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Raza, and Pullan, JJ.

If he held that the Munsif was right and that the case could not be heard by the Munsif but only by the revenue court, the only course open to the Subordinate Judge was to dismiss the appeal. It certainly cannot be said that the Subordinate Judge to whom the appeal had been transferred by the District Judge failed to exercise his jurisdiction rightly when he passed the order dismissing the appeal. This was the view taken by the Allahabad High Court in a similar matter in the case of *Bisheshar Prasad Pandey* v. *Raghubir* (1). In our opinion the order of the court below was correct and the order of the Munsif was also correct. The case was clearly cognizable in the revenue court and could not be tried by the Munsif. We reject this application with costs.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

SAKTAY SAH AND OTHERS (PLAINTIFFS-APPELLANTS) v. MAHADIN AND OTHERS (DEFENDANTS-RESPONDENTS.)*

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February 13.

Contract Act (IX of 1872), section 23—Settlement to stifle criminal prosecution—Contracts against public policy, what are—Compounding of an offence which is compoundable under the law, validity of—Illegal contracts, enforcement of—Money paid under an illegal contract, whether can be recovered back in a court of law—Declaratory relief, whether can be obtained in respect of an illegal contract.

It is a settled rule of law that where the offence charged is non-compoundable the settlement of that offence must be deemed to be invalid, but where the offence charged is compoundable, the settlement cannot be deemed to be invalid because the Legislature itself allows a settlement of such cases and it cannot, therefore, be said that the object of

*Second Civil Appeal No. 321 of 1928, against the decree of Saiyid Khurshed Husain, Subordinate Judge of Hardoi, dated the 6th of August, 1928, confirming the decree of Syed Abid Raza, Munsif of Bilgram, dated the 29th of February, 1928, dismissing the plaintiffs' claim.

(1) (1925) 24 A. L. J., 83 (85).

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such an agreement is opposed to public policy. *Amir Khan* v. *Amir Jan* (1), *Chetan Das* v. *Hari Ram* (2), *Ahmed Hassan* v. *Hassan Mahomed* (3), *Lachhman Das* v. *Narain* (4), relied on.

The settled rule of law with regard to illegal contracts is that a court of law will not assist persons in enforcing the performance of an illegal contract or assist them to recover back the property, which they have given away under such an illegal contract. The principle is that when the parties to a contract are themselves in *pari delicto* the courts will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person who has paid the money in pursuance of that agreement be allowed to recover the sum paid thereunder.

Further there can be no distinction in principle between the granting of a relief by way of declaration and the restoring of property given away under an illegal contract. *Bindeshari Prasad* v. *Lekhraj Sahu and others* (5), *Amjadennessa Bibi* v. *Rahim Bukhsh Shikdar* (6), and *Vilayat Husain* v. *Misras* (7), relied on. *Moulvi Mahammad Ismail* v. *Samad Ali Bhuiyan and others* (8), *Taylor* v. *Chestor* (9), *and Kearly* v. *Thomson* (10), referred to.

Messrs. *Haider Husain* and *Ghulam Husan*, for the appellants.

Mr. *M. Wasim*, for the respondents.

MISRA, J. :—The present appeal arises out of a suit for cancellation of two deeds and for recovery of Rs. 366 cash, brought by the plaintiffs-appellants against the defendants-respondents, which has been dismissed by both the courts below.

The facts of the case are that there were certain criminal proceedings taken by the defendants-respondents, who are father and son, against the plaintiffs-appellants. The respondents had lodged a complaint under

(1) (1898) 3 C. W. N., 5.
(2) (1911) 8 A. L. J., 498.
(3) (1928) I. L. R., 52 Bom., 693.
(4) (1914) 17 O. C., 213.
(5) (1916) 1 Pat., L. J., 48.
(6) (1914) I. L. R., 42 Calc., 286.
(7) (1923) I. L. R., 45 All., 396.
(8) (1915) 20 C. W. N., 946.
(9) (1869) L. R., 4 Q. B., 309.
(10) (1890) 24 Q. B. D., 742.

section 325 of the Indian Penal Code against the appellants and two others. The counter complaint under section 323 of the Indian Penal Code was also brought by the appellants against the respondents. A mutual settlement was, however, subsequently arrived at between the parties to this case, under which the appellants agreed to execute two deeds in favour of the respondents, under one of which they agreed to sell a plot of land to the respondents and under the other to remove a latrine from the vicinity of the respondents' house. They also agreed to pay to the respondents a sum of Rs. 366 in cash. In consequence of this settlement applications were filed by both the parties in the criminal court to get their respective cases dismissed and consigned to records. The appellants' case under section 323 of the Indian Penal Code was dismissed without any difficulty, but there was at first some hesitation on the part of the criminal court to give permission to the respondents to compound the case, which they had brought against the appellants. The courts, however, subsequently agreed to give the parties permission to compound the case and the complaint was after such permission allowed to be ultimately withdrawn, and the plaintiffs-appellants discharged of the offence.

