policy, yet suit was held maintainable for recovery of any amount actually paid if the contract was broken. Ramaswami, J., on the other hand, referred to Manu Smriti and observed that Shastric Law prohibited sale of one's off-spring. However, his Lordship, though he referred to the maxims *restitutio in integrum* and *ex turpi causa non oritur actio* eventually took the view that Mitakshara treated "betrothal" as a binding promise and also relied on P.R. Srinivasa Aiyar Vs. A. Sesha Aiyar and Another, as also on another decision of the Bombay High Court to decree plaintiffs suit for a part of the claim.

The case of Rayudu Pallamsetti and Another Vs. Dommeti Sriramulu, , had similar facts in that contract was between parents, of the bride and bridegroom and a learned single Judge of Andhra Pradesh High Court took the view that the plaintiff had a right of restitution of money advanced and that only in cases where there was part-performance of illegal contract, the Court will not render assistance in the recovery of moneys advanced for an illegal purpose. I have no doubt that the two last-cited decisions have a marginal bearing only on the facts of the instant case and it is not necessary, therefore, to say anything more about them. True, the facts of the other decisions do resemble to the fact situation of the instant case.

7. Before I proceed to examine and discuss decisions cited by appellant's counsel Shri Mishra, I would prefer to express my view that it is not possible to concur with the interpretation of the expression "discovered to be void" which finds place in the decisions aforecited of Lahore, Madras and Nagpur High Courts for several reasons, evidently because the pre-constitution position has ceased to be valid and effective. However, I would like to say also that Section 65 of the Act is not in derogation of the Common Law maxims *Ex dolo malo non oritur actio*, (for short "ex dolo malo") and *In pari delicto potior est conditio possidentis*, (for short, "in pari delicto") and that this position has not been noticed in some other cases as well. Indeed, in two cases no primacy is attached to this position. I am prepared to take the view that only those cases as are not covered by the maxims aforesaid can only attract application of the provision of Section 65 on the footing that when an agreement in its inception was not void and it was hit by the maxims but is "discovered to be void" subsequently, right to restitution of the advantage received under such agreement is secured on equitable consideration.

8. In Wharton's Law Lexicon (Fourteenth Edition), the implications of the two maxims are stated. "Where both parties are equally in the wrong, the defendant holds the stronger ground" and, therefore, according to the maxim *in pari delicto*, "the law will take notice of an illegal transaction to defeat a suit". According to *Corpus Juris Secundum* (Vol. 42), the terms "*In pari delicto*" is said to mean that two parties are equally culpable or criminal and further that when parties to an action or transaction are "*in pari delicto*" neither could secure affirmative relief at law or at equity. Broom's Legal Maxims also says that the maxim is founded on public policy that "the Court will not assist an illegal transaction in any respect" and as such, the plaintiff who had paid any money in pursuance of an illegal or immoral contract cannot recover it back because of the settled position in Common Law under the maxim "*in pari delicto*". In *Corpus Juris Secundum*, Vol. 33, the maxim *Ex dolo malo non oritur actio* is discussed and it is stated that it "lies at the foundation of a general rule of public policy, the rule that the Courts will not sustain an ; action which arises out of the moral turpitude of the plaintiff or out of his violation of a general law enacted to carry into effect the public policy of the State or Nation".

9. Looking at the purport and primacy of the two maxims, it appears clear to me that Section 65 was not enacted in derogation of the two maxims. Indeed, the fundamental status of the two maxims and the primacy attached in Common Law to the two maxims is signified by the fact, as Broom says, of abolition by a Statute of the Common Law rule which ran counter to the maxims and allowed recovery of compensation by a participant in a crime from his co-participants. It can be safely presumed that the provision was meant to convey a narrow field of operation; it was not enacted to supersede the two maxims, the constitutional status whereof under Common Law continued undisturbed in India as well. Whether or not the fact that a contract was void *ab initio* was known to both parties, if they were both at fault and if their conduct was repugnant to such public policy as was statutorily or constitutionally entrenched in the legal system it would not be open to any one of them to derive any benefit from the transaction, vitiated by the immoral or unconstitutional conduct. This position obtains in law, according to me, despite what is contemplated u/s 65 which merely deals with contractual obligations of parties in terms of the Contract Act because of the undiminished currency in India of the Common Law maxims by virtue of Article 372 of the Constitution. Indeed, Section 65 does not evidently embrace within its fold the question of tortious or criminal liability or violation of a constitutional injunction. Obviously, because, Section 23 of the Act speaks only of "unlawful objects and consideration of an agreement and contemplates further that it would be competent for a Court to regard as not "immoral", or "opposed to public policy" any object or consideration of an agreement. The "void agreement" contemplated u/s 65 is evidently one to which are attracted the provisions only of Section 24 et. al.

