The Munsif found that it was hostile, but the Lower Appellate Court came to the contrary conclusion.

It appears to us that the Subordinate Judge has overlooked one important consideration. It is true that the opinion that the self-acquisition of an individual member descended to his own representatives has now been held to be erroneous, but its very prevalence, so far from showing that the possession was not hostile, explains and accounts for the adverse position taken up by *Rayiru*, the Karnavan of defendant's branch. He distinctly asserted that these particular properties were not tarwad property, but the self-acquisitions of *Kannan* and *Kanaran* of his branch, and that they would not pass to plaintiff's branch until the extinction of his own branch. It was the old tarwad property which he said that he managed with *Kelu's* consent. As regards these particular numbers, therefore, he set up an independent title. And the statement made by *Kelu*, the Karnavan, was to the same effect. These properties, he said, had been acquired by *Kanaran* and *Kannan*, and after the latter's death had passed to *Rayiru*, who was the heir to the property acquired by *Kanaran*. It is true that in one place he stated that *Rayiru* was managing with his consent, but when the whole statement is considered, this seems merely to mean that he, as Karnavan, was the only person, if any, entitled to object, and that in his opinion *Rayiru* was the proper person to hold the property. It thus appears that *Kelu* **[215]** acquiesced in the claim set up by *Rayiru*, but it would make no difference whether he did or did not acquiesce. It is sufficient that *Rayiru* set up the claim and continued in undisturbed possession.

We think that the possession from 1858 was hostile, and as regards these Nos. 1, 2, 7, 10, 14, 15 and 16, we set aside the Subordinate Judge's decree and restore that of the Munsif with costs.

[3 Mad. 215.]

APPELLATE CIVIL.

The 13th June, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE KINDERSLEY.

Tamarasherri Sivithri Andarjanom.....(Plaintiff) Appellant

versus

Maranat Vasudevan Nambudripad.....(Defendant) Respondent.*

Contract with Namburi woman—Burden of proof as to knowledge of transaction discharged—Contract against public policy—In pari delicto potior est conditio possidentis *—Specific Relief Act. Section 35—Contract Act, Section 65.*

Where two Namburi females, a mother and daughter (plaintiff), executed a document in favour of defendant, a male relative (nephew of the former), which purported to divest the plaintiff and her mother of the entire property of the Illom of which they were the sole proprietors, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the Illom to which the plaintiff and her mother belonged, and to maintain the plaintiff and

* Second Appeal No. 679 of 1880 against the decree of H. Wigram, Officiating District Judge of South Malabar, confirming the decree of the Subordinate Judge of Calicut, dated 24th July 1880.

her mother till death, and it was proved that plaintiff was well aware of what she was doing, and had subsequently clearly recognized the defendant as absolute proprietor of the property and was contented with his having assumed the position pointed out in the document.

Held that the transaction was valid and could not be called into question on the suggestion that plaintiff was placed at a disadvantage and was not fully cognizant of the irrevocable nature of the deed, and that the rule laid down by the Privy Council in *Ashgar Ali* v. *Delroos Banoo Begam* (I. L. R., 3 Cal. 324) and in *Tacoordeen Tewarry* v. *N. Syed Ali* (L. R., 1 I.A., 392) had been complied with and that defendant had discharged the burden of proof upon him.

Held further by INNES, J., that the document aimed at defeating the right of escheat of the Government, and the transaction was against public policy with reference to the decision in *Cavali Vencata Narainappa's* case (8 M. I. A. 500), but that the plaintiff being *in pari delicto* with the defendant could not recover the property.

[216] *Held* by KINDERSLEY, J., that as no claim was made by the Crown it was not necessary to decide as to rights which may or may not be claimed by the Crown, and that if plaintiff and her mother were not, as apparently they were not, in the position of ordinary Hindu widows, there was nothing opposed to public policy in their disposing of the property, as being the last owners and competent to dispose of it absolutely.

THE plaintiff in this case sued in 1879 to set aside a document executed by her and her mother to the defendant in 1874 on the ground that their consent to it was obtained by fraud, that it was given without consideration, and that the defendant had not acted up to its terms, and also to recover the *Tamarasherry* Illom and its appurtenances from defendant.

