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and 4. This condition will only attach to those lands which are included in the Mulgeni lease. In regard to the lands not so included the plaintiff will be entitled to unconditional possession and mesne profits from the year 1902-03 till delivery of possession or until the expiration of three years from the date of this decree whichever event first occurs.

Costs on the respondents throughout.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

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December 20.

BANI MUNCHARAM AND ANOTHER, PLAINTIFFS, *v.* REGINA STANGER, DEFENDANT.*

Suit for Ejectment—Contract Act (IX of 1872), section 23—Immoral transaction.

If a plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail.

Fivaz v. *Nicholls* (1), followed.

THE facts of this case appear sufficiently from the judgment.

Inverarity with him *Raikes* and *Jinnah* for plaintiff.

This is in the nature of a hire and purchase agreement. The property in the goods is not parted with. Suppose there is a transfer of property and suppose the agreement is illegal, section 84 of the Transfer of Property Act applies. The transferor is not *in pari delicto* with the transferee. The property in the furniture has not passed: *Ex parte Crawcour* (2); Benjamin on Sale (5th Edn.), p. 327. We admit our plaint is inartistically drawn but the claim is not based on the lease. There is no prayer for payment of rent. Possession is asked for in general terms. The

* Suit No. 737 of 1907.

(1) (1846) 2 C. B. 501.

(2) (1878) 9 Ch. D. 419.

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plaint is not defective as we are not suing on the covenant; we don't declare that the lease is forfeited; we ask leave to amend our plaint.

Talyarkhan and *Bhandarkar* for defendant.

The defendant is a public prostitute, the premises were demised and the furniture assigned to her with that knowledge and for the purposes of her trade.

The property has passed: (1) the right title and interest of the plaintiffs as lessees of Nensey Khairaj and Co. has passed by the demise of the premises; (2) possession of the furniture has been taken.

If money is paid or property is delivered under an illegal contract it cannot be taken back: *Ayerst* v. *Jenkins* [1]. *In pari delicto potior est conditio defendentis* is a maxim of public policy: see Eyre, C. J.'s Judgment in *Lightfoot* v. *Tenant* [2]; see also *Tamarasherri Sivithri Andarjanom* v. *Maranat Vasudevan Nambudripad* [3]. A person who lets lodgings to an immodest woman cannot recover rent in an action for the same: *Pearce* v. *Brooks* [4]; *Smith* v. *White* [5]; *Taylor* v. *Chester* [6]. The defendant cannot be called upon to surrender where there is a void covenant: *Scarfe* v. *Morgan* [7]. See also Transfer of Property Act, s. 6: *Shiam Lal* v. *Chhaki Lal* [8].

The property in the furniture has passed, section 78 of Contract Act.

RUSSELL, J.:—This case to my mind raises an interesting question of law, upon which I have been unable to find any direct authority.

The suit related to a certain house and the furniture therein situated at Arthur Road, and the plaintiff is according to himself a milliner and dress-maker in Falkland Road, and a Baniah by caste; and apparently for some time past he had been minded

(1) (1873) L. R. 16 Eq. 275.
(2) (1796) 1 B. & P. 551 at p. 554.
(3) (1881) 3 Mad. 215.
(4) (1866) L. R. 1 Ex. 213: 35 L. J. Ex. 134.
(5) (1866) L. R. 1 Eq. 626: 35 L. J. Ch. 454.
(6) (1869) L. R. 4 Q. B. 309.
(7) (1838) 4 M. & W. 270 at p. 281.
(8) (1900) 22 All. 220.

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to add to the gains of his millinery shop by keeping a brothel, as he very frankly admits.

The defendant is a Jewish lady of quality, and apparently this is the first transaction which she has had with the plaintiff.

It appears that the house in question is the property of a firm in Bombay and by an indenture of lease dated the 1st April 1906, made between that firm and the plaintiff, the firm let to the plaintiff this bungalow at Rs. 300 a month for two years. But the plaintiff did not obtain possession of the bungalow until the 10th of July 1906. If I may misapply an expression derived from the Roman Law, I may say that the plaintiff acquired in this house a *damnosa hereditas* because it appears that when it was let to him it was occupied by another lady of quality called Sophia or Sophie. Sophie was opposed to leaving the house in question. The result was this firm took steps at the instance of the plaintiff to eject Sophie; and consequently a suit was filed for that purpose: the suit, however, failed and the plaintiff had to pay no less than Rs. 4,200 and costs of that suit to eject Sophie.

Then, according to his plaint, he got possession on the 10th of July 1906.

Then again he had singularly bad luck in letting this house, because he let it to another lady of quality and he had to incur costs to the extent of Rs. 900 to get rid of her, and if I can judge from his evidence, a much larger sum than that.

