

**(1981) 04 BOM CK 0007**  
**In the Bombay High Court**  
**Case No : First Appeal No. 446 of 1973**

Sushila Bhiku Shinde

APPELLANT

Vs

Sulochana Baburao Bhoj

RESPONDENT

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**Date of Decision :** 09-04-1981

**Acts Referred:**

Contract Act, 1872 — Section 23

**Citation :** (1981) 83 BOMLR 267 : (1982) MhLj 598

**Hon'ble Judges :** Masodkar, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Masodkar, J.—This appeal questions the decree made by the trial Court with regard to survey No. 398 of village Kasabe Pedgaon, Taluka Shrigonda, District Ahmednagar, holding that the said land belonged to one Bhiku and plaintiff No. 1 was born to him before his death and was his legitimate daughter. Bhiku died sometime on April 24, 1970 at Pedgaon. The suit was filed thereafter, claiming the right of inheritance by plaintiff No. 1 as his daughter and by plaintiff No. 2 as his real elder brother, while plaintiff No. 3 as the sister.

2. The plaint alleged that the present appellant Sushila was the kept mistress of Bhiku and she was residing with Bhiku since before two-three years before 1961, i.e., since about 1958, as Bhiku had no wife nor any son. Bhiku was completely under the control of Sushila, defendant No. 1, and he was unable to think freely and on his own. The plaint further alleged that by deceit and by exercise of undue influence promising that she would maintain him well, Sushila encouraged Bhiku to take to drinks and eventually on July 28, 1961, by exercising undue influence, got his property gifted to herself. It was further alleged in the plaint that she made false representations that she would serve Bhiku in all the best manner. According to the plaint, in the year 1970, Bhiku committed suicide. It was further asserted that the gift-deed taken by defendant No. 1 was executed without any consultation by Bhiku with any lawyer. Defendant No. 1 was residing

with Bhiku and was in possession of all the estate and she is in possession of the same even after his death. Her possession is thus unauthorised. These are the allegations on the basis of which the admitted document of gift-deed is said to be not binding on the plaintiffs. It was further claimed that after avoiding the gift, which was brought about by undue influence and fraud in this manner the plaintiffs were entitled to succeed to the property left by the deceased Bhiku.

3. These allegations were controverted and necessary issues were raised by the learned trial Judge. The parties tendered their evidence, which consists of two witnesses on behalf of the plaintiffs, being plaintiff No. 1 herself, Sulochana Babu, and plaintiff No. 2 Babu Narayan Shinde, while, as against this, Sushila Bhiku Shinde has entered the witness box and produced the gift-deed (exh. 62) duly executed and registered almost ten years before the death of Bhiku.

4. Having found in favour of plaintiff No. 1 that she is the legitimate daughter, the trial Court negatived the plaintiff's case that there was any undue influence or fraud practised by Sushila on Bhiku so as to take the gift produced at exh. 62. Having so negatived the main case on the basis of which the plaintiffs came to the Court, the result of which should have been dismissal of the suit, however the trial Court proceeded to avoid the gift holding it to be illegal because, in view of the learned trial Judge, this gift was hit by the provisions of Section 23 of the Indian Contract Act and further that though there were no pleas on this aspect of the matter, the Court was entitled to avoid the gift being made for immoral consideration. The trial Court reached a finding that the object of execution of the gift-deed was "past and future cohabitation." The defence resistance that in want of such a specific plea, the Court was not entitled to consider this aspect, has been ruled out by referring to the judgment of the Rajasthan High Court in the case of Smt. Naraini Vs. Pyare Mohan,

5. The narrow and yet important question, therefore, that falls for consideration is whether the trial Court was right in embarking upon the enquiry under the facts and circumstances of the present case so as to hold the gift as, void because of the provisions of Section 23 of the Indian Contract Act, particularly when, admittedly, there was no plea nor any specific issue on that aspect. No doubt, a general issue is framed as to whether the gift was illegal, but it has no reference to any particular plea of immoral consideration.

6. At the outset, it must be stated that the entire pleadings, which were lodged after about ten years from the gift itself which is of 1961 and the suit having been filed in 1971, raised the plea of undue influence, fraud and misrepresentation as rendering the gift as not binding. On that aspect, rightly, the trial Court has non-suited the plaintiffs, for there is no evidence worth the name to uphold any such plea. It is obvious that in the entire plaint there is no assertion that the consideration for this gift was in any manner unlawful. On the other hand, the pleadings will have to be read as having basis that the gift was for lawful consideration and ostensibly legal, but was affected because of the misrepresentation, fraud or alleged deceit, The plea thus does not raise any

grounds of immorality. The entire pleadings do not suggest remotely that the gift was made in consideration of past, or, to secure enjoyment, of future cohabitation.

