APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

P. R. SRINIVASA AYYAR (PLAINTIFF), APPELLANT,

v.

A. SESHA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1917, February, 28 and March, 1 and 14.

Indian Contract Act (IX of 1872), ss. 23 and 65—Marriage brocage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.

A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed. Such an agreement does not fall within section 65 of the Contract Act and the rule to be applied is the rule of English Law.

Taylor v. *Bowers* (1876) 1 Q.B.D., 291, *Kearley* v. *Thomson* (1890) 24 Q.B.D., 742, *Barclay* v. *Pearson* (1893) 2 Ch., 154, and *Petherperumal Chetty* v. *Muniandy Servai* (1908) I.L.R., 35 Calc., 551 (P.C.), referred to.

Ledu Coachman v. *Hiralal Bose* (1916) I.L.R., 43 Calc., 115, dissented from.

The rule applies whether the transfer of the property under the agreement was merely ostensible or real.

In re Great Berlin Steamboat Company (1884) 26 Ch. Div., 616, followed.

APPEAL under clause 15 of the Letters Patent against the order of BURN, J., in *Srinivasa Ayyar* v. *Sesha Ayyar*(1).

The plaintiff paid the defendants rupees four hundred under an agreement for the marriage of the first defendant's son (Raman) with the plaintiff's minor sister. The amount was not paid as a settlement for the bride or her issue but as remuneration to the defendants to bring about the marriage. The marriage did not take place and the plaintiff sued for recovery of the amount, and alleged that there was breach of the agreement by the defendants. The defendants contended (1) that there was no cause of action against them, as the first defendant agreed only on behalf of Raman and that the second defendant was not a party at all; (2) that the agreement was not broken by the defendants and (3) that the agreement was invalid as being contrary to public policy, and that the money advanced under it

* Letters Patent Appeal No. 233 of 1916.

(1) Civil Revision Petition No. 862 of 1915 praying the High Court to revise the decree of K. KRISHNAMA ACHARIYAR, Subordinate Judge of Madura, in Small Cause Suit No. 1314 of 1915.

SRINIVASA v. SESHA.

was therefore irrecoverable. The Subordinate Judge, who tried the suit on the small cause side, held that the agreement was broken by the plaintiff and that consequently he could not recover the suit amount. The plaintiff preferred a civil revision petition to the High Court which was heard by BURN, J., who dismissed the petition holding that the plaintiff could not recover the amount as he was responsible for the breach of the agreement. The learned Judge did not allow the plaintiff to raise the contention that he was entitled to recover the money as paid under an agreement which was unlawful as being opposed to public policy and expressed the opinion that section 65 of the Indian Contract Act had no application to the case. The plaintiff preferred this Letters Patent Appeal.

Dr. *K. Pandalai* for the appellant.

T. R. Venkatarama Sastriyar for the respondents.

OLDFIELD, J.

OLDFIELD, J.—Plaintiff, here appellant, sued defendants for Rs. 400 alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, the first defendant's son and the second defendant's brother. There were three defences; that (1) there was no cause of action, because the first defendant entered into the agreement only on behalf of Raman and the second defendant was not a party to it at all; (2) the agreement was not broken by defendants; (3) it was invalid, as being against public policy; and (4) the money advanced under it was therefore irrecoverable.

Of these defences, the first was not dealt with either at the trial or by the learned Judge in this court though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was, according to plaintiff's second witness and first defendant, of age at the date of the agreement. The latter said that he took away the Rs. 400 paid under it. It is not the case that no evidence to support defendant's pleas was adduced; and it was admitted before us that they were relied on in this court, although the learned Judge did not mention them. It is not possible in these

circumstances to hold that they were abandoned or that defendants cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds.

The learned Subordinate Judge's finding on the second defence, that plaintiff, not defendants, broke the agreement is one of fact and must be accepted. It is, however, to be observed that coupled as it was with a plea that the agreement was unlawful and therefore unenforceable, it could justify no legal conclusion. For the plea, in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly they could not complain of plaintiff's refusal to do what they alleged would have been wrong.

On the remaining question raised there is no doubt that the agreement was unlawful and therefore void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and as plaintiff's grounds of appeal Nos. 5 and 6 and first defendant's written statement (paragraph 8) and the second defendant's (paragraph 13) show, both sides are agreed that such an agreement would be unlawful. *Venkatakrishnayya* v. *Lakshminarayana*(1) and *Devarayan* v. *Muthuraman*(2). The question is then whether plaintiff is entitled to recover what he paid under such an agreement and whether defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendant's allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here also expressing the opinion that his claim was unsustainable with reference to section 65 of the Indian Contract Act. That section, however, is not applicable: *Dayabhai Tribhovandas* v. *Lakshmichand Panachand*(3), *Gulabchand* v. *Fulbai*(4) and *Ledu Coachman* v.