Having met with bad fortune initially, the plaintiff was minded to lease the house to the defendant, whose acquaintance apparently he had made through his clerk and agent, who is called James Monroe or "Jimmy the lawyer," and who also has taken a certain part in getting the present lease drawn up. Being so minded, the plaintiff executed a lease to the defendant which has been put in evidence, and set out in para. 3 of the plaint as follows:—"By an indenture of lease bearing date the 5th day of July 1907 and made between the plaintiffs of the one part and the defendant of the other part in consideration of the sum of Rs. 3,500 paid by the defendant to the plaintiff on the execution of the said lease and in consideration of monthly rent of Rs. 1,300

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agreed to be paid by the defendant to the plaintiff the plaintiffs sub-let to the defendants the said bungalow and also assigned to her the furniture standing in the said bungalow and specified in the list hereto annexed and marked B subject to the provisions conditions and covenants contained in the said indenture of lease. A copy of the said indenture is hereto annexed and marked C."

It will be observed therefore that evidently the plaintiff was desirous to make up as much leeway as he could by the demand of an enormous rent of Rs. 1,300 per month and an enormous sum of Rs. 3,500 for the furniture, because it appears from the terms of the lease that the payment of Rs. 3,500,—although it is stated in the lease to be a premium,—was really to go in part payment of this furniture, and at the expiration of the lease, by reason of the defendant paying Rs. 1,300 a month and this sum of Rs. 3,500, she was to be the absolute owner of the furniture at the end of the period.

Then the plaint goes on, para. 4:—"By the said indenture of lease it is *inter alia* provided and agreed that if the said monthly rent of Rs. 1,300 or any part thereof should be in arrears for the space of three days next after any of the said days whereupon the same ought to be paid as aforesaid or if any of the covenants therein contained on the part of the defendant should not be observed and performed by her then it should be lawful for the plaintiffs at any time thereafter to enter into and upon the said demised premises and assigned furniture."

Then para. 5 of the plaint is as follows:—"The defendant is using the said premises for immoral purposes and has not paid to the plaintiffs any portion of the rent due by her to the plaintiffs."

Now it appears to me that the statement in that paragraph is absolutely misleading, because it is obvious from the wording of the plaint that it is put forward as a reason for the plaintiff being anxious to eject the defendant the fact that he has discovered that she is using the premises for immoral purposes On the other hand, as the plaintiff very frankly admitted, his intention was from the very beginning to lease this property to the defendant for the purposes of a brothel in order to recoup himself if possible

the losses he had incurred apparently through Sophie and the other lady.

In para. 6 of the plaint, the plaintiffs refer to their attorneys' letter of the 27th August 1907, which runs as follows:—"Under instructions from our clients Bani Mancharam Pitamber and Ramji Bhoola we have to state that under an indenture of lease dated 5th July 1907 you are liable to pay a monthly rent of Rs. 1,300 for the furnished premises at Arthur Road from the 1st of August 1907. It appears that the said Bani Mancharam Pitamber and Ramji Bhoola repeatedly called upon you but you have failed to pay the amount of Rs. 1,300 which became due on the 1st of August 1907.

"This is now to give you notice that you are required to pay to our clients or to us as their attorneys the sum of Rs. 1,300 within 24 (twenty-four) hours after receipt hereof and to require you to give to our clients possession forthwith of the furnished premises which by reason of the proviso contained in the said lease you are bound to give. Please note that in default of your compliance with the above requisition within 24 (twenty-four) hours as aforesaid, our clients will take further steps in the matter at your risk as to costs and consequences."

Therefore, I say it is perfectly plain to my mind that by the plaint, which embodies in it that letter, the plaintiff is relying upon this lease in respect of the cause of action that he alleges against the defendant, and the ground upon which he seeks to make her vacate the house and the premises is that she has not paid the rent which is mentioned in that lease.

Now I have here to point out, again within a very few days, the risk that litigants are exposed to unless they have their plaint drawn up under the best advice they can get. Mr. Inverarity said that the plaint was drawn in an inartistic way, and if the plaint is defective it is owing to the extreme old age of the plaintiff's attorney Mr. Khanderao, who, he said, is the oldest attorney of this Court; but the extreme old age of an attorney may account for but cannot to my mind excuse a defective plaint.

The question then arises: Is the plaintiff entitled to any relief upon this plaint?

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Here again I must point out that the written statement was also drawn up by an attorney but not artistically; but fortunately it does raise the question that the plaint is a bad plaint, and the question is specifically raised in the 6th issue.

Therefore, I am justified in treating the written statement as equivalent to what was formerly known as a demurrer and raising the point namely that the plaint upon the face of it is bad in law. This is the question to which I now propose to address myself; and the cases I propose to cite are intended to support the proposition that if the plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail. The plaintiff's case as to the claim to the house and premises and to the furniture stands on the same footing.