The defendant pleaded that the suit was barred by *Limitation*, denied that there was any fraud, and alleged that the document was a gift, and that the Illom and its appurtenances had been put into his possession.

The Subordinate Judge dismissed the suit.

The District Judge, to whom plaintiff appealed, overruled the Subordinate Judge's ruling that the suit was barred by *Limitation*, holding that the prayer to set aside the document was subsidiary to the prayer for recovery of possession of the estate, *Raj Bahadur Singh* v. *Achambit Lal* (L.R., 6 I.A. 113), and held that the document sought to be set aside was a contract, not a gift, by which the defendant in consideration of an immediate transfer of possession of the Illom estates to him as proprietor undertook to marry and raise up issue to represent the Illom and to maintain the females till their death; that no fraud had been proved; that defendant had evaded performance of his promise, *viz.*, to marry for the Illom; that plaintiff had waived her right to have the agreement rescinded on this ground, and proceeded as follows :—The last question which was not raised by the parties is whether the agreement is not altogether void within the meaning of Section 23 of the *Contract Act*, because the consideration or object of it is of such a nature that, if permitted, it would defeat the provisions of the Law of Escheat, and is opposed to public policy.

"The estate of inheritance which devolved on plaintiff's mother and then on plaintiff was under the Hindu Law a qualified estate, and the case of *Cavali Vencata Narainappa* (8 M.I.A., 500) is an authority **[217]** that they had no power to alienate to the prejudice of the Crown claiming by escheat. No special custom among Nambudries has been alleged, and the secrecy with which the matter was conducted until 1879 (the Exhibit I was never produced except for registration) leads to the inference that the intention of the plaintiff's mother was to defeat the right of Government by alienating the property to her own brother's son.

"Now it certainly appears to me that it is contrary to public policy that such an agreement should be allowed to take effect, and that defendant should be allowed to carry out what is really the immediate object and consideration of the agreement, *viz.*, to marry a wife for the Illom and beget heirs who will really be no heirs. The agreement cannot, in my opinion, be split up so as to separate the lawful parts from the unlawful. It would, of course, have been perfectly lawful for plaintiff and her mother to have alienated their life interests to defendant in consideration of his maintaining them and performing the funeral ceremonies of the family. But it was unlawful to make an absolute alienation of the property in consideration of defendant raising up heirs to the Illom. The main object of the agreement being illegal, I think that the whole agreement is void.

"But it does not, therefore, follow that plaintiff is entitled to treat it as void and to recover back the property transferred under it. If the agreement was an executed agreement in which the reciprocal promises had been performed, under the rule laid down in *Ayerst* v. *Jenkins* (L. R., 16 Eq., 275) plaintiff would have a right to impeach it. Here the agreement is so far as defendant is concerned executory. But still the general rule to be followed is that money paid or property delivered under an unlawful agreement cannot be recovered back; in other words, '*In pari delicto potior est conditio possidentis.*'

"There are exceptions to this rule, but I do not think that plaintiff's case falls under any of them. Thus in *Symes* v. *Hughes* (L. R., 9 Eq., 475) a plaintiff who had assigned property to a trustee with the intention of defeating his creditors was allowed to recover back the same on the ground that the illegal purpose had **[218]** not been fully executed, but this was not so much for the benefit of plaintiff himself as for the general body of creditors.

"On the following grounds, *viz.*, that the agreement was acted on for eight years without dispute; that the agreement, if legal, would not be voidable in equity at the option of plaintiff; that no interests of third parties at present require that the agreement should be rescinded, and that it is open to the Government to take such steps as they may be advised to defeat the unlawful intention of the parties, I am of opinion that plaintiff is not entitled to relief."

The plaintiff appealed to the High Court on the ground that the disposition made by Exhibit I was revocable at the plaintiff's will; that the defendant had failed to perform the condition on which he took possession of the property; and that the agreement being void the property ought to be restored to the plaintiff.

Mr. *Shephard* for Appellant.

Mr. *Branson* and *A. Ramachandrayyar* for Respondent.