7. That being the position of the pleadings, the basic rule and the principle applicable is that the party is not entitled to succeed on the assumption of such plea nor can lead evidence to prove the matters not so pleaded. It is well settled that the Court cannot supply the plea and then find the case in favour of a party. Surely, the facts and circumstances of the present case do not admit any exception to the general rule. The gift was duly executed and registered, while Bhiku was alive, in the year 1961. He died after about nine years after the execution of the gift. It is admitted that Sushila was residing with him and serving him all the while. Surely, the plaintiffs, if wanted to rely on the unlawful consideration with regard to the gift, could have set out the same in the plea. It is indeed difficult to consider the case of the plaintiffs in want of any plea with regard to the alleged illegality of the consideration,

8. That apart, the first principle of law is that the unlawful intentions are not to be presumed. Not only they are the matters which are required to be alleged, but call for proof before human actions having legal effects are so avoided.

9. In *Mshenchunder Singh v. S. Butto* (1866) 11 M.I.A. 7 the Privy Council emphasised that there was (p. 21):

... absolute necessity that the determination in a cause should be rounded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. It will introduce the greatest amount of uncertainty into judicial proceedings if the filial determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.

With these observations, the Privy Council ruled that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from. This principle has been consistently applied and followed in several ways by the Supreme Court as and when the occasion arose.

10. In the case of *Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another*, the Supreme Court refused to entertain the case not pleaded in defence with regard to the subletting in want of any pleading to that effect in the written statement (para. 6). In the case of *Central Bank of India v. H. P. Jalan* AIR [1972] S.C. 1274, which concerned itself to a question of goods stated to have been damaged and claimed to have been not delivered to the defendants, the Supreme Court observed that in want of plea to that effect, the Court was not entitled to rely on the oral evidence with regard to the nondelivery of the goods. After noticing that there was no pleading in the written statement on this matter, the Supreme Court observed (p. 1278):

... We are completely at a loss to understand how in these circumstances any

oral evidence could be looked at for determining whether the admissions contained in all the aforesaid documents about the delivery of goods to the defendants were wrong. In our judgment in such circumstances oral evidence would be worthless and would be of no value even if it could be considered in spite of the serious infirmity in the whole case of the defendants on the point there being complete absence of pleadings and issues.

11. In the case of Afsar Sheikh and Another Vs. Soleman Bibi and Others, the Supreme Court was dealing with the allegations and proof with regard to undue influence and observed that while it is true that undue influence, fraud and misrepresentation are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order VI, Rule 4, read with Order VI, Rule 2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint about the condition of the plaintiff was not held to be sufficient. The case of Bhagwati Prasad Vs. Shri Chandramaul, explained the doctrine in the background, where the plea is not specifically made and yet was covered by an issue by implication and the parties knew that the said plea was involved in the trial, and ruled that the mere fact that the plea was not expressly taken would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. In Srinivas Ram Kumar Vs. Mahabir Prasad and Others, the Court recognised the principle that relief cannot be granted to the plaintiff for which there was no foundation in the pleadings and which the other side was not called upon or had any opportunity to meet. If the plaintiff were to assert custom, he has to plead the custom on which reliance is being placed. (See Salig Ram v. Munshi Ran AIR [1961] S.C. 1374.

12. In the light of these principles, the Court has to approach in each given case the matters of pleading and proof. It is implicit in all these authorities that it is not for the Court to supply the case which is not pleaded and which is not in issue. This would be more applicable when the plaintiff had chosen to make pleadings only with regard to the matters, like fraud or misrepresentation, and omitted to rely on the plea of consideration being unlawful on any ground, either of public ethics or of law.

13. A mere reference to Section 23 of the Indian Contract Act, 1872 by the Court without pleading and without issue can hardly subserve the basic rule that parties are free to choose their own case and seek to prove it. In the very nature of things, Section 23 of the Indian Contract Act is not a mere matter of law, but before its terms are applied, it operates upon several factual considerations, including the factum of consideration as well as the objects thereof which should be specifically pleaded before it is shown to be void on the ground of immorality or inhibitions of law. What applies to the pleadings with regard to fraud should ordinarily apply to the pleadings with regard to the matters falling in the categories where the case allegation! are that consideration or the object of an agreement was forbidden by law or it would defeat the provisions of any law or

involves or implies injury to the person or property of another or where the Court is called upon to regard it as immoral or opposed to public policy. These are not simply the matters of inferences. Surely, before the consideration or object of an agreement is declared unlawful or void under this section, viz., Section 23 of the Indian Contract Act, the necessary data in that regard will have to be available, beginning with the plea in that regard. It is only in exceptional cases, where the issue is joined and the law or the moral precept or rule is clear, that such a strict adherence to the principle of having pleading first, followed by its proof, could be relaxed.

