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Read I and II together, they come to this,—you may join them, but if when joined several make up one compound offence, you shall only punish for one. They shall be considered to make up such a compound, when one of them is the criminal result at which the other has arrived. You may then punish to the extent permissible for any one of them, but you shall not tack the punishments together.

In our opinion this second punishment for the theft is by the present Code as it was by a long course of previous decisions, which the Code is professing to follow, absolutely illegal. It must therefore be quashed.

We doubt whether, on this evidence, there could properly have been a conviction for simple kidnapping. It is the very subsequent theft which shewed the act not to be a perfectly innocent one, stamped it with its criminal character, and shewed by the completed act that there was abduction with the intent which that act executed.

Appellate Jurisdiction.(a)

Special Appeal No. 378 *of* 1874.

PUDISHARY KRISHNEN, NUMBUDRY AND ANOTHER. } *Special Appellants.*

KARAMPALLY KUNHUNNI KURUP. } *Special Respondent.*

The plaintiff, under threat of a criminal prosecution for the offence of criminal trespass, executed an agreement in writing which conferred certain rights on the defendant. There was no foundation for the charge made by the defendant.

In a suit to set aside the agreement. *Held*, that the plaintiff was entitled to maintain the suit.

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THIS was a Special Appeal against the decision of J. K. Ramen Nair, the Subordinate Judge of South Malabar, in Regular Appeal No. 225 of 1873, reversing the decree of the Court of the District Munsif of Calicut, in Original Suit No. 434 of 1872.

This suit was brought for a declaration that plaintiffs and their father, 2nd defendant are the uralers of a temple

(a) Present : Holloway, and Innes, JJ.

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called Kakat Chitram, and that 1st defendant had no right to the temple or to the property appertaining to it. Plaintiffs prayed also for the cancelment of an agreement executed by them and 2nd defendant to 1st defendant on 26th June 1872, on the ground that it was executed by them without consideration and on account of undue influence and coercion used by 1st defendant.

The 1st defendant answered that the contract which plaintiffs sought to cancel was executed by them and 2nd defendant by their free consent and for proper consideration.

The following issues amongst others were settled :—

8th. Whether the contract executed by plaintiffs and 2nd defendant was entered into by them without their free consent as mentioned in the plaint and for illegal consideration as therein alleged.

9th. Whether, as alleged by 1st defendant, the contract was subsequently ratified by plaintiffs and 2nd defendant.

10th. Whether such ratification was for a legal consideration and was valid as alleged by 1st defendant.

The following is extracted from the Judgment of the District Munsif :— Such were the rights of the parties with respect to this temple when on 13th June 1872 plaintiffs entered the paramba on which the temple stands, felled two trees and removed a few stones of the building preparatory to renovating it. On the following day a petition was presented by 1st defendant's agent to the Taluk Magistrate charging plaintiffs and 2nd defendant with trespass and assault, and on the 18th of the same month 1st defendant himself filed a complaint against the same parties supporting the statement of his agent. It was while these charges were pending and with a view to their being withdrawn that the agreement was executed by plaintiffs and 2nd defendant.

Now an agreement to be valid must be made by the free consent of parties competent to contract for a lawful consideration and with a lawful object. Did the present agreement fulfil these conditions ? There cannot be two opinions on this

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question. The consideration and the object of the agreement was 1st defendant's forbearance to prosecute a charge of trespass and assault then pending against plaintiffs and 2nd defendant before the Sub-Magistrate. There can be no doubt that if 1st defendant, instead of preferring a criminal charge, intended to bring a civil action for the trespass and assault and the agreement was entered into by plaintiff to induce him to forego his action, the agreement would be valid. It is doubtful whether the exception in Section 214 of the Penal Code legalises the acceptance of a gratification for the sole purpose of forbearing to bring a person to legal punishment. The intention appears to me to be that where an act is committed for which the injured person has his remedy either by indictment or by action, and he elects to proceed by action and receives a consideration for the purpose of foregoing the action, he commits no offence, although the result of the compromise may be that the offender thereby escapes legal punishment. However this may be, an agreement, though not forbidden by law, would be unlawful if it is opposed to public policy.

