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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03-12-2025

CORAM

THE HONOURABLE MR JUSTICE N. ANAND VENKATESH

Arb O.P(COM.DIV.) No. 192 of 2021

1.Mr.K.M.Manoharan
S/o. Raman
Door No.2, Plot No.7, Kulakarai Street,
United India Colony, Kodambakkam,
Chennai - 600024.

2. J.Raymond
S/o. A.Joise
Door No.15, Plot No.8, West Avenue,
Kodambakkam,
Chennai - 600 024.

..Petitioner(s)

.Vs.

1. Church of South India Trust
Association
Having its registered office at No.5,
Whites Road, Royapettah, Chennai 600
014. Rep by its Power of Attorney Hon.
Diocesan Secretary, CSI Madras
Dioceses, Diocesan Office, No.226,
Cathedral Road, Chennai - 600 086.

2.Mr.D.D.Paulraj, S/o.Devairakkam
No.10, Ashok Nagar Main Road,
Kodambakkam, Chennai - 600 024.

..Respondent(s)

**PRAYER**

Petition filed under Section 34(2)(a)(ii), 34(2)(v)(b)(1) & (2) of Arbitration and Conciliation Act, 1996.

a. Set aside the award dated 18.03.2020 passed by Learned Arbitrator Honble Mr.Justice M.Jaichandren - Former Judge, High Court of Madras

b. Award costs of the proceedings to the Petitioners.

For Petitioner(s): M/s.Pass Associates
for Mr.Ashokapathy

For Respondent(s): Mr. Ralph V.Manohar
for R1

S.Ramesh
for R2

ORDER

This Arbitration Original Petition (Com.Div.) has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred as 'the Act'] challenging the award passed by the sole Arbitrator dated 18.03.2020.



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2.The respondent is the claimant. The respondent which is the Church of South India Trust Association was looking for a place for having a burial ground for Christians in Chennai. At that point of time, two petitioners and one another person seem to have represented that they are in possession and enjoyment of the subject property in Survey No.145/1A, measuring to an extent of 20 acres and 37 cents at Thaiyur Village, Chengalpet Taluk, Kancheepuram District. The said lands were classified as 'Meikkal Poramboke'. The respondent therefore entered into an agreement for sale dated 13.12.2012 with the petitioners for the purchase of the said property. The total sale consideration was fixed at Rs.1,35,00,000/- and an advance amount of Rs.60,00,000/- was paid to the petitioners and one another person. As per the sale agreement, the respondent is said to have been given possession of the property and they were informed that the petitioners were taking steps and coordinating with the Government authorities to obtain patta for the said property and that the property will be conveyed in favour of the respondent in a lawful manner.



3. In the meantime, a suit was also filed in OS.No.213/2010 before the District Munsif Court, Chengalpet, against the Government for obtaining patta.

4. Subsequently, a document having the nomenclature of a sale deed dated 21.5.2014 was executed by the petitioners in favour of the respondent and pursuant to the same, a further sale consideration of Rs.50,00,000/- was received. Thus, a total sum of Rs.1,10,00,000/- was received from the respondent.

5. The proceedings were initiated under the Tamil Nadu Land Encroachment Act, through notice dated 20.01.2015 and steps were taken by the Government to evict the occupants from the property. The respondent became aware of the fact that the Government was taking steps to allot the lands to the Indian Institute of Technology, Guindy. The eviction proceedings were completed and the Government took over possession of the lands and the lands were allotted to the Indian Institute of Technology, Guindy.



6.The respondent filed a complaint before the E8 Kelambakkam Police Station against the petitioners on the ground that they have been cheated and based on the complaint, an FIR came to be registered in Crime No.75 of 2016 for offence under Sections 420, 465, 467 and 468 IPC and the investigation was pending.

7.The respondent was seeking for the refund of the amounts received from them and such request was acted upon by one Paulraj, who is said to have refunded a sum of Rs.20,00,000/- to the respondent. The balance amount was not forthcoming from the petitioners.

8.As per the terms of the agreement, the respondent issued a notice dated 11.04.2017 and suggested for the appointment of an Arbitrator to resolve the dispute. Subsequently, OP.No.61 of 2018 was filed before this Court for appointment of an Arbitrator. Accordingly, a sole Arbitrator was appointed by this Court.