The Court (INNES and KINDERSLEY, JJ.) delivered the following

Judgments:—

Innes, J.—The suit out of which this second appeal arises was in terms to set aside an instrument whereby the plaintiff and her mother purported to divest themselves of all their immovable property and make it over to the defendant.

The plaintiff said that the Illom to which she belonged came to consist solely of females, and she and her mother in consequence appointed an agent to look after the affairs of the property; that in 1872 they dismissed him and appointed defendant in his place; that in 1879 when they left their place on a short visit elsewhere, the defendant took possession of the property; that in the same year after the mother's death, resolving to dismiss defendant and take

the management of the property on herself, plaintiff sued some of the tenants for the recovery of certain land; that the tenants pleaded that they held under mortgage from defendant, and defendant appearing as a witness on their behalf put forward the deed (Exhibit I), and alleged that under the provisions of this deed he was the owner of the property; that the signature of her mother and herself were fraudulently obtained to this document on the supposition that it was a mere Power of Attorney; and that **[219]** she now sought to set it aside as it purported to give away to defendant her entire property.

Defendant pleaded that the suit was barred by lapse of time, that the allegation of dispossession by defendant was false, and that the deed was executed by plaintiff and her mother of their own accord and with full knowledge of its contents and was ratified by them by several subsequent acts.

The Subordinate Judge, and in appeal the District Judge, have both found that the plaintiff and her mother at the time of the execution of Exhibit I were perfectly aware of what they were doing, and that there was no fraud whatever in the conduct of defendant, and that the consideration for the document was the undertaking of defendant to marry and raise up seed to the *Tamarasherry* Illom.

The Subordinate Judge also considered that the suit was barred by the Law of *Limitation* as it was a suit to set aside a document and the provisions 91 to 93 and 95 of the *Limitation Act* applied, and, under the circumstances proved, allowed plaintiff only three years from the date of the instrument.

The District Judge was of opinion in regard to this point that the suit being substantially a suit to recover the property consisting of land, the period was twelve years and that the suit was not barred, but upon the other grounds he held that plaintiff's suit was rightly dismissed.

He considered that the document embodied an agreement which was illegal and against public policy. The plaintiff and her mother according to the doctrine laid down in *Cavali Vencata Narainappa* (8 M.I.A., 500, 549-553), were possessed of only a limited interest in the property and could not effect an alienation of it so as to defeat the ultimate rights of the Government arising from the exhaustion of heirs in the *Tamarasherry* Illom. The object of the instrument was to create a new heir in the person of defendant and his heirs and so to defeat the right of Government by escheat of the estate, which on the decease of plaintiff and her mother without legal heirs would necessarily arise.

He was of opinion, however, that plaintiff could not recover.

[220] In appeal it was urged by Mr. *Shephard* that the District Judge should have followed the doctrine laid down by the Privy Council in *Ashgar Ali* v. *Delroos Banoo Begam* (I. L. R., 3 Cal., 324) and kindred cases; that a Court when dealing with the dispositions of her property by a Pardanishin woman, ought to be satisfied that the transaction was explained to her and that she knew what she was doing; and that the burden of proof which the law throws upon the party taking the benefit to the prejudice of the other had not been discharged by the defendant in the present case.

He also contended that the document was not necessarily a deed of gift or contract whereby the defendant became the owner of the property, but that it might be construed as creating the appointment of defendant as an agent with a promise superadded of making him heir. The further contention was that the deed having been found to be void plaintiff should recover. I feel unable to agree with Mr. *Shephard*. It appears to me that the only reasonable construction of the document is that it was intended to divest the plaintiff

and her mother of the entire property, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the Illom, to which plaintiff and her mother belonged. Two Courts have found that there was no fraud, and Mr. *Shephard* says he does not now contend that there was any fraud. The Courts below have, however, gone further. They find that plaintiff knew perfectly well what she was doing, and certainly the registration of the deed as a deed of gift, and the depositions given by plaintiff and her mother in 1873 (Documents 10 and 11) and again in 1877 (Documents 12 and 13) seem to show clearly that they recognized defendant as the absolute proprietor of the property and were quite contented with his having assumed this position under what they style the deed of gift.