10. However, what I regard to be of paramount consideration in this case is that supreme primacy must be attached to the constitutional prohibition contained in

I Article 23 which prohibits "traffic in human beings" and indeed also of Article 21 which secures dignified existence to a human being. I would also notice that Article 51(c) authorises me to construe any statutory provision not only in consonance with the constitutional provisions, but also with "international law". The Fundamental Duties of a citizen inscribed in Clause (e) of Article 51A, which obligates a citizen to "renounce practices derogatory to the dignity of women", must have supreme relevance to the instant lis, indicative as it evidently is of an unconstitutional conduct of a citizen. Let it be also noted that Article 1 of the Universal Declaration of Human Rights, 1948, ensures "dignity" to all human beings and Article 4. additionally prohibits slavery, servitude as also slave-trade. The International Covenant on Civil and Political Rights, 1966, to which India has acceded, also envisages under Article 8 that "no one shall be held in slavery; and slavery and slave-trade in any of their forms shall be prohibited". While under Article 3 of the Covenant is envisaged undertaking of each State party "to ensure the equal right of man and woman to the enjoyment of all civil and political rights set forth in the covenant". In the context and setting of the national and international constitutional provision, I would like to construe Section 65 to be applicable to only limited cases, such cases as do not come within the mischief of the prohibition earlier stated to be regarded as a- constitutional imperative.

11. The term "traffic" is said to mean "to trade, to buy and sell" etc. (see -- Shorter Oxford English Dictionary, 3rd Edition --p. 2226). In Black's Law Dictionary, the word "traffic" is said to mean "commerce; trade; sale or exchange of merchandise; bills, money, and the like". Thus, sale of any human being, man or woman, would definitely be "traffic" in human beings which is constitutionally prohibited vide Article 23. Though such a transaction, when it takes place in respect of a woman, is unfortunately not illegal in terms of the Immoral Traffic Act, violation of constitutional injunction contemplated under Articles 21 and 23 would still be evident in such a case. Even if the transaction is sanctioned by a caste-custom, as is pleaded by the plaintiff in this case, nothing would insulate it against the constitutional injunction. To buy a woman to be kept as a mistress to evade the customary (though illegal) mandate of child marriage, is not constitutionally countenanced. Because, such a question would be ipso facto void on and after, promulgation of the Constitution in virtue of Article 13(1), being derogatory to Articles 21 and 23.

12. It is not only that for the first time in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, , that their Lordships of the Supreme Court held Article 21 to inhere the right to live with human dignity because very early, in *Kharak Singh Vs. The State of U.P. and Others*, , the Supreme Court accepted the meaning of the term "life" defined by Field, J. in *Munn v. Illinois* (1877) 94 US 113, attributing to the term the meaning that it was "something more than mere animal existence". In clear and categorical terms, a ringing declaration was made in *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, that "Article 21 assures the right to live with human dignity, free from exploitation". In *Sheela Barse Vs. State of Maharashtra*, , the right of woman prisoners in Police lock-up

to legal aid to protect their limited freedom was secured by positive directions to uphold "human dignity" in terms of Article 23(1) as also indeed of Articles 14 and 39A of the Constitution. It was evidently meant to carry out the constitutional mandates that in 1978 the Child Marriage Restraint Act, 1929 was amended to enhance credibility of the measure. Unfortunately, though child marriage is punishable and it is visited with custodial penalty, the Act has overlooked customs and practices derogating from its aims and objects. A marriage between a man and a woman, , when they are not adult and also when any one of them has not given consent to the wedlock, is void under the Hindu Marriage Act, 1955. Unfortunately, however, although Section 18 also punishes child marriage, it overlooks marriages fraudulently performed, a "fake-marriage" and its like. Section 370, IPC has made punishable buying and selling any person as a "slave" and by Section 372 selling of a minor for "prostitution" is also made punishable. These provisions also, unfortunately, do not adequately meet the challenge posed by caste-custom or the like pleaded in this case by the plaintiff. True, it is for the Legislature to uptone, update and fortify the enacted law. But, this Court cannot shirk its constitutional duty of interpreting the statutory provision enacted in Section 65 in a manner that will prevent flouting of the constitutional injunctions, positives as also negatives.

13. Although appellant's counsel, Shri Mishra, has pressed in service the decision in Neville's case (1915) 3 KB 556, I have no doubt that their Lordships of the English Court of Appeal, in that case, were called upon to decide merely the question as to whether an agreement in the restraint of trade being opposed to public policy, was unenforceable. True, plaintiffs action was dismissed, but the decision rested on the short ground that the claim being founded upon an unenforceable contract, such an action did not lie. On the other hand, in the instant case, I am required to construe the statutory provision of Section 65 on which the claim is sought to be justified. I would like to look therefore at the decision in Ledu (AIR 1916 Cal 266) (supra), because the provisions of Section 65 in the context of Section 23 came to be discussed in that case. The principle which was applied in the facts and circumstances of the case by their Lordships was that "the Court will not assist a party who has entered into contract tainted by moral turpitude". I am tempted to quote the following passage from the judgment in that case:

"If the Court were to assist the plaintiff to recover his money, bribery and corruption would be encouraged; every person in the position of the plaintiff will be tempted to say, "let me offer a bribe to get an appointment for my son, for I can do so with impunity and without risk of loss; if he secures the appointment, the end is achieved, if he does not, I can sue to recover back my money". No Court of Justice will tolerate such a position".