9.The respondent filed claim petition seeking for the refund of a



sum of Rs.90,00,000/- along with interest.

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10. Even though, the claim petition was filed against three persons, since the third respondent in the claim petition had refunded the sum of Rs.20,00,000/-, the claim against the 3rd respondent therein was given up and the claim petition was prosecuted only as against the petitioners herein.

11. The petitioners took a defense that the very agreement is void *ab initio* and therefore the respondent cannot make any claim arising out of such an agreement. The petitioners also took a preliminary objection on the sustainability of the sale agreement dated 13.12.2012 [Ex.C.1] and the sale deed dated 21.5.2014 [Ex.C.2]. This is in view of the fact that both were unregistered documents and insufficiently stamped and therefore according to the petitioners, those documents cannot even be looked into and consequently the respondent cannot seek for recovery of amount by relying upon those documents.

12. The sole Arbitrator after considering the pleadings framed the



following issues:

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(i) Whether the Agreements entered into between the Claimant and the Respondents, dated 13.12.2012 and 21.05.2014 are opposed to Law and therefore void in law?

(ii) Whether the Respondents 1 and 2 are liable to return the amount of Rs.45,00,000/- each, to the Claimant, along with the interest due thereon, at the rate of 24% per annum, as claimed in the Claim Petition?

(iii) Has not the Agreement for Sale, dated 13.12.2012 merged with the Sale Deed dated 21.05.2014 and if so, is not the Sale Deed, dated 21.05.2014, inadmissible in evidence for want of stamp duty and whether an insufficiently stamped documents can be relied on for collateral purposes ?

(iv) Is the claim of the Claimant liable to be dismissed for non-joinder of necessary parties, whose names had been mentioned in the Agreement, dated 13.12.2012 and the Sale Deed, dated 21.05.2014?

(v) Is not the claim of the Claimant barred by limitation?

(vi) Are the parties entitled to any other relief or reliefs, as per law?

(vii) Whether the parties to the dispute are entitled to the Arbitral Proceedings?

13.No witnesses were examined and on the side of the



respondent/claimant, Ex.C.1 to Ex.C.9 were marked.

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14.The sole Arbitrator on considering the facts and circumstances of the case and on appreciation of evidence passed an award dated 18.3.2020 in the following terms.

1.The 1st and 2nd Respondents shall pay to the Claimant a sum of Rs.45,00,000/- (Rupees Forty Five Lakhs only) each, along with the interest @ 9% per annum, from 09.02.2015, till the date of the passing of this Award;

2.The above said amount shall be paid by the 1 and 2nd Respondents, to the Claimant, within a period of TWO MONTHS from the date of this Award, failing which the 1 and 2nd Respondents would be liable to pay interest, on the said amount, @ 12% per annum, after the said period of two months, till the date of realization of the amount;

3.The parties to this dispute shall bear their own costs.

15.Aggrieved by the above award passed by the sole Arbitrator, the present petition has been filed before this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

16.Heard Mr.Ashokapathy, learned counsel for the petitioners, Mr.Ralph V.Manohar, learned counsel for R1 and Mr.S.Ramesh, learned counsel for R2.



17.The primordial ground that was raised on the side of the petitioners is that the agreement of sale and the sale deed are documents which are void *ab initio* and therefore no relief can flow out of such documents and that the sole Arbitrator failed to consider this issue in the proper prospective and has passed the award in favour of the respondent which suffers from patent illegality.

18.The other issue that was raised on the side of the petitioners touched upon the admissibility of the documents marked as Ex.C.1 and Ex.C2.

19.This Court will deal with the first issue that has been raised on the side of the petitioners since the necessity to go into the other issues will depend upon the answer to be given to this issue.

