APPELLATE CIVIL.

Before R. C. Mitter J.

KALIKUMARI BAISHNABI

v.

MANOMOHINEE BAISHNABI*.

1935

July 12, 17.

Contract—Consideration for promissory note, Immoral—Suit on such promissory note, Maintainability of—Ex turpi causa non oritur actio—In pari delicto potior est conditio possidentis.

Under the Indian law, an agreement, the consideration or object of which is illegal, immoral or against public policy, is not a contract; and moneys due or paid under such an agreement cannot be recovered by suit.

Moneys due on a promissory note executed in consideration of the balance of the security deposit for the lease of a house taken for immoral purposes cannot be recovered by suit.

Taylor v. *Chester* (1); *Fisher* v. *Bridges* (2); *Geere* v. *Mare* (3); *Clay* v. *Ray* (4); *Hyams* v. *Stuart King* (5); *Bubb* v. *Yelverton* (6); *Begbie* v. *Phosphate Sewage Company, Limited* (7) and *Scott* v. *Brown, Doering, McNab & Co.* (8) referred to.

SECOND APPEAL by the plaintiff.

The material facts of the case and the arguments in the appeal appear in the judgment.

Beerendrakumar De for the appellant.

Amarendramohan Mitra (with him *Parimalchandra Guha*) for the respondent.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 2486 of 1932, against the decree of Beerendrachandra Sen Gupta, Fourth Subordinate Judge of Mymensingh, dated Aug. 20, 1932, reversing the decree of Rabeendrakumar Basu, First Munsif of Mymensingh, dated April 29, 1932.

(1) (1869) L. R. 4 Q. B. 309.
(2) (1854) 3 E. & B. 642; 118 E. R. 1283.
(3) (1863) 2 H. & C. 339; 159 E. R. 141.
(4) (1864) 17 C. B. (N.S.) 188; 144 E. R. 76.
(5) [1908] 2 K. B. 696.
(6) (1870) L. R. 9 Eq. 471.
(7) (1875) L. R. 10 Q. B. 491
(8) [1892] 2 Q. B. 724.

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R. C. MITTER J. The plaintiff, who was fortunate in winning in the trial court, has preferred this appeal against the decree of the learned Subordinate Judge, Fourth Court, Mymensingh, passed on appeal, by which her suit has been dismissed. The suit is on a promissory note, executed by the defendant in her favour on the 4th *Ashârh*, 1338 (19th June, 1931) for the repayment of Rs. 500 with interest at the rate of Rs. $37\frac{1}{2}$ per cent. per annum.

The plaintiff recites the following facts in her plaints :—

(i) That she took a lease of a house belonging to the defendant on the 14th *Ashârh*, 1336 (28th June, 1929) at a monthly rent of Rs. 50.

(ii) That she deposited Rs. 600 with the defendant.

(iii) That the contract was that, on her vacating the house, the said money was to be returned to her.

(iv) That she left the house in *Jaistha*, 1338 (June, 1931) and the defendant took possession. There was then an adjustment of accounts between her and the defendant; the rent due for *Baisâkh* and *Jaistha*, 1338 was deducted and the sum of Rs. 500 was found due from the defendant to the plaintiff.

(v) That the defendant could not pay the said sum then and there and for it executed the promissory note sued upon.

The recitals in the promissory note, filed with the plaint, are to the same effect. The plaintiff is a prostitute, and leased the defendant's house for sub-letting it to prostitutes for carrying on their trade. The finding of the court below is that the defendant knew that the plaintiff was a prostitute and took the house for sub-letting it to prostitutes.

The defence is that the money due on the promissory note cannot be recovered by suit, the claim being

based on *turpi causa*. This defence was negatived by the Munsif, but has prevailed with the learned Subordinate Judge.

An agreement, the consideration or object of which is illegal, immoral or against public policy, is not a contract under the Indian law. Moneys due or paid under such an agreement cannot be recovered by suit. This is clear on the statute itself, but what is urged by the appellant's advocate is that in order that the principle *ex turpi causa non oritur actio* may be invoked by a defendant, it is necessary that the plaintiff should require aid from the illegal transaction to establish his case. To support the said contention he relies upon the observations of Mellor J. in *Taylor* v. *Chester* (1), which is as follows:—

It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "*inpari delicto potior est conditio possidentis*" clearly applies, and is decisive of the case.

The learned advocate for the appellant says that the plaintiff has not to rely in this case before me on the agreement for lease and that she is entitled to succeed on the promissory note as soon as its execution is proved.

In my judgment, the true principle deducible from the cases, that where the consideration or object of an agreement is illegal, immoral or against public policy, is that the agreement cannot be enforced; the moneys due on the basis of the said agreement cannot be recovered, and securities, covenants, bonds and documents of a like nature given in respect of the moneys due under the agreement would be equally un-enforceable in a court of law. If the spring is tainted the flow is equally so. In *Fisher* v. *Bridges* (2), the defendant covenanted by a deed with plaintiff that he, the defendant, would pay the plaintiff £630 on a certain date. The suit was brought on this covenant.