After they had been so discharged the two deeds of agreement executed by them were handed over to the respondents and the sum of Rs. 366 mentioned above was also paid. It may be mentioned that the two deeds and the money had remained in the custody of one of the pleaders of Bilgram named Babu Baldeo Prasad and had been handed over to the respondents only when the court granted permission and the compromise was effected as a result of which they were discharged from the criminal court.

The appellants seem to have backed out of the agreement since they refused to get the two deeds registered

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and the respondents had to apply against them for compulsory registration of the said two deeds, which were registered only under the orders of the District Registrar. After this was done the appellants brought the present suit for cancellation of the two deeds mentioned above and for recovery of the sum of Rs. 366, which had been paid by them to the respondents.

The main allegations on which the appellants brought their present suit were to the effect that they had been compelled to execute the two deeds and to pay the amount in cash under fraud and undue influence, that no consideration had passed to the appellants in respect of the two deeds of agreement and that they were also void on the ground that they were executed with the object of stifling the criminal prosecution and were, therefore, void in law.

The defendants-respondents contested the suit on the ground that the two deeds had been executed by the appellants out of their own free will and the money had also been paid by them willingly in order to save themselves from the consequences of the criminal proceedings, which had been instituted by them against the plaintiffs, that the said deeds were executed for consideration and were quite binding upon the plaintiffs and that they were estopped from maintaining the present suit.

The learned Munsif of Bilgram who tried the suit came to the finding that the two deeds had been executed and the money paid by the plaintiffs-appellants without any fraud or undue influence having been exercised upon them and that they had done so out of their free will and pleasure. He, therefore, dismissed the plaintiffs' suit.

On appeal the learned Subordinate Judge of Hardoi has confirmed those findings and dismissed the appeal.

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In second appeal it is contended before me that the two agreements and the payment in cash were transactions void in law, they being in pursuance of an agreement, the object of which was to stifle the criminal prosecution and the plaintiffs-appellants were entitled in law to obtain the declaration which they had sought for in the present suit.

In my opinion there is no force in either of these two contentions and I proceed to give my reasons for the same.

As to the contention that the transaction was void being for an illegal consideration, the argument advanced was to the effect that though the offence with which the appellants were charged was an offence under section 325 of the Indian Penal Code, yet the facts in the complaint were such that the accused might well have been charged with an offence under section 147 of the said Code also, which was an offence, which could not be compounded, and that, therefore, the settlement arrived at being for an illegal consideration was void under section 23 of the Indian Contract Act, IX of 1872. I regret I cannot accept this contention. In order to determine whether the case could be considered to be compoundable or not we have to look to the offence with the commission of which the appellants were charged in the complaint or in any case with which the court charged them. In this case it is admitted that the respondents charged the appellants only with an offence under section 325 of the Indian Penal Code and not with an offence under section 147 of the Code. The Magistrate also did not charge them with an offence under section 147 of the Indian Penal Code. In such a case I am of opinion that it could not be held that the offence with which the appellants had been charged was one, which could not be compounded even with the permission of the court. I am supported in this view by a

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decision of the Calcutta High Court reported in *Moulvi Mahammad Ismail* v. *Samad Ali Bhuiyan and others* (1). The facts of that case were that the Magistrate had, after examining the complainant, summoned the accused under section 325 of the Indian Penal Code, although the allegations were made in the petition of the complaint as to an offence under section 147 of the said Code also. An agreement was in that case entered into between the parties and with the leave of the court the case was compromised. It was held that it being a case under section 325 of the Indian Penal Code, which was compoundable with the leave of the court and the Magistrate having given permission to compound the case, the agreement as to settlement was not opposed to public policy. Similarly in the case before me it may have been possible for the respondents to charge the appellants with an offence under section 147 of the Indian Penal Code and also for the Magistrate to charge them with that offence, yet the appellants could not be considered as having been charged with that offence, when the Magistrate issued summons only under section 325 of the Indian Penal Code and gave them permission to compound for that offence.

I am, therefore, of opinion that the object of the settlement was not to stifle the prosecution.

It has been held in a large number of cases that where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecutor and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal.

