1943 *Present :* **Howard C.J. and Keuneman J.**

SAURMMA *et al.*, Appellants, *and* MOHAMADU LEBBE, Respondent.

92—D. C. Kurunegala, 365.

Trust—Property transferred to defraud creditors—Illegal purpose—Debts eventually paid—Action to recover property.

Where a person transferred property in the name of another in order to put it beyond the reach of creditors at a time when those creditors had instituted proceedings against him,—

Held, that the effect of his action was to delay the payment of his debts and that his illegal purpose was carried out, even if the debts were eventually paid in full.

In such a case the maxim *in pari delicto potior est conditio possidentis* applies.

APPEAL from a judgment of the District Judge of Kurunegala. The facts appear from the judgment.

H. V. Perera, K.C. (with him *E. B. Wikremanayake*), for the plaintiffs, appellants.

[1] *5 N. L. R. 326.*

N. E. Weerasooria, K.C. (with him *Dodwell Gunawardana* and *S. R. Wijayatilake*), for the defendant, respondent.

Cur. adv. vult.

August 27, 1943. HOWARD C.J.—

This is an appeal by the plaintiffs against the judgment of the District Judge of Kurunegala dismissing their action for a declaration of title to the lands mentioned in the schedule to the plaint. The defendant-respondent had transferred these lands to his son-in-law, the 4th plaintiff, by deed No. 3,473 dated June 4, 1931 (D 1), in order to defraud his creditors. The first, second, and third plaintiffs are the minor children of the fourth plaintiff who by deed of transfer No. 1,331 of December 18, 1937 (P 10), transferred to them sixteen of the twenty-one properties in dispute. The defendant, in giving evidence, stated that the years 1930, 1931, and 1932, being years of economic depression and the value of lands having depreciated, he feared his creditors would seize all his lands for the recovery of the debts due by him and sell them in a depressed market. With a view to saving some of his properties and of obtaining time to pay his debts he therefore executed D 1 for no consideration in favour of the fourth plaintiff on the latter, so he asserts, agreeing to hold the properties dealt with on the deed in trust for him. Defendant states that he has now paid all his debts and did not defraud any of his creditors. The learned Judge was not satisfied that the defendant had defrauded any of his creditors and, therefore, there was only an intention to defraud without any actual fraud having been committed. He also held that no consideration passed in respect of D 1 and that the defendant has all along been in possession in spite of the transfer which was executed. In these circumstances, he held that the *cestuique* trust is not precluded from enforcing the trust and on the authority of *Mohamadu Marikar v. Ibrahim Naina*[1] *and Andris v. Punchihamy*[2] gave judgment for the defendant.

In contending that the decision of the learned District Judge was wrong in law, Mr. Perera, on behalf of the plaintiffs, has argued that, as the legal title is in the plaintiffs by virtue of D 1, the defendant can only succeed by setting up his own illegality and fraud. In fact, he maintains that the defendant, when he executed D 1, committed criminal offences by contravening the provisions of sections 404 and 406 of the Penal Code. Mr. Perera has invited our attention to various English cases. In this connection I would refer to section 2 of the Trusts Ordinance (Cap. 72) which is worded as follows :—

> "2. All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

Moreover in the judgment of Middleton J. on page 191 of *Mohamadu Marikar v. Ibrahim Naina* (*supra*) the following passage occurs :—

> "Under the Roman-Dutch law he would not be entitled to any relief, and I have some doubt if this is a case to which should be

[1] *13 N. L. R. 187.* [2] *24 N L. R. 203.*

applied the doctrine of equity derived from the English law to soften the rigour of the Roman-Dutch law."

In *Taylor v. Chester*[1] the plaintiff deposited with the defendant the half of a £50 bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note, it was held that the maxim, *in pari delicto potior est conditio possidentis,* applied; and that 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. The following passage from the judgment of Mellor J. is applicable to the facts of the present case:—

> "It was argued on the part of the defendant, in showing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the Jury and the facts as admitted by the demurrer, the plaintiff and defendant were *in pari delicto* and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was argued that it was the defendant who was relying on the illegal transaction as an answer to a claim of the plaintiff, founded on his ownership of the note, and his rights to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that '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 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' per Lord Ellenborough in *Edgar v. Fowler*[2]; *Collins v. Blantern*[3]; Lord Mansfield in *Holman v. Johnson*[4].
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> 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: *Simpson v. Bloss*[5], *Fivaz v. Nicholls*[6]. It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Ferret v. Hill*[7], which was cited for the plaintiff; but is the direct result of the transaction upon which the deposit of the half-note took place."