It is not necessary for me now to cite section 23 of the Contract Act because it is well known that it gives the definition of "unlawful agreements," and, amongst others, agreements are unlawful when they are immoral.

The first case is the case of *The Gas Light and Coke Company* v. *Turner* [1]. That was confirmed in the Exchequer Chancery, reported in 6 Bingham's New Cases, 324. I do not cite this case as being pertinent to the present question in this sense, for Mr. Inverarity says truly that the present is not a case for rent arising out of the lease. The headnote is as follows:—"It was held a good plea in covenant for rent, that the lease was entered into by plaintiff and defendant, and that the premises were let to defendant for the express purpose of being used by defendant in drawing oil of tar and boiling oil and tar, contrary to the provisions of the Building Act."

That of course was a suit for rent and the defendant successfully said that it was an unlawful agreement. But the importance of the decision appears in the remarks towards the end of the judgment, where, at page 678 last para., Tindal, C. J., says:—"And, further, if an ejectment were brought by the lessors to recover possession, on the ground that the lease was void, it might be difficult for the lessee to maintain his right to hold under the

[1] (1839) 5 Bing. N. C. 666.

lease, after having pleaded in the present action, in which he and the lessors were parties, that the indenture was void, and obtained the judgment of the Court in his favour on that plea. Without, however, giving any opinion on that point, we think, for the reasons before given, that the defendant is entitled to judgment on this record."

This passage shows that the Chief Justice was of opinion that a suit for ejectment would lie because it would be impossible for the defendant to plead the illegality of the lease after having pleaded in the action before him that it was void.

The same point is referred to in the case of *Taylor* v. *Chester* (1). There it is said that the maxim "*In pari delicto potior est conditio possidentis*" applied. That was a deposit of half of £50 Bank note for the purposes of the supply of wines and suppers to the plaintiff by the defendant in a brothel kept by her to be there consumed in a debauch. As the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. Mr. Justice Hannen, in the course of the argument, said: "If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment?" So, that again seems to show that he could bring ejectment. Mr. Justice Mellor, in delivering the judgment of the Court, at page 314, says: "The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." He cites *Simpson* v. *Bloss* (2) and *Fivaz* v. *Nicholls* (3), and to my mind the latter is a case very much in point, I refer to the judgment of Tindal, C. J., who says at page 512:—"I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered

(1) (1869) L. R. 4 Q. B. 309. (2) (1816) 7 Taunt. 246.
(3) (1846) 2 C. B. 501.

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into between himself and the defendant. That is an objection that goes to the very root of the action. Suppose, instead of resisting the action brought against him by Rouse, the plaintiff had paid the money, he could not have recovered it back had he attempted to do so, he would have been met by the maxim of law, *ex dolo malo non oritur actio*. If he could not succeed in such an action, I do not see how he can recover damages in a Court of law for an injury incidentally resulting from the same state of circumstances, inasmuch as he must put in the very front of his declaration the illegal agreement to which he has been a party. The case of *Simpson* v. *Bloss* (1) seems to me in effect to decide the present."

In the present case the plaintiff must put in the forefront of his plaint the agreement to which he has been a party, but which was an immoral one *ab initio*. The proposition is stated in Broom's Legal Maxims (7th Edn.) at pages 547 and 548 thus:—"The maxim *in pari delicto potior est conditio possidentis* is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but it is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; for the Courts will not assist an illegal transaction in any respect. The maxim is, therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causâ non oritur actio*, on account of which no Court will 'allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal'; and the maxim may be said to be a branch of that comprehensive rule; for the well-established test, for determining whether money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction: if he 'requires aid from the illegal transaction to establish his case' the Court will not entertain his claim."

(1) (1816) 7 Taunt. 46.

Similarly, in the case of *Smith* v. *White* [1], the headnote is: "A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel: and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—*Held*, that the assignment, and everything arising out of it, was so tainted with the immoral purpose, that the plaintiff could not recover."

At page 630, Vice-Chancellor Kindersley says:—"Now, it appears to me that the authorities clearly show that out of such a transaction as this no legal right can be created; and that no action would lie for the rent, or for the breach of any of the covenants, or for anything else arising out of the transaction."

In the case of *Pearce* v. *Brooks* [2], Chief Justice Pollock, C. B., says:—"Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

Now, here, in my opinion, it is perfectly clear that the plaintiff and the defendant are in *pari delicto*. That that is essential is also proved by the case of *Reynell* v *Sprye* [3], where it is said:—"But where the parties to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne* v. *Williams* [4] is one."

(1) (1866) L. R. 1 Eq. 626.
(2) (1866) L. R. 1 Ex. 213 at p. 218.
(3) (1852) 1 De Gex, M. & G. 660 at p. 679.
(4) (1811) 18 Ves. 379.