In *Amir Khan* v. *Amir Jan* (2) it was held that where the defendant agreed to execute a *kobala* (lease) of certain lands in favour of the plaintiff in consideration

(1) (1915) 20 C. W. N., 946. (2) (1898) 3 C. W. N., 5.

of the latter's abstaining from taking criminal proceedings against the former with respect to an offence, which is compoundable the contract could not be regarded as forbidden by law or as against public policy and the same could be enforced.

The same view was held in *Chetan Das* v. *Hari Ram* (1). It was held in that case that the compounding of an offence which the law permits to be compounded is not opposed to the public policy within the meaning of section 23 of the Indian Contract Act, 1872, and where such a compromise is entered into the consideration of the agreement could not be considered as illegal, and it was not void. The Bombay High Court has also taken the same view recently in *Ahmed Hassan* v. *Hassan Mahomed* (2).

In *Lachhman Das* v. *Narain* (3) it was pointed out that an agreement to stifle a prosecution in respect of an offence of a public nature was against public policy and illegal and where the consideration for a compromise was to withdraw a criminal prosecution for a non-compoundable offence the compromise could not be enforced.

It, therefore, appears to me to be a settled rule of law that where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable, the settlement cannot be deemed to be invalid, because the Legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy. I, therefore, hold that the settlement arrived at in this case was valid and the cash paid and the agreements executed by the appellants in pursuance of such settlement cannot be treated in law to be void.

Apart from this it appears to me to be equally clear that even if the agreement had been held to be void the

(1) (1911) 3 A. L. J., 498. (2) (1928) I. L. R., 52 Bom., 693.
(3) (1914) 17 O. C., 213.

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appellants themselves could not be allowed to take advantage of their own action and to seek the assistance of the court in obtaining the declaration which they desire to obtain in this case. The settled rule of law with regard to illegal contracts is that a court of law will not assist persons in enforcing the performance of an illegal contract or assist them to recover back the property, which they have given away under such an illegal contract. The principle is that when the parties to a contract are themselves in *pari delicto* the courts will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person who has paid the money in pursuance of that agreement be allowed to recover the sum paid thereunder. I am also of opinion that there can be no distinction in principle between the granting of a relief by way of declaration and the restoring of property given away under an illegal contract. I am supported in this view by a decision of the Patna High Court reported in *Bindeshari Prasad* v. *Lekhraj Sahu and others* (1). CHAPMAN, J., observed in that case as follows :—

> "Where an illegal portion of an agreement has been carried into effect the whole matter is outlawed and the court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. 'The courts will not assist an illegal transaction'; *Taylor* v. *Chestor* (2). It is a scandal to assist a plaintiff to recover upon the ground that he has joined in the breaking the law but this will not prevent the court from intervening to frustrate the illegal purpose before it has been effected, or, in any event,

(1) (1916) 1 Pat., L. J., 48. (2) (1869) L. R. 4 Q. B., 309.

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from giving relief to the innocent. In particular, the court will not in any case allow a defendant to retain the proceeds of fraud or oppression and the court cannot refuse protection to those classes of persons, whom the law seeks to protect. But in a case in which no such considerations arise, if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate; *Kearly* v. *Thomson* (1).

In the present case the illegal portion of the agreement was the undertaking to withdraw from the prosecution of certain charges which the law says shall not be compounded'. This illegal promise had been carried into effect beyond possibility of recall. One side now seeks relief from the act done in consideration for the illegal promise. All that they can say in excuse of their breach of the law is that they were persons accused in those criminal cases. But *executio juris non habet injuriam*, and in the absence of any evidence to suggest that the criminal proceedings were improper it cannot be held that there was any fraud or oppression or that the accused took a more innocent part in the illegal compromise than the complainant. The authorities make it clear, that a suit for the recovery of property transferred in consideration for such an illegal promise would not have lain. There is no direct authority that the principle would also defeat a suit which is not for the recovery

(1) (1890) 24 Q. B. D., 742.

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of property but merely for a declaration that a sale-deed executed in consideration for the illegal promise is void, and in America it has been apparently held that a declaratory suit would not be defeated (Keener on Quasi Contracts, p. 441). But if it is the scandal involved that defeats suits of this class, then the principle is clearly applicable to a suit for a declaratory decree. For so far as the scandal is concerned there is no difference between a suit for the recovery of property and a suit for a declaration."

I am in full agreement with the observations quoted above. The same view was taken by the Calcutta High Court in *Amjadennessa Bibi* v. *Rahim Bukhsh Shikdar* (1), and by the Allahabad High Court in *Vilayat Husain* v. *Misras* (2).

I am, therefore, of opinion that the appellants cannot be allowed the relief claimed for by them in the present suit and that it has been rightly dismissed by the courts below. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1914) I. L. R., 42 Calc., 286. (2) (1923) I. L. R., 45 All. 396