In *Gascoigne v. Gascoigne*[8], the same principle was followed and it was held that a husband, who transferred property to his wife's name with her

[1] *1868–69; 4 Q. B. 309.*
[2] *3 East, 222.*
[3] *2 Wils. 341*
[4] *Cowp. at p. 343.*
[5] *7 Taunt. 246.*
[6] *2 C. B. 501,*
[7] *15 C. B. 207; 23 L. J. (C. P.) 185.*
[8] *1918; 1 K. B. 223.*

knowledge and connivance to defraud his creditors, could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, and she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud. The judgment of the Court contains the following passages at pages 226 and 227 which are of interest so far as this case is concerned :—

> " Now, assuming that there was evidence to support the finding that the defendant was a party to the scheme which the plaintiff admitted, but without deciding it, what the learned judge has done is this : He has permitted the plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this.
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> A similar question arose before Lord Eldon in *Muckleston v. Brown* [1]. Lord Eldon commented on the decision in *Cottington v. Fletcher* [2], and said that if the defendant there had demurred the relief would have been refused, because the plaintiff stated that he had been guilty of a fraud upon the law, to evade and disappoint the provision of the Legislature, ' and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the Court would not act, but would say : Let the estate lie where it falls ' ".

On the other hand Counsel for the defendant-respondent has invited our attention to *Symes v. Hughes* [3], where it was held that although, where a trust has been created for an illegal purpose, the Court will not in general interfere, it will do so where the illegal purpose fails to take effect. The judgment of Lord Romilly M.R., at page 479, contains the following passage :—

> " Two objections have been raised on behalf of the defendant. The first is, that the assignment was made for an illegal purpose, and it is said that such being the case the Court will not interfere. I think the correct answer to this was given by Mr. Southgate, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assigner of his right to recover the property from the assignee who has given no consideration for it. It is clear in the present case that no harm has been done to any creditor, and, in fact, the suit is now being prosecuted for the purpose of enabling the creditors to recover something."

It seems to me that the grounds underlying the decision in this case were (1) That there was mere intention to effect an illegal object ; (2) That the illegal object was not carried into effect ; (3) That nothing was done under it ; (4) That the plaintiff was not setting up his intended fraud to obtain a benefit for himself but for the parties he intended to defraud, namely, his creditors. There is no doubt that the two local decisions relied on by Counsel for the defendant and cited by the learned District

[1] *(1801) 6 Ves. 5268.* [2] *2 Atk. 156.* [3] *(1869–70) 9 Eq. 475.*

Judge support the contention that where there was only an intention to defraud, but no actual fraud was committed, the *cestuique* trust can recover. But inasmuch as the matter is governed by English law as modified by the Trusts Ordinance, it is difficult to understand how the Roman-Dutch maxim "a man may not enrich himself at the expense of another", called in aid of these decisions, can have any relevance. He also relies on section 86 of the Trusts Ordinance (Cap. 72). This provision is worded as follows :—

> "Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried out into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

I find it a matter of some difficulty to reconcile the decisions in *Taylor v. Chester* (*supra*) and *Gascoigne v. Gascoigne* (*supra*) with the two local decisions relied on by the defendant. No doubt in the former case it was proved that the illegal purpose was carried out, but in the latter case there is nothing in the report to indicate that this was so. It is, therefore, of the utmost relevance to consider what, in this case, was the purpose of the assignment to the fourth plaintiff and was that purpose an illegal one. The defendant in his evidence states that, when he made the assignment, he owed the Chettinad Corporation Rs. 1,000 on a promissory note and on which he was subsequently sued. He was also sued by Sevugan Chettiar and Natesan Chettiar on a bond for Rs. 3,500 made in 1927. The defendant states that he told the fourth plaintiff that he was transferring the properties in his name to prevent the creditors selling these properties for low prices. Or in other words he was putting the properties beyond the reach of creditors at a time when one of these creditors had instituted proceedings against him in the Courts. Even if the defendant had no intention of depriving his creditors permanently of what was owing to them and has eventually paid the debts in full, the effect of what he did was to delay the payment of those debts and his purpose was illegal. That illegal object was achieved. Hence the maxim *in pari delicto potior est conditio possidentis,* applies inasmuch as the defendant cannot succeed without proving his own fraud and illegality to rebut the title conferred on the plaintiffs by D 1. The judgment of the District Court must be set aside and judgment entered for the plaintiffs as prayed for with costs in this Court and the Court below.

KEUNEMAN J.—I agree.

Appeal allowed.