In II, H. C. R., 187, it was held that "a contract to pay money in consideration of foregoing a criminal prosecution is opposed to public policy and will not be enforced. The consideration to support the promise on such a contract is a vicious consideration." In the English case, referred to in this decision, Tindal, Chief Justice, doubts "whether even in the case of an assault the prosecutor is at liberty to agree not to indict, although he may agree not to pursue the assaulter civilly."

Now admitting that the consideration for the agreement was lawful and that it was made with a lawful object, there remains the next essential ingredient to its validity to be considered. Whether it was made by the free consent of the parties. "Consent implies acquiescence of the mind in something proposed or affirmed." The term involves in contemplation of law the existence of a physical and moral power of assenting as well as a deliberate and free exercise of such power. Hence the absence of any of these capa-

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cities in either of the parties to a contract renders the person labouring under it incapable of binding himself thereby (Powell on Contracts). In the present case the plaintiffs and their aged father were arraigned before a Magistrate for offences which if brought home to them might deprive them not only of their liberty, but that which all Brahmins prize more than liberty, their caste. Imprisonment to a Brahmin is a terrible punishment, and the slightest possibility of incurring it is sufficient to induce them to agree to any proposal by which they may avoid it. Had plaintiffs any reasonable ground to fear this punishment? The evidence in this case abundantly demonstrates that the fear was not groundless. Prosecuted by a man of the wealth, influence, and position of 1st defendant, who was supported by a host of witnesses (*vide* Exhibit D) ready to swear in support of the charge, he must be a brave Brahmin indeed who can retain his mind undisturbed and composed under such an ordeal and be able to resist any proposal tending to free him from his mental distress. Again 1st defendant prosecuting plaintiffs for an offence really committed is a different thing from 1st defendant prosecuting plaintiffs upon a false charge. 1st defendant no doubt was in possession of the temple and the paramba on which it stands, but he was in possession as an agent or patali. Admitting that the entry on the paramba and in the temple by the only trustees of the institution could be regarded as a trespass because they had long abstained from exercising their right of management, it is clear that their offence, if offence it be, would be so slight as not to require more than a nominal fine. But in 1st defendant's complaint care was taken to shew that the trespass was without any palliating circumstance. Plaintiffs and 2nd defendant were declared to possess no right to the temple. This was a statement which 1st defendant must have known to be false, and he further deliberately repeated this statement when examined on oath by the Magistrate (Exhibit H). It is clear therefore that 1st defendant committed an act forbidden by the Indian Penal Code to the prejudice of plaintiffs and 2nd defendant with the intention, as the event proves, of causing them to enter into this agreement. This is coercion, and

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it is abundantly clear also that there was undue influence exercised by 1st defendant over plaintiffs and their aged father, whose mind was enfeebled by mental distress from the unfounded charge brought against them to substantiate which every effort was being used. It is quite clear that but for this treatment plaintiffs and 2nd defendant would not have consented to an agreement acknowledging that valuable rights to the temple belong to the tarwad of 1st defendant, who but ten days before in their petition B. to the Superintendent of Police was declared to possess no right whatever to the temple. The suggestion of 3rd defendant's vakil that by the agreement 2nd defendant was entitled to receive about 18 parras of paddy for performing the sandi ceremony, which is double the amount formerly received by 2nd defendant, and that this was a sufficient consideration for the agreement of plaintiffs and 2nd defendant, is undeserving of any weight. It is needless to observe that 18 parras of paddy as a price for valuable rights to a temple is a consideration so grossly inadequate as to demonstrate that nothing but coercion and undue influence could have caused plaintiffs and 2nd defendant to enter into this agreement. Plaintiffs therefore have made out a sufficient case to justify this Court in cancelling an agreement which they and 2nd defendant were inveigled into executing by coercion and undue influence exercised over them by 1st defendant.

Great stress was laid by 3rd defendant's vakil on the fact that the agreement was subsequently ratified by 2nd defendant's acceptance of the increased wages allowed by the agreement and execution of a document (Exhibit 42) acknowledging receipt of the amount. Now admitting this document to be genuine, there is no evidence to show that the ratification was made deliberately after due consideration. 2nd defendant's old age, and the fact that the receipt is said to have been granted the day after the agreement, furnish the most vehement presumption that it was executed without due deliberation and before his enfeebled mind had sufficient time to recover from the effects of the treatment to which it had been subjected for many days.

