

ALLAHABAD HIGH COURT

Balo

Vs

Parbati

(Verma, J.)

26.01.1940

JUDGMENT

Verma, J.

1. This is an appeal by defendant 1. The suit was for sale on foot of a deed of simple mortgage executed by Mt. Munno in favour of Lachhman Das on 4th November 1925. The mortgagee, Lachhman Das, assigned his mortgagee rights to the plaintiff, Mt. Parbati, on 5th February 1930. The appellant was impleaded as defendant 1 on the allegation that she was in possession of the property. Mt. Jamuna was impleaded as defendant 2 on the allegation that it was stated that she was a daughter of Mt. Munno. The Courts below have decreed the suit. The principal point which learned Counsel appearing for the appellant has argued is that the Courts below having found that no legal necessity for the mortgage in suit had been proved, the suit should not have been decreed. It seems to us however that before the point of legal necessity can be raised, it must be shown that Mt. Munno was in possession of the property holding the limited estate of a Hindu woman. The Court of first instance states in its judgment that it has not been proved by the defendants that Mt. Munno was in possession of the property as a limited owner under the Hindu law. It has also been found that Mt. Munno's husband died before her gauna was performed and that defendant 2 is her illegitimate daughter. In these circumstances, it was for the appellant to establish by clear evidence that Mt. Munno was not the full owner of the property with an absolute right of transfer. The Courts below have correctly held that the appellant in these circumstances was not entitled to raise the question of legal necessity.

2. The only other point that has been argued is that the plaintiff, Mt. Parbati, was a mistress of Lachhman Das, that the assignment made by the latter in her favour was for an "immoral consideration" and that therefore the plaintiff was not entitled to maintain the suit. Reference is made by learned Counsel to Clause (h) of Section 6, T.P. Act, which refers to Section 23, Contract Act. It has however been consistently held in this Court that past cohabitation is not an unlawful consideration: (vide *Man Kuar v. Jasodha Kuar*¹ and *Dhiraj Kuar v. Bikramajit Singh*² The latest case in this Court which deals with the subject is that in *Mt. Mahtab-un-Nissa v. Rifaqat Ullah*³ in which the learned Judge makes these observations: When the agreement is that parties are to live in adulterous cohabitation in future the contract is obviously illegal, but if in order to compensate the woman for the past illicit connexion, 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.

3. In the case before us it has not been suggested that the relation between Lachhman Das and Mt. Parbati was adulterous. The same view has been taken by the High Courts of Madras and Patna in *Lakshminarayana Reddyar v. Subhadri Ammal*⁴ and *L.R. Godfrey v. Mt. Parbati Paluni*⁵ We agree with the views expressed in these cases. Learned counsel for appellant has cited the case in *Sabava Yellappa v. Yamanappa Sabu* (1933) 20 AIR Bom 209 In that case Patkar J. held that the transfer in question was in lieu of past as well as future cohabitation. He observes at p. 214: In the present case there was the immoral object so far as the future cohabitation with defendant 1 was contemplated by Sabu.

4. No such point arises in the case before us. As to past cohabitation, the learned Judge observes: Past cohabitation would be consideration for an agreement under Section 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.

5. The other learned Judge, Barlee J., did not entirely agree with the views expressed by Patkar J. As stated above, we prefer the view that has been held in this Court and in the High Courts of Madras and Patna. We are therefore unable to accept the contention of the learned Counsel for the appellant. For the reasons given above, we dismiss this appeal with costs.

Cases Referred.

1(1876) 1 All 478

2(1881) 3 All 787

3(1925) 12 AIR All 474

4(1903) 13 MLJ 7. at p. 13

5(1938) 25 AIR Pat 502