(1) (1909) I.L.R., 32 Mad., 185.
(2) (1914) I.L.R., 37 Mad., 393.
(3) (1885) I.L.R., 9 Bom., 358.
(4) (1909) I.L.R., 33 Bom., 411.

SRINIVASA v. SESHA.

OLDFIELD, J.

Hiralal(1). The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority.

He has supported his conclusion against the existence of any right to recover what has passed in connexion with an unlawful agreement by citation of three cases. But in one of them, *Girdhari Singh* v. *Neeladhar Singh*(2), it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is therefore no authority against the contention, advanced before us, that the general rule is subject to an exception in the plaintiff's favour, when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case, *Hathu Khan* v. *Sewak Koer*(3), since it was one of completed performance. The third case, *Ledu Coachman* v. *Hiralal*(1), cannot be dismissed so shortly, since it directly negatives the contention just referred to by the statement:

"It is plain that, although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law, or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it."

The distinction drawn would appear to be between agreements contrary to law or public policy and others, which would merely have an unlawful object and would also therefore be void under section 23 of the Indian Contract Act. But there is no warrant for it in that section, since all alike are made unlawful or (with all respect) in the cases referred to by the learned Judges, who moreover take no account of other cases, in which the exception was applied without reference to the distinction proposed.

Of the cases referred to by them, *Taylor* v. *Chester*(4) was a case of completed performance and *Howson* v. *Hancock*(5) one of a claim to recover money paid on a wager, in which no further performance was possible: *Tappenden* v. *Randall*(6) is

(1) (1916) I.L.R., 43 Calc., 115.
(2) (1912) 10 A.L.J., 159.
(3) (1911) 15 C.W.N., 408.
(4) (1865) L.R., 4 Q. B., 309.
(5) (1800) 8 T.R., 575.
(6) (1801) 2 Boss. and P., 467.

relied on only for a dictum which apparently has not affected later decisions. So also the learned Judge's quotation from *Collins* v. *Blantern*(1), though it is reproduced in *Kearley* v. *Thomson*(2) and *Barclay* v. *Pearson*(3) to be referred to later. Of the Indian cases cited, *Bai Vijli* v. *Nansa Nagar*(4) is not of importance, since this point and the authorities regarding it were not considered. The learned Judge's reason for rejecting two decisions in the opposite sense, *Bakshi Das* v. *Nadu Das*(5) and *Gulabchand* v. *Fulbai*(6), that they relate to marriage brocage contracts, is in any case not available to us in the present connexion.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance is clearly recognized without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor* v. *Bowers*(7) in which the object of the agreement a fraud on creditors would, if persisted in, have resulted in the frustration of the Insolvency law. Distrust of the decision in *Taylor* v. *Bowers*(7) was no doubt expressed in *Kearley* v. *Thomson*(2) but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to, although the object of the agreement was described as to defeat justice. The principle of *Taylor* v. *Bowers*(7) was moreover adopted fully in *Barclay* v. *Pearson*(3), already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it could recover. Of the Indian cases those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement as for instance in *Yeramati Krishnayya* v. *Chundru Papayya*(8). In *benami* cases however, for example, *Banka Behary Dass* v. *Raj Kumar Dass*(9) and *Govinda Kuar* v. *Lala Kishun Prosad*(10) the decision has always turned not on the extent to which the agreement if it were performed, would conflict with law or public policy, but on whether it was performed

(1) (1765) 2 Wilson, 341.
(2) (1890) 24 Q.B.D., 742.
(3) (1893) 2 Ch., 154.
(4) (1886) I.L.R., 10 Bom., 152.
(5) (1905) 1 C.L.J., 261.
(6) (1909) I.L.R., 33 Bom., 411.
(7) (1876) 1 Q.B.D., 291.
(8) (1897) I.L.R., 20 Mad., 326 at p. 329.
(9) (1900) I.L.R., 27 Calc., 231.
(10) (1901) I.L.R., 28 Calc., 370.

SRINIVASA v. SESHA. — OLDFIELD, J.

and the unlawful purpose was effected wholly or substantially or not. The decision of the Privy Council in *Petherperumal Chetty* v. *Muniandy Servai*(1) may in particular be mentioned firstly because it refers to the weight of the decision in *Taylor* v. *Bowers*(2) as unimpaired by *Kearley* v. *Thomson*(3) and secondly because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out,

"which would on the trial of an indictment for conspiracy have amounted to a good overt act of conspiracy,"

was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is, with all due deference, not possible to follow the decision in *Ledu Coachman* v. *Hiralal Bose*(4) or to confirm the decision, which is under appeal.