20.The relevant Clauses in the agreement of sale dated 13.12.2012, is extracted hereunder:

WHEREAS the Vendors represents that the property seized and possessed of or otherwise well and sufficiently entitled to the vacant lands, viz, property, land comprised in Survey Number 1454/1A, measuring to an extent of 20 Acres 37 Cents, at No.46, THAIYUR VILLAGE, Chengalpet Taluk, Kancheepuram District, more fully described in the schedule hereunder, and

Whereas the said property being Meikkal lands initially cultivated by Murugesan, Ayyakkannu, Lakshmi Ammal, Govindasamy, Sahadevan, Puruthothaman, Balalrishnan and Adhimoolam; and the said persons are paid the B' memo charges to the Government and the said lands are being one block Whereas the above mentioned local village persons sold and conveyed the same to one C. Kandasamy Nadar, and his sons namely K. Dhanapalan, and K. Jayabalan and they are in possession and enjoyment of the property by carried out the



agricultural activities and also a proper and valid resolution obtained from the Village Panchayat for the possession of the schedule mentioned property, and

WHEREAS that in pursuance of the said Sale agreement, the PURCHASER paid a sum of Rs.60,00,000/-(rupees Sixty Lakhs only) as advance, by way of six Cheques, being the part sale consideration of the schedule mentioned property, on this day to the Vendors as follows:

<u>Sl.No.</u>	<u>Date</u>	<u>Cheque No</u>	<u>Amount</u>	<u>In favour of</u>
1.	15.10.2012	081699	Rs.20,00,000/-	Vendor No.1
2.	17.12.2012	066040	Rs. 5,00,000/-	Vendor No.2
3.	17.12.2012	095621	Rs. 5,00,000/-	Vendor No.2
4.	17.12.2012	095622	Rs. 5,00,000/-	Vendor No.2
5.	17.12.2012	095623	Rs. 5,00,000/-	Vendor No.2
6.	17.12.2012	095624	Rs. 5,00,000/-	Vendor No.3
7.	17.12.2012	095625	Rs. 5,00,000/-	Vendor No.3
8.	17.12.2012	095626	Rs. 5,00,000/-	Vendor No.3
9.	17.12.2012	095627	Rs. 5,00,000/-	Vendor No.3

all the above mentioned Cheques are drawn on Corporation Dank, Whites Road Branch, Chennai 600 014: and the same has been duly acknowledged by signing the sale agreement, the Vendors herein agrees to convey the schedule mentioned property, in favour of the Purchaser or their nominee(s) on receipt of the balance sale consideration, and handed over all the original title deeds pertaining to the Schedule mentioned property to the Purchaser, and in continuation of this Sale Agreement has been made between the parties enable them to complete the transaction in a perfect and legal manner.

NOW THIS DEED OF AGREEMENT OF SALE WITNESS-

1. The Vendors has as on this date received the advance amount of Rs.60,00,000/- (Rupees Sixty Lakhs only) from the Purchaser, and the balance sale consideration, of Rs.75,00,000/- (Rupees Seventy five lakhs only) has to be made within 90 days from the date of this Agreement.

2 That it is further agreed between the parties if the Purchaser requires



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additional period to pay the balance sale consideration, both parties fix the period by mutual consent. It is further agreed between the parties that the Vendors herein convey schedule mentioned property in a legal manner, and If the Vendors herein unable convey the same in a proper manner of or any hurdle for the transfer the title of the property assure and undertake to return the advance amounts received from the purchaser.

3. The third vendor agree and undertake to the Purchaser, that he has representative for Vendor Nos. 4 to 6, and settle their part of sale consideration and also undertake obtain any signature in future.

4. The vendors has handed over all the copies of title deeds pertaining to the schedule mentioned properties to the Purchaser, and delivered the vacant possession of the said properties, on this day and the Purchaser has duly acknowledged the same by signing in the Agreement of sale.

5. That the Vendors assures and undertakes to obtain further documents to perfect the title of the schedule mentioned property if deemed necessary,

6. The Vendors herein undertake to produce all the relevant documents to Purchaser enable them to obtain their project approval from the Government and the Vendors herein agrees to co-operate in all respect to complete their project.

7. That the Vendors agrees to produce, any letter(s) from the Revenue authorities, regarding the sale of the property if deemed necessary.

8.The Vendors, as on this date produced all the connected revenue records, parent documents, to the Purchaser, for the Schedule mentioned Property.

9.The Vendors further under take that they will at all time assists and undertake to the Purchaser, to assist them enabling to obtain Government Permission, for their project to get succeeded or any other competent authorities, so as to complete this transaction in a smooth manner.

