APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

MUTHUVEERAPPA CHETTY *alias* VELLAYAPPA CHETTY (PLAINTIFF), APPELLANT,

v.

RAMASWAMI CHETTY (DECEASED), AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF THE DECEASED FIRST DEFENDANT), RESPONDENTS.*

1915. November 28 and 29 and December 8.

Contract Act (IX of 1872), sec. 72—Coercion—Money paid to stifle a pending non-compoundable criminal prosecution—Suit to recover, maintainability of.

Money obtained from the plaintiff by the defendant under an agreement to stifle a pending non-compoundable criminal prosecution, is money paid under 'coercion' within the meaning of section 72 of the Indian Contract Act, and can be recovered back. The maxim *in pari delicto potior est conditio defendentis* does not apply to such a case.

Williams v. *Hedley* (1807) 8 East, 378, *Unwin* v. *Leaper* (1840) 1 M. & G., 747 and *Atkinson* v. *Denby* (1861) 6 H. & N., 778, followed.

Kanhaya Lal v. *National Bank of India, Limited* (1913) I.L.R., 40 Calc., 598 (P.C.), referred to.

The fact that the money was actually paid as the result of an arbitration is immaterial if the plaintiff's consent to the arbitration was obtained by means of the prosecution.

APPEALS Nos. 208 of 1910 and 176 of 1911 against the decrees of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura (East), in Original Suits Nos. 78 and 122 of 1909 and Appeals Nos. 177 and 178 of 1911, against the decrees of the said Subordinate Judge of Madura (East) in Original Suit No. 198 of 1908.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

K. S. Jayarama Ayyar for *R. Kuppuswami Ayyar* for the appellant.

T. Rangachariyar and *S. Sundararaja Ayyangar* for the respondents.

WALLIS, C.J.—The Subordinate Judge has found in this case—and we see no reason to differ from his finding on the evidence—that the plaintiff was induced to pay Rs. 7,000 to

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the defendants in order that a criminal prosecution instituted by the defendants against the plaintiff for an offence which was not compoundable should not be proceeded with.

The agreement to stifle the criminal prosecution was illegal, and it is said that money paid in pursuance of an illegal agreement cannot be recovered back. No doubt that is generally so according to the maxim *in pari delicto potior est conditio defendentis*; but it appears to be well established that when a payment of money is obtained by means of such an agreement the parties are not to be considered *in pari delicto* and that the money may be recovered back. In Bullen and Leake's Precedents of Pleadings, second edition, page 51, the law is stated as follows: "But where the plaintiff having paid the money in execution of an illegal contract or for an illegal purpose is not *in pari delicto*, he may in some cases recover it; as when the money was paid under oppression, as the money paid by a bankrupt to obtain his certificate—*Smith* v. *Bromley*(1); money paid by the defendant in a penal action to compound the action; *Williams* v. *Hedley*(2) and *Unwin* v. *Leaper*(3). In *Williams* v. *Hedley*(2), an action for penalties had been brought by the defendant against the plaintiff in respect of certain usurious transactions entered into by the latter, and to escape the penal action the plaintiff had been induced to pay the persons who put forward Hedley the amount of a debt due to them by a third party; and it was held the money could be recovered back. Similarly in *Unwin* v. *Leaper*(3), the jury were directed that the money could be recovered if it had not been paid voluntarily but by coercion of the threatened penal actions." The Subordinate Judge held that the evidence did not show coercion within the meaning of the Contract Act but it is now settled that is not the test: *Kanhaya Lal* v. *National Bank of India, Ld*(4). It makes no difference in my opinion here that money was found payable by the arbitrators as the plaintiff's consent to the arbitration was obtained by means of the criminal prosecution, or that it may have been really due, as in either case the plaintiff is entitled to get back what was obtained from him by coercion. The appeal must be allowed with interest at 6 per cent. from the

(1) (1760) 2 Doug., 696.
(2) (1807) 8 East., 378.
(3) (1840) 1 M. & G., 747.
(4) (1913) I.L.R., 40 Calc., 598 (P.C.)

date of plaint. No order as to costs. As regards the connected appeals I agree with the judgment of my learned brother.

SESHAGIRI AYYAR, J.—The plaintiff was the agent of the defendants at Rangoon. He returned in 1905 to Madras. Disputes arose at once regarding the plaintiff's management. An attempt at mediation between the parties was not successful. About the end of 1907 matters came to a crisis. The defendants had a plaint prepared to be filed against the plaintiff in August of that year (Exhibit C). In November, they instituted a complaint for criminal breach of trust in respect of a pair of bangles. The plaintiff was arrested on a warrant on the 30th of November and was released on bail while the difference between the parties was being adjusted. Two arbitrators were selected on the 1st of December, one by the plaintiff and the other by the defendants. As a result of their mediation, the plaintiff paid Rs. 7,000 to the defendants and gave a *hundi* for Rs. 3,000. No evidence was offered by the defendants at the adjourned hearing of the criminal prosecution and the plaintiff was acquitted.