It is however argued by Mr. T. R. Venkatarama Sastri for defendants firstly that the exception above referred to to the general rule depends, not on whether there has been performance of the unlawful agreement but on whether the transfer of an advantage under it was merely ostensible or was intended to be real, recovery of the advantage being allowed only in the former class of cases. That is not the test recognized in the authorities already referred to or in *In re Great Berlin Steamboat Company*(5) in which the transfer was treated as irrevocable though it was clearly ostensible. It is then urged with reference to *Kearley* v. *Thomson*(3) that plaintiff cannot recover, because though the whole of the unlawful agreement has not been performed a substantial portion has been; and on the view already expressed a remand on this point may no doubt be fairly claimed.

The last question raised is whether plaintiff can rely on defendants' admission that the agreement was unlawful either generally or when, as in this case, he did not refer to its unlawfulness in his plaint. The answer however to the question in both forms is the same, that in the words of MELLISH, L.J., in *Taylor* v. *Bowers*(2) plaintiff does not

"as the rule is laid down in *Simpson* v. *Bloss*(6), require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction.

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(1) (1908) I.L.R., 35 Calc., 551 (P.C.). (2) (1876) 1 Q.B.D., 291.
(3) (1890) 24 Q.B.D., 742. (4) (1913) I.L.R., 43 Calc., 115.
(5) (1884) 26 Ch.D., 616. (6) (1816) 7 Taunt, 246.

To hold that plaintiff is entitled to recover does not carry out the illegal transaction but the effect is to put everybody in the same situation as they were before it was determined upon";

or, as the point was put by JAMES, L.J.:

"It is the defendant who has really got to show the fraud"

the element vitiating the agreement in the case under consideration. . .

"It is the defendant who has got to make out his title to the goods from the transaction, which is a fraud and which it seems he was a party to . . . and there would be no title in defendant independently of that."

To adapt these principles to the present case, the plea that the agreement is unlawful is not plaintiff's but defendant's. Defendants, as already pointed out, cannot, relying on it, also complain of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the Subordinate Judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on his side is one purely of law, and in the circumstances there is no adequate reason for depriving him of the benefit of it.

Defendants have further proposed to support the lower Court's judgment with reference to the counterclaim made in their written statements to damages on account of loss of reputation. It has not however been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendant's denial, that they were parties to that agreement. The questions for consideration are therefore only:—

(1) Whether the plaint agreement was entered into with defendants or either of them or with Raman with or without first defendant as his agent.

(2) Whether, with reference to the authorities above referred to, the agreement or a substantial part of it was performed?

The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the small cause suit to file and rehear it, admitting any additional

SRINIVASA v. SESHA.

evidence tendered in the light of the foregoing. Costs to date in both Courts will be costs in the cause and will be provided for in the decree to be passed.

BAKEWELL, J.

BAKEWELL, J.—In India marriage is not generally a matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

The pleadings in this case are not clear but I think that the plaint alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and, apart from other averments in the written statement of the first defendant it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof, had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendants' admission that the agreement was illegal and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid.

The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement and the plaintiff cannot reply that the agreement was illegal because he is *particeps criminis*. If the agreement is still wholly executory and no material part of the illegal purpose has been

accomplished, the defendant cannot plead that he holds the money for that purpose: [see *Barclay* v. *Pearson*(1), *Pether-perumal Chetty* v. *Muniandy Servai*(2)] and the cases there cited. These propositions apply when the parties are in *pari delicto*, and to agreements void under Civil Law; different considerations may arise in the case of an agreement to commit an offence against the Crown. I agree to the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

R. S. RAMA SHENOI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

M. A. HALLAGNA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1917, March, 19 and 20.

Civil Procedure Code (Act V of 1908), sec. 13 (b) and (d)—Natural justice, meaning of the term—Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.

A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of section 13 (*b*) of the Civil Procedure Code.

The term "Natural justice" in section 13 (*d*) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case.

Crawley v. *Isaacs* (1867) 16 L.T. (N.S.), 529, followed.

Liverpool Marine Credit Co. v. *Hunter* (1868) L.R., 3 Ch. App., 479, applied and followed.

Imrie v. *Castrique* (1860) 8 C.B. (N.S.), 405; s.c., 141 E.R., 1222, and *Scott* v. *Pilkington* (1862) 2 B. & S., 11; s.c., 121 E.R., 978, referred to.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal No. 528 of 1912, preferred against the decree of J. A. DEROZARIO, the Subordinate Judge of South Malabar at Cochin, in the Original Suit No. 3 of 1913.

Appeal under Clause 15 of the Letters Patent preferred against the decision of AYLING, J.

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(1) (1893) 2 Ch., 154. (2) (1908) I.L.R., 35 Calc., 551 (P.C.).

* Second Appeal No. 2181 of 1915 and Letters Patent Appeal No. 56 of 1915.