The rule of law as to the evidence to be required in such cases is that the Court should be satisfied that the transaction was explained to the person parting with the property and that she knew what she was doing.

I think the defendant has done all that he was bound to do, and that the validity of the transaction cannot now be questioned on **[221]** the suggestion that plaintiff was placed at a disadvantage and was not fully cognizant of the irrevocable effect of the deed.

The deed no doubt aimed at defeating the right of escheat of the Government and the transaction has been rightly found to be against public policy with reference to the decision of the Judicial Committee in the *Collector of Masulipatam* v. *Cavali Vencata Narainappa* (8 M. I. A., 500, 549-553). On the question of whether plaintiff ought to be allowed to recover, the general rule is well set out in *Sheshaya* v. *Kandaiya* (2 M. H. C. R., 252). The rule of the Civil law which corresponds with the English law is as follows :—*Si cui aliquid ob causam respectu solius ejus qui accepit, non etian ejus qui dedit, turpem datum est ; hic dotum repetere potest sed sine usuria. Sin datum est ob causam respect solius ejus qui dedit turpem, hic datum repetere nequit. Æque atque si turpiter et datum et acceptum est* (Mack., Sec. 480). *Childers* v. *Childers* (3 K. and J. 310 White and Tudor, vol. i, p. 224) to which we were referred was a case in which a reconveyance to the plaintiff was ordered only after it was discovered that in fact the transaction had not been illegal at all, but the consideration had failed.

In *Symes* v. *Hughes* (L. R., 9 Eq., 475), when the plaintiff, who was a bankrupt, was allowed to recover, he took no benefit. The effect of allowing him to recover was to prevent the illegal transaction from operating to defeat the rights of third parties—his creditors.

In *Ayrest* v. *Jenkins* (L.R., 16 Eq., 275) there was this difference which is noticed by the District Judge from the present case—that the mutual promises had been performed. But it does not appear that that distinction in the case before us is one that works an exception to the rule in English law.

The *Contract Act*, Section 65, appears to admit of a plaintiff recovering any advantage which the defendant has gained in pursuance of a void contract made between them, but the cases in which a plaintiff may sue to rescind an unlawful contract seem to be limited by Section 35 of the *Specific Relief Act*.

The clause of that section applicable to the present case is Clause 6, which provides that rescission of a contract may be **[222]** adjudged when the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff.

Now can the defendant be said to be more to blame than the plaintiff in this case? It appears to me that they are *in pari delicto*, and that the District Judge and the Court of First Instance were right in deciding that plaintiff could not have relief.

I would dismiss the second appeal with costs.

Kindersley, J.—The circumstances under which this suit was brought are as follow: The plaintiff and her mother belonged to the *Tamarasherry* Illom in *South Malabar;* and, there being no male member of that Illom surviving, the plaintiff and her mother on the 4th of November 1872 executed an instrument in favour of their relative, the defendant, purporting to place him in immediate possession of all the property of their Illom as heir and manager, subject to payment of debts, and imposing on the defendant the duty of maintaining the plaintiff and her mother during their lives, and of performing their obsequies after their deaths. The defendant was also to marry and to raise up seed for the plaintiff's Illom.

The present suit is brought to recover the property of the plaintiff's Illom from the defendant, and to set aside the instrument in question on the ground of fraud and misrepresentation; the defendant having at the time of its execution deceived the plaintiff and her mother (now deceased) by representing that the instrument was only a Power of Attorney. It is not now contended that there was any misrepresentation. But it is said that the plaintiff and her mother were gosha women, and that it was for the defendant to show that the purport of the instrument was fully explained to them, and that they understood it.