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I have no hesitation, therefore, in declaring the agreement invalid. It is not necessary that I should go further and make a declaratory decree as to the rights of plaintiffs and defendants to the temple and its property. Plaintiffs were aggrieved by this agreement, and this Court has given them relief by setting it aside. The parties have thus been placed in the position they occupied before the agreement. It is not expedient that plaintiffs should be placed in a better position.

Upon appeal the Subordinate Court delivered the following judgment:—

I regret that I am unable to concur with the Munsif in deeming the plaintiffs' case sustainable. The suit was brought by plaintiffs to have their uraima right to a certain pagoda established, and also for the cancellation of an agreement by which they and their father, the 2nd defendant, have conferred on the 1st defendant half the uraima right to that pagoda and a perpetual samudayamship on the ground that it was executed by them without consideration and under duress.

Plaintiffs' uraima right to the pagoda is not only not disputed by the 1st defendant, but it was actually admitted by him before they came to Court, and moreover the 3rd defendant still admits that right. Hence the plaintiffs have no cause of action for a suit for declaration of their right.

The main object of the suit then is the cancellation of the above agreement. But the Munsif has distinctly found, and I fully agree with him in his finding, that a trespass was committed by plaintiffs and 2nd defendant on the paramba on which the pagoda stands, that the pagoda itself was forcibly entered into by them, that certain trees belonging to the pagoda were felled by them, and that all these properties have, for many years, been in the exclusive possession and under the exclusive management of the 1st defendant. The plaintiffs and the 2nd defendant were prosecuted before the Sub-Magistrate by the 1st defendant for the offence they committed, and it was during the pendency or immediately after the termination of the criminal proceedings against

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them that the agreement, of which the cancellation is here sought for, was executed by the plaintiffs and the 2nd defendant. I quiet agree with the Munsif that the consideration and the object of the agreement was first defendant's forbearance to prosecute a charge of trespass and assault against them. This consideration the Munsif has correctly found to be a vicious one, and the agreement opposed to public policy. But I entertain great doubts whether under such circumstances the Munsif was right in cancelling the agreement at the instance of the plaintiffs. For the rule of law is that one of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other for an injury arising out of the transaction in which they had thus been illegally engaged. And we have been further taught that the Indian Penal Code makes no distinction between felonies and misdemeanours. Hence a suit by either party to the agreement, by the 1st defendant to enforce it and by plaintiffs for its cancellation is, in my opinion, unsustainable. What is plaintiffs' case and prayer as stated in the plaint? They are simply as follows. We committed a trespass on the property in the possession of the 1st defendant and assaulted his men. He prosecuted us for the offences before a Criminal Court, and to forbear that prosecution we executed to him the agreement in question. He accordingly forbore the prosecution, and we by that means escaped from legal punishment, and as we have thus gained our object, please now give us a decree cancelling that agreement. Such a request and a decree in accordance therewith is contrary to the policy of the law. I therefore reverse the Munsif's decree and dismiss the original suit, assessing each party with his own costs throughout.

The plaintiffs preferred a Special Appeal to the High Court for the following reasons:—

Because the plaintiffs are entitled to the declaratory decree prayed for.

Because upon the facts stated in the judgment, the plaintiffs are entitled to have the agreement in question rescinded.

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Shephard, for the special appellants, the plaintiffs.

O'Sullivan, for special respondent, the 3rd defendant.

The Court delivered the following judgments :—

HOLLOWAY, J. :—The question is whether the plaintiffs, who, without delay, applied to the Court for the setting aside of this agreement are entitled to the relief sought. The findings are that a question of right to office in a certain temple was at issue between plaintiff and the tarwads of defendant and that, for the purpose of asserting that right, the plaintiffs entered the paramba on which temple was built.

A charge of criminal trespass was immediately brought of which the result might be, and probably would be, the imprisonment and consequent civil death of these superstitious Nambudriês.

They were cognizant of no nice distinctions as to the existence of a *bonâ fide* question of right preventing the act from amounting to criminal trespass.