14. As stated earlier, in the present case there is not a whisper in the entire pleading nor there is any proof in the evidence that the consideration or the object of the gift in issue was immoral or opposed to the public policy, in that it was for the purpose of procuring sexual pleasures otherwise prohibited by law.

15. As far as the personal Hindu law is concerned, conceptually to have a mistress was not a taboo, but had recognition in the shape of "Avaruddha Stree." Not only that, she had claims with regard to the maintenance as against the estate of her master. The status of an "Avaruddha Stree" under the Shastric law was recognised and she could claim maintenance from the estate of the paramour subject to her sexual fidelity to him. (See Amireddi Rajagopala Rao and Others Vs. Amireddi Sitharamamma and Others, approving Akku Prahlad Kulkarni Vs. Ganesh Prahlad Kulkarni, and Ammireddi Ramamoorthy (died) and Others Vs. Ammireddi Sitharamamma and Others, Thus, only because a female happened to be styled in a document of the present kind as "a mistress" by a Hindu, it would not follow that the gift in her favour was made for the purpose of securing immoral or carnal purposes opposed to ethics and, as such, public policy. The terms "as immoral, or opposed to public policy" in Section 23 of the Indian Contract Act are of restrictive nature. Immorality contemplated has reference to sexual immorality and not to general deviations of any or all types. (See Gherulal Parakh Vs. Mahadeodas Maiya and Others, , ). To take a mistress in the character of "Avaruddha Street" by itself would not, therefore, fall within the prohibition of the ethics in the light of personal law to which the present parties appear to belong, particularly because neither the pleadings nor the proof make out any case to show that the consideration for the gift was any past sexual service or expectation of any such future service.

16. Human intentions cannot be presumed to be immoral or illegal. Ordinary presumption that applies to human conduct is that their actions are lawful. Coupled with it is the tenet of freedom of contracts. Courts are not expected to approach the same with inhibition in favour of illegality. Tendency need not be lightly to infer or to attribute want of law or of ethics to the acts of parties. No doubt, there may be exceptional cases where facts and circumstances would not leave any manner of doubt about the devious nature of consideration. But that is not a general rule. When a desolate dependant male needs the services, assistance and affection of a female and has her as a companion or mistress in

home and, out of considerations for her services to him and to his home as well as out of love and affection towards her, makes a gift, something more would be necessary to prove that considerations of the gift were only sexual or carnal and as such immoral, so as to avoid its legal effect.

17. Vague theory of ethics or veiled suggestions as to immorality are not adequate answers to each and every type of male and female associations. It is not, and modernity does not recognise, that every such human relation is contrary to social ethics. Right from varying degrees of friendship and companionship to the recognised relations having marital bonds, there are species, of human relatedness in recognition of which one or the other may part in gift the property. Where it is possible to infer that the gift was made totally in recognition of human love and affection in keeping with the other services, the female friend or mistress might have continuously rendered by not only serving the household but also by taking care of the master, it should behave that the gift should be upheld as lawful in favour of such a female and the same need not fail. Unless there is clear evidence that the gift in issue was to perpetuate or perpetrate rewards of prostitution or sexual deviations, it would be too much to deprive the female of the fruits of such services as well as the due reward of her love and affection. If the matter be intermixed as to the purposes that go to support the gift, not only there should be pleadings but also the evidence to show that the major consideration or the object of gift was unlawful.

18. That apart, the recitals in exh. 62 themselves show that the consideration, which weighed with the donor, cannot be said to be in any manner unlawful. It recites that the donor has nobody and that the donee was residing with him as his mistress and was, serving him in best of the manners. She is taking care of him and that even hereafter till he is alive, she will be treating him and serving him well and of which he is assured. As a result of this service and treatment and for the maintenance and to commemorate the memory, the donor purported to settle the property in gift. Then, the document recites the details of the property. In the penultimate paragraph, the document asserts that out of love and affection the gift-deed is being executed and that the property is being handed over in the possession of the donee and under the document, the donee has become the owner of the property.