The case of *Tacoordeen Tewarry* v. *N. Syed Ali Hoosein Khan* (L. R., 1 I. A., 192), shows that in a case like this the strongest proof ought to be given by the person claiming under a gift or sale from a gosha woman, that the transaction was a real and *bonâ fide* transaction, and fully understood by the lady whose property is to be dealt with. But in the present case the Judge has found that the plaintiff's allegation that she signed the instrument without under-**[223]** standing its contents was clearly false. And it has been shown that in July 1873 the plaintiff and her mother deposed before a Revenue officer that they had transferred all their property to the defendant and were supported by him. And in the following November they consented to the transfer of the registry of the property into the name of the defendant. This is very strong evidence in support of the finding that the plaintiff and her mother were fully aware of the purport of the document which they executed.

It may further be observed that the instrument was not without consideration, and although the defendant has not yet married for the benefit of the Illom, he is quite willing to do so.

It has been contended that the instrument in question is void as contrary to public policy, as the continuance of the family by means of the defendant would prevent an escheat of the property to the Crown. No claim having been made on behalf of the Crown, I do not think it would be convenient to express any opinion in the present suit as to the rights which may or may not be claimed by the ruling power. The Subordinate Judge has observed that it was not denied that the plaintiff and her mother, who apparently were not in the position of ordinary Hindu widows, had power to make a gift of their property. And, if they being the last owners were competent to dispose of it absolutely, I see at present nothing opposed to public policy in their doing so. If, as the District Judge puts it, they had only a qualified estate, the Government may have a right to object. But I do not think that the plaintiff has any right to raise this objection.

In the result I agree that the appeal ought to be dismissed with costs.

NOTES.

[As to other applications of the maxim *In pari delicto*, etc., see the leading case of **(1887) 11 Bom. 708** and also the following cases:—(1895) 18 Mad. 378; (1896) 20 Mad. 323; (1897) 20 Mad. 326; (1908) 31 Mad. 485; (1900) 28 Cal. 370; (1906) 33 Cal. 967.

It is enough if the delict was the same to a substantial degree :—(1906) 29 Mad. 72.

Where the transferor is not guilty as the transferee, relief may be given :—(1895) 23 Cal. 460. See also the Trusts Act s. 84 ; The Specific Relief Act s. 35 (b).

As to the point of escheat left open in this case, see (1887) 11 Mad. 157 and see also (1882) 6 Mad. 121.]

[224] APPELLATE CIVIL.

The 4th July, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE KINDERSLEY.

Vengideswara Putter.....(Plaintiff) Appellant in No. 718 and Respondent in No. 856

versus

Chatu Achen.....(Second Defendant) Respondent in No. 718 and Appellant in No. 856.*

Stipulation to pay contract rate of interest upon breach of contract not an independent obligation—Plaintiff entitled to costs when the amount stipulated for on breach of contract is not tendered, and decision of Court is required to ascertain rate of compensation due—Contract Act, Section 74.

V lent Rs. 1,500 to *C* and the members of his family under a bond by which it was agreed that *C*'s family should demise certain land on kanom to *V* and receive a further sum. It was also stipulated in the bond that *C* and the members of his family should pay interest at 6 per cent. upon Rs. 1,500 until the execution of the kanom deed, and interest at 24 per cent. from the date of the loan in the event of their not making the demise. The demise was not made.

Held that the stipulation for the enhanced rate of interest did not create an independent obligation, and that the proper course was to determine what would be a sufficient compensation for the breach of contract.

C tendered what he considered sufficient compensation to *V* before suit and claimed exemption from payment of interest and costs.

Held that as *C* had not tendered the amount stipulated for in the bond, *V* was justified in coming to the Court to obtain a decision as to the rate of compensation which should be paid and was entitled to his costs.

IN this case the plaintiff sued to recover from the defendants personally and by sale of the property hypothecated Rs. 2,530, being principal (Rs. 1,500) and interest due on a bond, dated 25th July 1877.

The seven defendants were members of one of the houses of the *Palghat* Raja's family. In consideration of a loan of Rs. 1,500 they agreed to demise certain lands to the plaintiff on kanom for Rs. 3,428-9-2, the difference to be paid on the date of execution of the kanom deed, and until such time to pay

* Second Appeals, Nos. 718 and 856 of 1880, against the decree of H. Wigram, Officiating District Judge of South Malabar, modifying the decree of the Subordinate Judge of South Malabar, dated 20th September 1880.