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It seems to me, therefore, that looking at all these cases and the plaint as framed, the plaintiff is not entitled to recover anything in this suit at present.

I heard a most ingenious argument from Mr. Inverarity yesterday morning which had the effect of making me take further time to consider my judgment; but it appears to me that the result of his argument is to show how manifestly unjust it would be to allow any amendment of the plaint to be made now. No suggestion of an amendment of the plaint was made until the very close of his argument. The defendant went to trial upon the statements of the plaint, which, she said, was a bad plaint on the face of it. I think—but I don't intend to express any opinion whatever—there may be a great deal in the argument of Mr. Inverarity addressed to me by him under section 6, cl. 8 (*h*), of the Transfer of Property Act, the effect of which would be that this lease was void *ab initio*. I do not express any opinion as to whether the plaintiff would be entitled to succeed had it been that this lease was void *ab initio*, and therefore no transfer of any property could be effectual under it and under that section of the Transfer of Property Act.

Again, with regard to section 84 of the Indian Trusts Act, that he relied upon, that also may be put forward to form a good cause of action for the plaintiff.

On the other hand the defendant has had no opportunity of raising the defence which would be open to her if the suit had been framed upon the basis of section 84 of the Transfer of Property Act, upon the authority of the well-known case *Ayerst* v. *Jenkins*[1] which is cited in Messrs. Shephard and Brown's Transfer of Property Act, 6th Edition, page 51. "In cases not within this section it is conceived that the transferor cannot reclaim the property, since the transferee is protected by the principle *in pari delicto potior est conditio possidentis*. A completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity."

(1) (1873) L. R. 16 Eq. 275.

I, therefore, am not going to be led to consider either of the two questions thus raised by the learned counsel. I only deal with the pleadings as they are before me.

The conclusion I have come to is that the plaint as framed is a bad plaint inasmuch as the plaintiff by his pleadings has relied upon the lease which the law declares to be immoral and, therefore, unlawful.

It is to be regretted, as I said before, that this point was not distinctly set forth in the written statement and that the Court has been asked to go into several side issues.

As to the question of fraud and misrepresentation, Mr. Inverarity asked me to express an opinion on it, as Mr. Laud, a partner in the firm of the plaintiff's attorneys, is concerned in the matter. With regard to that, for the purposes of this suit only and not to be used in any other suit, all I can say is, the defendant, upon whom this onus lies, has failed to convince me that she was defrauded or that any misrepresentation was practised on her with reference to this lease. It is unfortunate she had got no independent advice. But she certainly had, with her, her companion, another Regina. The defendant struck me, as far as I could judge, as an intelligent person; and she spoke English with a perfectly pure intonation and accent and she understood every word she said; and I think, looking at the evidence of Mr. Laud upon the point, it would be impossible for me to hold that any misrepresentation or fraud had been practised upon her. The probabilities are that the wish was father to the thought, that having entered into a lease and left the office and seeing that it was a very undesirable bargain for herself, she probably thought a very great deal about it and may have persuaded herself, that she was a victim of misrepresentation and fraud. That the bargain was in favour of the tailor and milliner it is impossible to deny.

[Here his Lordship recorded his findings on the issues.]

I grant leave to the plaintiff to withdraw the suit with liberty to file a fresh one if so advised. But I direct that he do pay all the costs of this suit down to and inclusive of to-day. If he

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does not choose to withdraw the suit with the liberty I have given him, his suit will stand dismissed with costs throughout.

Mr. Jinnah says that he undertakes to withdraw this suit and file a fresh suit at once.

The order is to be drawn up so as to make the payment of the costs of the suit a condition precedent to the plaintiff's bringing a fresh suit.

The fresh suit to be filed within a month from this date.

Rs. 5,000 to be deposited forthwith with the Prothonotary for the defendant's costs subject to the taxation of the bill.

Attorneys for plaintiffs :—*Messrs. Khanderao, Laud & Mehta.*

Attorneys for the defendant :—*Mr. M. B. Chothia.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
February 14.

JAGGANATH HIRALAL (APPELLANT AND PLAINTIFF) *v.* TULKA KERA AND OTHERS (RESPONDENTS AND DEFENDANTS).*

Practice—Interpleader suit—Suit to redeem mortgage against two parties claiming mortgage money—Appropriate Relief.

When a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance, a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount and that the mortgagor should be indemnified in consequence of the loss of the original mortgage-deed. Prior to the hearing the defendants agreed that the assignee was entitled to receive the mortgage amount. The suit was dismissed on the grounds that no interpleader suit could lie as the plaintiff sought an indemnity from one of the defendants which gave him a personal interest in the suit. On appeal,

* Suit No. 355 of 1907. Appeal No. 1509.