Under these circumstances three suits were instituted in the Subordinate-Court of Madura (East) which have given rise to four appeals in this Court. The plaintiff's first suit was for damages for malicious prosecution. The Subordinate Judge awarded Rs. 200 as damages. In Appeal No. 177 of 1911, the plaintiff complains against the inadequacy of the amount decreed. Appeal No. 178 of 1911 is by the defendants disputing the right to any damages. Original Suit No. 75 of 1909 was brought by the plaintiff for the refund of the sum of Rs. 7,000 paid by him. The lower Court dismissed the suit. Appeal No. 208 of 1910 is against that decree. The defendants instituted Original Suit No. 122 of 1909 to recover the Rs. 3,000 under the *hundi* executed in their favour by the plaintiff. That suit was also dismissed. Appeal No. 176 of 1911 is against that decision.

Appeals Nos. 177 and 178 of 1911 can be disposed of shortly. I am unable to agree with the learned Subordinate Judge that the prosecution for criminal breach of trust was instituted without reasonable and probable cause. The plaintiff admits that he purchased a pair of bangles for Rs. 10 with a view to sell it at a profit. It is also admitted that it was not sold. His case is that he melted the bangles and sold the gold for Rs. 10.

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No explanation is given as to why this extraordinary procedure was adopted. He is unable to point to any other instance in which a similar thing was done.

Prima facie, the explanation is very suspicious. By melting, the cost of making is lost. The entry of the sale of gold does not carry the matter any further. The plaintiff was in the habit of purchasing gold for making bangles. He has been selling gold also. The entry as to the sale of the gold for Rs. 10-4-0 may relate to the purchased gold and not to the melted gold. The total quantity of gold accounted for excluding this item is found by the Subordinate Judge not to exceed the quantity purchased. I think the explanation of the plaintiff is unconvincing. At any rate, the defendants cannot be said to have had no reasonable or probable cause for believing that the plaintiff misappropriated the bangles. The immediate occasion and very likely the motive for instituting the complaint was to put pressure on the plaintiff to render true and proper accounts of his agency; but that is not enough; the plaintiff is bound to prove that the prosecution was launched without reasonable and probable cause, and not simply that it was improper or had an ulterior object. It was said that the evidence given by the defendant's agent at the conclusion of the criminal trial showed that the defendants were satisfied that the bangles were accounted for.

The parties having settled their civil rights, it was part of the compact that the criminal prosecution should not be pressed. Consequently, evidence as little incriminating as possible was given at the final trial. This evidence does not indicate that the defendants had no grounds for preferring the complaint. In my opinion, the plaintiff has failed to prove his case. Appeal No. 178 of 1911 must be allowed and Appeal No. 177 of 1911 must be dismissed. The result will be that Original Suit No. 198 of 1908 is dismissed with costs throughout.

In dealing with the other two appeals, I accept in their entirety the findings of the learned Subordinate Judge. No serious attempt was made on either side to show that he was wrong; and the evidence fully supports his conclusions. Briefly stated, the facts established are: (1) that the plaintiff failed to render proper accounts of the business, (2) that the salary chit was not returned to him (an almost conclusive indication among Nattu Kottai Chettis that the transaction was not closed

between the parties), (3) that the defendants were prepared to institute a suit against the plaintiff for nearly Rs. 30,000, (4) that the defendants resorted to the expedient of a criminal prosecution to coerce the plaintiff to come to terms, (5) that the plaintiff was arrested, (6) that while on bail, the parties referred their differences to two arbitrators and (7) that as a result of the mediation it was agreed that the prosecution against the plaintiff should not be pressed, provided he gave Rs. 7,000 at once and executed a *hundi* for Rs. 3,000 more. On these facts the question is whether the defendants are entitled to recover the amount due on the *hundi* and whether the plaintiff is entitled to the money paid by him. There can be no doubt on the first question. As the document was given with a view to stifle the prosecution, Courts cannot give a decree on the *hundi*. Section 23 of the Contract Act makes the consideration illegal: *Majibar Rahman* v. *Muktashed Hossain*(1) and *Mottai* v. *Thanappa*(2) are directly in point. In *Jones* v. *Merionethshire Building Society*(3), Lord Justice LINDLEY says, "If any bargaining could be shown here to stifle a prosecution for a criminal act, the action certainly could not be maintained." Lords Justices BOWEN and FRY are equally emphatic. The Subordinate Judge was therefore right in dismissing the suit. The appeal should be dismissed with costs.