(1) (1869) L. R. 4 Q. B. 309, 314.

(2) (1854) 3 E. & B. 642; 118 E. R. 1283.

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The defence was that the plaintiff agreed to sell to the defendant some lands knowing that the said lands were to be exposed for sale by the defendant by lottery contrary to statute; that, in pursuance of the agreement, the lands were sold by the plaintiff to the defendant, and, as part of the consideration could not be paid then and there in cash, the aforesaid covenant was made to secure payment thereof. The fact alleged in the defence was established. It was not denied that the original agreement, *e.g.*, for sale, was tainted with illegality, lotteries being prohibited by statutes passed in the reigns of William III and George II (10 & 11 Will. III c. 17 and 12 Geo. II c. 28) and could not be enforced. No action could be brought for recovery of the purchase money left outstanding. It was argued, however, that the covenant could be enforced, the covenant being in an instrument under seal which required no consideration to support it. Jervis C. J., in overruling this contention, observed thus:—

> The authorities cited in the argument show that, where the bond or other instrument is connected with the illegal agreement, it cannot be enforced; *Lightfoot* v. *Tenant* (1), *Paxton* v. *Popham* (2), *The Gas Light and Coke Company* v. *Turner* (3), and therefore, if this plea alleges that the covenant was given in pursuance of the illegal agreement, it would upon these authorities be an answer to the action.................... It is clear that the covenant was given for payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

A case of the same type is *Geere* v. *Mare* (4). The defendant was indebted to the plaintiff and other creditors. He proposed a composition with his creditors to pay 5 shillings for a pound, and, for the purpose of inducing the plaintiff and Thomas Geere to the proposal, promised to pay them a further composition of another 5 shillings for a pound. This was a fraudulent preference and an act of fraud on

(1) (1796) 1 Bos. & P. 551; 126 E. R. 1059.

(2) (1808) 9 East 408; 103 E. R. 628.

(3) (1840) 6 Bing. N. C. 324; 133 E. R. 127.

(4) (1863) 2 H. & C. 339 (345-6); 159 E. R. 141 (143-4).

other creditors, and this further agreement was undoubtedly illegal. In furtherance of the illegal agreement, the defendant's brother accepted a bill of exchange. The said bill being dishonoured on presentation and legal proceedings being threatened the defendant assigned a policy on his life to the plaintiff as a security for the payment of the said bill. The suit being brought to enforce the said security, the defence was that it could not be enforced as the source was tainted. The defence was given effect to, Pollock C. B. observing that :—

It is impossible not to see that the case falls within the principles of the decision in *Fisher* v. *Bridges* (1). I entertain a strong opinion that, apart from authority, I should have decided in the same way, but I consider that we are bound by that decision.

Bramwell B. in the same case observed thus :—

It is sufficient to say that he executed the indenture to secure the payment of an illegal debt, and as that debt could not be enforced neither can the security be enforced.

Baron Wilde also concurred.

The case of *Clay* v. *Ray* (2) is an extreme case, which illustrates the same principle. The son of the defendant, being about to compound with his creditors, gave two promissory notes to the plaintiff, one of the creditors, without the knowledge of the others, each promissory note was for £ 25 beyond the amount of the composition. The defendant, the father, also joined in executing the promissory notes. This was done to induce the plaintiff to sign the composition deed. On the first promissory note an action was brought, judgment obtained and execution levied. As consideration of the plaintiff forbearing from enforcing the judgment, the defendant gave him a guarantee for the amount of the judgment and for the amount of the other outstanding promissory note, and thereupon the two promissory notes were given up. The suit was upon the guarantee. It was held the guarantee could not be enforced being tainted with the original fraud.

(1) (1854) 3 E. & B. 642; 118 E. R. 1283.

(2) (1864) 17 C. B. (N. S.) 188; 144 E. R. 76.

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It is unnecessary to notice all the decisions which have followed the principle of *Fisher's* case (1) except the decision of the court of appeal in the case of *Hyams* v. *Stuart King* (2). The plaintiff and the defendant were bookmakers, who had betting transactions together, which resulted in indebtedness of the defendant to the plaintiff. The defendant gave a cheque to the plaintiff for the amount of bets lost to him. At the request of the defendant the cheque was held over for a time, and part of the amount of the cheque was later on paid by the defendant to the plaintiff in cash. Later on a verbal agreement was entered into by the parties, by which in consideration of the plaintiff holding over the cheque for a further time and refraining from declaring the defendant a defaulter, which act would have injured the defendant's business with his customers, the defendant promised to pay the balance of the amount of the cheque in a few days. The suit was on the verbal promise. The consideration for this promise was that the plaintiff would not place the defendant on the defaulters' list. The consideration was, as Romilly M. R. put it in *Bubb* v. *Yelverton* (3), "a perfectly good consideration "quite ulterior to and independent of any racing "debt".