Under the pressure of a prosecution threatening such consequences and to procure its withdrawal, the present agreement was executed. The Munsif has set it aside and the Sub-Judge has reversed his decree upon the doctrine of "*par delictum*" which he supposes to attach to the case and to prevent either party from taking active steps upon it. If we first take it that the transaction was a violation of law, the entering into it would be a *delictum* on both sides, and the fact that the parties were not on equal terms, that the one "holds the rod and the other bows to it" would destroy that parity and leave the question of coercion the residuum which the Court would have to consider (*Smith* v. *Bromley*, 2, Doug., 695 ; *Smith* v. *Cuff*, 6, M. and S., 160-165 ; *Atkinson* v. *Denby*, 6, H. and N., 778-792 and 7, H. and N., 934.) These cases establish that in English law the rule "*ubi autem dantis accipientis turpitudo versatur non posse repeti dicimus*" will not prevent recovery where there is inequality of situation and the transaction is the result of pressure produced by that inequality. And in Roman law the rule was subject to the very marked exception that, if

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by the transaction, a crime was kept out of sight, the money paid could be recovered not by the "*condictio ob turpum*" but by the "*condictio ob instanti causam*" (see Ulpian Dig. XII, 6 2, Section 2, Code IV, 7-3 quoted Voight. page 627 and 630). The cases were of bribery in a judicial matter and to avoid the obligatory military service. The case is still clearer in the English Courts of Equity. In *Williams* v. *Bayley* there is a striking example of an agreement set aside on the two grounds of trafficking in crime and the procuring of assent by the terror of the punishment of another (1, L. R. H. L., 200).

If, however, there was no delict at all, the case resolves itself into the simple one of the will overmastered by terror of consequences quite sufficient to prevent any possibility of its being self determined. It is not the case of an agreement to fulfil an already existing demand. (See Lord Cranworth in the case quoted) but a case in which both the Courts have found that the sole cause, not the mere occasion of entering into the agreement embodying matter altogether beyond the scope of mere compensation, was the well founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings. It is useless to quote authorities for the position that such an agreement cannot possibly stand. Our books bristle with cases of relief on grounds infinitely weaker. The decree must be reversed, that of the Munsif restored and all costs paid by the defendants below.

INNES, J.—Had there been a criminal trespass, it would, I think, be difficult to say that there was coercion exercised. In that case the threat by defendant of prosecution or continued prosecution would be the threat of exercising rights which the law gave him, and this, according to the opinion of Lord Chancellor Cranworth in *Williams* v. *Bayley*, would not amount to coercion. But assuming this to be so, the agreement would amount to the stifling of a criminal prosecution for an offence which the law does not permit to be compounded, as it is eminently not an offence irrespective of intention (Sec exception to Sec-

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tion, 214, I. P. C.), and on the ground of public policy such an agreement would be liable to be set aside notwithstanding "*par delictum.*"

But, according to the finding of the District Munsif (and I do not see that the Sub-Judge adopts a different view) the charge of criminal trespass was false, the trespass having been committed for the purpose of asserting a right and not with any such intention as is required to constitute the offence of criminal trespass. The defendant, besides, so colored the circumstances as to render it probable that the plaintiff, if convicted, would suffer a heavier punishment than if the simple facts had been adhered to. In doing so, the defendant abused the rights which the law allowed him and the agreement was therefore, I think, rightly held by the Munsif to have been entered into by plaintiff under coercion. I concur therefore in the decree proposed.

Appellate Jurisdiction.(a)

Civil Miscellaneous Regular Appeal No. 353 *of* 1873.

KRISHNAJI KESAVA PUNDIT.....*Appellant.*

SUBBARAYA TAKKER.....*Respondent.*

Where a decree has been adjusted between the parties by a contract binding upon them a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract although the decree holder refuses to certify the adjustment of the decree under Section 206 of the Code of Procedure, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract.

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THIS was a Regular Appeal against the order of F. M. Kindersley, the District Judge of South Tanjore dated the 11th October 1873, passed on Civil Petition No. 671 of 1873.

The facts, so far as it is necessary to state then, were as follows:—The defendant in this suit (Krishnajee Kesava Pundit, got a decree in Original Suit No. 3 of 1865 in the Civil Court of Tanjore for nearly two lacs of rupees against the senior widow of the late Rajah of Tanjore upon an agreement executed by her, promising to pay Krishnajee the amount sued for in consideration of the trouble and

(a) Present: Holloway and Innes, JJ.