19. Now, this document by itself goes to show that defendant No. 1 was residing with Bhiku, there being none to look after him, and was his mistress, but apart from that, she was serving him and taking care of him and that the donor was of the view that she would continue to serve him and, therefore, out of love and affection, the property was settled. Normally, love and affection, which are high human sentiments for another human being, and are lawful considerations, it does not become immoral only because the donee is a female. A helpless and an uncared for person can well rely on the affection, care and services that he gets from the female companion, who is not only a companion but also the keeper of the house. Unless there is clear evidence to show that the consideration, of the

gift was to secure immoral purposes or was, in any manner, unlawful or prohibited by law, it cannot lightly be presumed, only because Sushila was not married to Bhiku, that the consideration itself be treated as one having nexus to sexual relations between a man; and a woman. As stated earlier, it was well permissible for a Hindu to have even an "Avaruddha Street," It is not as if that to keep mistress who is faithful and bound to the master was unknown to Hindu law. There is nothing to indicate that Sushila was of loose character or was a concubine, or that Bhiku actuated by carnal desires alone had kept Sushila in his house. The companionship may be long, but that by itself would not lead to the conclusion that the gift was secured for the purpose of companionship, which was in itself immoral. In fact, there is no evidence on this aspect tendered by the plaintiffs. On the other hand, if we were to go by the assertions in the document, which are binding on the plaintiffs, it appears that Sushila was the housekeeper of Bhiku and he, out of love and affection, had settled the property in gift in her favour.

20. On this aspect, Mr. Abhale relied on two factors. Firstly, he contended that the relationship of Bhiku and Sushila was that of a master and a mistress. There is no good reason not to infer from this that the gift of the property was because of the cohabitation between the two unmarried members of the society. According to the learned Counsel, the word "Prembhav" in exh. 62 and the word "mistress" go to show that the total consideration: was entirely unlawful. He further wanted to rely on the evidence of Sushila where she admitted her description as mistress, as is given in exh. 62. According to the learned Counsel, though there was no pleading, such a case, in the public interest, could be upheld by the Court.

21. None of these submissions has got any force when the document as a whole has to be considered, As stated earlier, the consideration cannot be presumed to be illegal nor the words used in the document can be understood so as to carry any unlawful intention. On the other hand, the word, on which Mr. Abhale has relied, clearly shows that the gift was made out of love and affection for a person who was well serving Bhiku when there was no one to look after him. Only because a person happens to be a mistress, these factors of service, love, affection, attachment and human sentiments are not ruled out. Gifts made in consideration of the general service rendered by persons who are held in love and affection are not hit by any provisions of the law. It is only when to secure sexual or carnal pleasures the properties are gifted and the evidence exists to that effect that the validity of such transfers comes under cloud. The present case is not the case of that type. Even the evidence of Sushila shows that the property was given to her because Bhiku had no one other than she herself and further that it was because they had confidence in each other. There was not even the slightest suggestion made to her in the cross-examination that the gift was made for any unlawful purpose or so as to secure sexual or carnal satisfaction, Even the evidence of Sushila, therefore, does not help to come to the conclusion that the consideration! of the gift was in any manner unlawful or

the one which was prohibited by law.

22. Mr. Abhale relied on the judgment of the Rajasthan High Court in Smt. Naraini's case (supra), the ratio of which is not at all applicable to the facts of the present case. The Court there found as a fact that the evidence suggested that the gift was made for securing future cohabitation and thus was for immoral consideration or opposed to public policy. On the question of pleadings, reliance was placed on two decisions of the Supreme Court in Immani Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Others, , Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar, . The first case of the Supreme Court dealt with the defence of illegality while considering the duty of the Court to take notice of the illegality itself, while the second reiterated the same principles. The argument before the Rajasthan High Court was that the question of future cohabitation being in the contemplation of the parties at the time of making the gift, it should have been pleaded and the Court found that that was not necessary under the state of affairs of the pleadings in that case. This is not the authority for the proposition which Mr. Abhale tried to support that in want of pleadings the Court is at large to enquire at the behest of the plaintiffs about the illegality of the transaction itself, which the plaintiffs could have pleaded and the defendants could have met by leading proper evidence. As stated above, the first and primary rule is to assume legality and those who want to assert otherwise are required not only to plead but, depending upon the subject and the controversy, to prove the existence of illegality so as to" avoid legal effects of legal transactions.

23. As far as the pleadings are concerned, there is no plea and the plaintiffs were not entitled to raise the issue of illegality in this manner. Even assuming that such an enquiry was open, neither the evidence nor the gift-deed helps to substantiate the conclusion that this gift was affected because its consideration was in any manner unlawful or immoral. The evidence is too inadequate to" come to any such conclusion.

24. In the result, therefore, the trial Court was not right in holding that exh. 62 did not bind the plaintiffs.

25. For all purposes, that document was executed before nine years of the death of Bhiku. It is a registered gift-deed. It was not kept in secrecy and it does appear that it was acted upon and there is no reason to avoid the gift-deed on the ground of immorality, as is done by the learned trial Judge.

26. That being the only point in the present appeal, the appeal must succeed. The appeal is, therefore, allowed and the judgment and decree made in favour of the plaintiffs with regard to survey No. 398 of village Kasabe Pedgaom are set aside. The suit of the plaintiffs in that regard is dismissed with costs throughout.