Reliance on Section 65 by the plaintiff was held to be of no avail because in such a case, it was held, the agreement could not be one as was "discovered" to be void or one that "became" void. It was held that when an agreement was void ab

initio, the Section has no" application inasmuch as the case of only such an agreement was contemplated u/s 65 as was "subsequently found to be void on account of a latent defect or circumstances unknown at the date of the agreement or of an agreement which is afterwards made void by circumstances which supervened". I have no hesitation to express my respectful agreement with this interpretation.

14. Reliance was placed by Shri Mishra on the decision in Bhure AIR 1920 Nag 157(2) which evidently supports the view taken in Ledu's case (AIR 1916 Cal 266) (supra), holding that Section 65 has no application to a case of a contract which embodies a purpose known to both parties to be illegal. The same view was also taken in (he case of Bhojraj AIR 1920 Nag 183 in interpreting the term "becoming void" to hold that the expression presupposes enforceability and that which is not enforceable cannot become void. A Division Bench subsequently, in the case of Chandradwaj Deo AIR 1936 Nag 15, took the same view though the earlier decision was not cited before it. It was held that Section 65 has no application to a case in which there never could have been any contract. In Bhiku Appa Kura Vs. Dattatraya Chandrayya, , it was held that Section 65 does not apply to agreements which are void ab initio and still less to those which are tainted with fraud or other moral turpitude and there is no section in the Act under which money paid for an unlawful purpose may be recovered back. That Section 65 was not in derogation of the maxim "In pari delicto" was held by the Division Bench in Jharia Coal-field Electric Supply Co. Ltd. Vs. Kaluram Agarwala, where it was held that when the parties knew the unlawfulness of the agreement before they acted on it, they would be "In pari delicto" and in such a case Section 65 cannot be invoked.

A Division Bench of this Court also took the same view in Sk. Umar Vs. Shivdan Singh and Others, , wherein it was held that the equitable maxims "In pari delicto" and "Ex dolo malo" applied to illegal and immoral (ransactions and the operation of Section 65 is outside the purview of those maxims. It was further held that the provision applied to cases where the contract was void ab initio. Ledu's case (AIR 1916 Cal 266) (supra) was relied on by the Court in Dhanna Munda and Another Vs. Mt. Kosila Banian, to take the view that Section 65 cannot be held to apply to a case of a contract which was in contravention of any statutory law because parties must be presumed to know the law when they entered into the contract. The case of Ramekbal Singh and Others Vs. Harihar Singh and Others, was a marriage contract and it was held that when the proposed marriage does not take place, the bride's father cannot recover the sum paid to the bride-groom's father, because both parties were "In pari delicto". The claim in that case was for refund of "Tilak" paid by bride's father to bride-groom's father in contravention of the provisions of Bihar Dowry Restraint Act, 1950, which was rejected.

15. Can there be any doubt that the conspectus of judicial opinion evidently supports the view taken by me indeed for a variety or reasons? According to me,

judicial opinion is almost unanimous that it is not possible for a party "In pari delicto" to invoke Section 65 of the Contract Act and to found his action on that. It is also by now well-settled, in my opinion, that when a contract is entered into by parties in contravention of any statutory prohibition, it would not be a case of contract "becoming" or of being "discovered to be" void; it would be a case of a contract which is void ab initio and indeed dehors Section 23 et. al when the transaction is not allowed to take place.

16. Indeed, I am of the view that when a contract is in violation of any constitutional injunction enshrined in Part III, such a contract would not only be void ab initio in virtue of Article 13(2) of the Constitution but, the constitutional prohibition of Article 23, when it operates in any case, would act as a threshold bar to the transaction. Indeed because, such a contract would not only be unenforceable a suit based on such a contract, could not have been entertained by any Court of law acting under the Constitution which prohibits such a transaction from taking place. Because a Court set up under the Constitution cannot be party to violation of a constitutional injunction. If sale of a woman is considered "traffic in human beings", which is prohibited by Article 23 of the Constitution, I do not see how any action based on a contract, evidencing such a transaction, can at all be entertained. I have no doubt, therefore, that the instant suit was not maintainable and it ought to have been dismissed in limine, I have also no hesitation to say that it was not open to the plaintiff to invoke Section 65 of the Act and for the Court below to decree the suit on that basis. It is regrettable that dismissal of the suit may be a blessing for the defendant but that is the price which must be paid for social reform constitutionally envisaged.

17. In the result, this appeal succeeds and is allowed; The judgment and decree passed by the Courts below are set aside. The parties are left to bear their own costs in all Courts.

18. A copy of this judgment shall be transmitted to the authorities undermentioned in order that the desirability of necessary reforms in the existing law at Union and State level may be considered. Measures may also be taken to enlighten public opinion and educate the rural-mass in the constitutional imperatives :

1. Law Commission of India, New Delhi,
2. Secretary, Law Department, Government of India, New Delhi,
3. State Law Commission, Bhopal,
4. Secretary, Law Department Government of Madhya Pradesh, Bhopal,
5. Secretary, Legal Aid Board, Madhya Pradesh, Bhopal.