The question before the appeal court was whether the verbal promise could be enforced. Sir Gorell Barnes, Farwell L. J. concurring, but Moulton L. J. dissenting, pointed that there was nothing illegal in making bets under the common law; they were void under 8 & 9 Vic. c. 109, and there would have been no illegality in paying them or in giving a cheque for them. The statute prevented recovery by an action, but they were debts of honour, which could be recovered by the conventional and effective methods followed in betting circles, *e.g.*, posting the man as a

(1) (1854) 3 E. & B. 642 ; 118 E. R. 1283.

(2) [1908] 2 K. B. 696, 707-8.

(3) (1870) L. R. 9 Eq. 471.

defaulter. The learned president then made the following observations :—

I am unable to see how a new contract such as that suggested, if made for good consideration, can be said to be illegal. I think it would probably have been different if the bets were illegal and the giving of the cheque an illegal act, for the principles then to be applied would be those succintly stated in the case of *Attorney-General* v. *Hollingworth* (1) by Baron Watson as follows :—" The rule laid down in the case of *Simpson* v. *Bloss* (2) is that, when a demand connected with an illegal transaction can be sued on without the necessity of having recourse to the illegal transaction, the plaintiff can maintain an action ; but wherever it is necessary to resort to the illegal transaction to make a case upon the new security, the new security cannot be enforced." But those principles do not strictly apply to a case where nothing prohibited has been done by the parties and the cheque and the bets are merely unenforceable by the plaintiff.

But, thirdly, it may be said, that these considerations do not completely dispose of the case, and that a contract, though not positively prohibited, may be unlawful either because it is immoral, that is to say, contrary to positive morality recognised as such by law or because it is against public policy, and that in such cases there is not a lawful contract founded on good consideration. It is upon this that I have felt some difficulty, for it may be said that the courts ought not to permit of a claim being made founded on the forebearance aforesaid, because by so doing a means may be afforded of evading the strict provisions of the Acts against gaming and wagering, and of allowing pressure to be brought to bear upon persons failing to pay that which they are under absolutely no legal obligation to pay, and that to support such an action as this will prove generally mischievous; but if there be no illegality nor unlawfulness in the contract and there be good consideration, I cannot see on what grounds it can be suggested that the courts could refuse to give effect to it.

These cases in my judgment establish the principle that, where an agreement is illegal or immoral or one which is hit by section 23 of the Indian Contract Act, the money due under the agreement cannot be recovered by a change in the form of action based on another agreement, which is naturally connected with or has for its support the original illegal agreement. Whether the plaintiff has to rely upon the illegal agreement or whether it is brought out by the defence is immaterial, all that is material is the intimate connection. In the case of *Taylor* v. *Chester* (3) the plaintiff had to rely upon the illegal agreement to repel the defence, but in *Fisher* v.

(1) (1857) 2 H. & N. 416 (423) ; 157 E. R. 172 (175).

(2) (1816) 7 Taunt 246 ; 129 E. R. 99.

(3) (1869) L. R. 4 Q. B. 309.

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Bridges (1), *Geere* v. *Mare* (2) and *Clay* v. *Ray* (3), the defendant raised it by way of defence, and succeeded as soon as he showed an intimate connection of the agreement sought to be enforced with the earlier illegal agreement, and established that the illegal agreement was the foundation upon which the latter agreement sued upon rested. In *Taylor* v. *Chester* (4), the illegality was pleaded, but in *Begbie* v. *Phosphate Sewage Company , Limited* (5) the fraud which made the agreement illegal was not pleaded, but it being apparent the Court did not interfere.

In the case before me the plaint recites the consideration for the promissory note sued upon and promissory note itself shows for what the consideration it was. It was the security deposit for the rent of the house let out by the defendant to plaintiff to be used as a brothel. The observations of A. L. Smith L. J. in *Scott* v. *Brown Doering, McNab & Co.* (6) are relevant and put the plaintiff out of court. They are as follows :—

> If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester* (4), where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Company, Limited* (5), where it was not pleaded, but the fraud being apparent the court would not interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants, *viz.*, to keep up the price of the shares, which upon the evidence was shown to be to create a fictitious premium.
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> In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, *has to prove the whole contract*, and it was not competent to him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract, upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim "*In pari delicto potior est conditio possidentis*" applies, and this Court ought not to assist the plaintiff when he seeks to recover £ 632-3 s. 5 d. back from the defendants.

(1) (1854) 3 E. & B. 642 ; 118 E. R. 1283.
(2) (1863) 2 H. & C. 339 ; 159 E. R. 141.
(3) (1864) 17 C. B. (N. S.) 188 ; 144 E. R. 76.
(4) (1869) L. R. 4 Q. B. 309.
(5) (1873) L. R. 10 Q. B. 491.
(6) [1892] 2 Q. B. 724, 734-5.

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The whole contract as evidenced by the promissory note in this suit is the repayment of the balance of the security deposit for the lease of the house taken for immoral purposes. For these reasons I maintain the decree passed by the lower appellate court and dismiss the appeal, but without costs.

Appeal dismissed.

A. K. D.