The claim for the refund cannot be so easily disposed of. Lord Justice BOWEN in the case above referred to says: "There might be a difficulty in recovering back money paid on account of the well-known ground which is shortly expressed in the maxim *melior est conditio defendentis*." It may be that if both parties are *in pari delicto*, the position of the defendant may give him an advantage. But where one party uses his position as prosecutor to secure moneys which but for the arrest, he would not have got, the principle of the parties being *in pari delicto* cannot apply. Mr. Rangachariyar foresaw this difficulty and contended that the payment was under the award of the arbitrators and that a decree directing the refund would offend against the principle of placing the parties *in status quo ante*. The arbitrator's decision may show that the claim was honest, but when it is given with the object of stifling a

(1) (1912) I.L.R., 40 Calc., 113. (2) (1914) I.L.R., 37 Mad., 385.
(3) 1892) 1 Ch., 173.

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pending prosecution, the consideration is opposed to public policy. It is true that in directing the payment, care should be taken to see that parties are placed *in status quo ante*. If in this case, the defendants had pleaded that they were entitled to retain the amount towards what is due to them from the plaintiff, I would have been inclined to direct the trial of an issue in that behalf. I agree with the dictum in *Shridhar Balakrishna* v. *Bubaji Mula*(1), that the defendant should not be estopped from showing that the money which he seeks to retain was really due to him: see also *Cocks* v. *Masterman*(2). and *Imperial Bank of Canada* v. *Bank of Hamilton*(3). But that is not the defendants' case. Therefore the only question is whether the money can be recovered having been paid as a consideration for not pressing the criminal prosecution. In the first place we have the statutory declaration in section 72 of the Contract Act that a person to whom money is paid under coercion must repay it. It was recently held by the Judicial Committee that the term "coercion" is not synonymous with the definition in the Act: *Kanhaya Lal* v. *National Bank of India, Ld*(4). In my opinion, the plaintiff would not have paid the Rs. 7,000 had he not been under arrest. He was coerced into paying the amount by the prosecution and by the promise to withdraw it, The decision in *Amjadennissa Bibi* v. *Rahim Buksh Shikdar*(5). is distinguishable from the present case. It was a compoundable offence and the learned Judge found that the defendant did not use his dominant position to get the money. In effect the finding was that there was no coercion. On the other hand, *Atkinson* v. *Denby*(6) lays down distinctly that if the agreement was to stifle a prosecution money can be recovered. Even if the payment was induced only in part by the agreement, the whole consideration must fail: see section 24 of the Contract Act and *Clark* v. *Woods*(7). Mr. Rangachariyar relies on *Flower* v. *Sadler*(8). In that case, there was no arrest. The party lawfully bound to pay paid the amount as soon as he was threatened with a prosecution. The principle of that case is that there is nothing illegal in a man recovering his just dues by

(1) (1914) I.L.R., 38 Bom., 709.
(2) (1829) 9 B. & C., 902.
(3) (1903) A.C., 49.
(4) (1913) I.L.R., 40 Calc., 598 (P.C.).
(5) (1915) I.L.R., 42 Calc., 286.
(6) (1861) 6 H. & N., 778.
(7) (1848) 2 Ex., 395.
(8) (1882) 10 Q.B.D., 572.

the use of threatening language so long as there is no agreement to stifle a prosecution. The illegality consists not in using questionable means to secure a lawful debt, but in agreeing to defeat public justice. In *In re Mapleback, Ex parte Caldecott*(1) also there was no arrest. In *Smith* v. *Monteith*(2), it was held that when a man is arrested under a process of law devised for recovering money, he is not entitled to be paid back. This is obvious. Otherwise the provision of our Code for arrest in execution will be rendered nugatory.

I am therefore constrained to hold that the plaintiff is entitled to the refund. As the claim of the defendants appears to have been just and reasonable, there will be interest at 6 *per cent per annum* on the amount of the decree only from the date of the plaint. Each party will bear his own costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

J. SUBBA RAO (DEFENDANT), APPELLANT,

v.

J. RAMA RAO (PLAINTIFF), RESPONDENT.*

1916. January 6.

Limitation Act (IX of 1908), *arts.* 62 *and* 120—*Suit by one part-owner of a jaghir against another who was also manager—Suit for account and recovery of income—Nature of suit—Suit in a District Munsif's Court for one year's income—Plaint returned for presentation to proper Court—Plaint, not represented—Subsequent suit in a District Court for income due for previous years—Civil Procedure Code (Act V of* 1908), *O. II, r.* 2, *suit, if, barred under.*

The plaintiff and the defendant were co-sharers in a jaghir of which the latter was appointed by the Government as manager. The former sued the latter in a District Munsif's Court for his share of the net income due for the year 1912, but the plaint was returned for presentation to the proper Court as the valuation of the suit exceeded the pecuniary limits of the jurisdiction of the said Court; the plaintiff did not re-present the plaint in any Court but

(1) (1876) 4 Ch.D., 150. (2) (1844) 3 M. & W., 427.

* Appeal No. 148 of 1915.