10.The Vendors has agreed to execute Sale deed(s) in favour of the Purchaser or their nominees on request of the Purchaser, and also agree to appear before the Revenue authorities for the success of the project.

19.The document which carries the nomenclature of a sale deed dated 21.5.2014 (Ex.C.2) once again imposed various obligations on the petitioners and as such, it is not a document which actually conveyed the title in favour of



the respondent. The only important development that took place through this document is that the petitioners and another received a further sum of Rs.50,00,000/- after this document was executed.

20.It is quite apparent from the above terms of the agreement which has been extracted supra that both the parties were aware of the fact that the subject lands were classified as meikkal lands and in fact the persons who were initially enjoying those lands had paid D memo charges to the Government. Those persons seem to have conveyed the land in favour of one Kandasamy Nadar and his sons. They thereafter seem to have conveyed the land to the petitioners and four others.

21.No person could have any claim or title over the property which admittedly belongs to the Government and which has been classified as meikkal lands. Therefore, at the time of entering into an agreement, both the parties were aware of the fact that the property belonged to the Government and inspite of the same, the parties had chosen to enter into an agreement to deal with the said property.

22.The only justification that has been given on the side of the respondent is that the respondent was expecting the petitioners and others to take effective



steps by coordinating with the Government to get the patta transferred in their favour and with that hope, the respondent had entered into an agreement and had parted with a sum of Rs.1.10 crores.

23. There is no need to get into the issue of admissibility or otherwise of Ex.C.1 and Ex.C.2 since the very agreement between the parties to deal with the Government land is void *ab initio*. In fact, the Government thereafter took steps under the Land Encroachment Act and took away the possession of the property and handed it over to the Indian Institute of Technology, Guindy.

24. In view of the above, the only issue that arises for consideration is as to whether the respondent will be entitled to refund of the amount, for which, reliance is placed upon the documents which has been held to be void *ab initio* and non-est in the eye of law.

25. The sole Arbitrator has dealt with this issue as issue No.1. The sole Arbitrator has rendered a finding that the respondent had parted with the money with the hope that the petitioners and others will perfect their title by coordinating with the Government and since they failed to do so, the amount has to be refunded to the respondent, since retaining such amount will amount to unjust enrichment.



26. In the considered view of this Court, the sole Arbitrator seems to have been swayed more by the sense of equity and such finding rendered by the sole Arbitrator is not inconsonance with law.

27. It will be relevant to take note of Section 65 of the Indian Contract Act, 1872 and for proper appreciation, the same is extracted hereunder:

65. Obligation of person who has received advantage under void agreement, or contract that becomes void. – When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

28. The scope and ambit of Section 65 of the Contract Act was gone into in detail by the Apex Court in *Loop Telecom and Trading Limited v. Union of India and Another* reported in *2022 6 SCC 762* and the relevant portions are extracted hereunder:

61. In Pollock & Mulla's seminal treatise on the Contract Act [R. Yashod Vardhan and Chitra Narayan, Pollock & Mulla's The Indian Contract and Specific Relief Acts, Vol. I (16th Edn., LexisNexis).], it has been noted that Section 65 does not operate in derogation of the maxim *in pari delicto potior est conditio possidentis*:

“Section 65 is not in derogation of the common law maxims *ex dolo malo non oritur actio* and *in pari delicto potior est conditio possidentis*; and only those cases as are not covered by these maxims can attract application of the provision of Section 65 on the footing that when an agreement in its inception was not void and it was not hit by the maxims but is discovered to be void subsequently, right to restitution of the advantage received under such agreement is secured on equitable consideration. The section has been held not to apply



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where both parties knew of the illegality at the time the agreement was made, and were in *pari delicto*.”

Thus, the application of Section 65 of the Contract Act, 1872 has to be limited to those cases where the party claiming restitution itself was not in *pari delicto*.

62. In *The Principles of Law of Restitution* [Graham Virgo, *The Principles of the Law of Restitution* (3rd Edn., OUP) p. 710.] , it has been noted that all claims for restitution are subject to a defence of illegality. The genesis of this defence is in the legal maxim *ex turpi causa non oritur actio* (no action can arise from a bad cause). A court will not assist those who aim to perpetuate illegality. This rule was initially recognised by the House of Lords in its decision in *Holman v. Johnson* [*Holman v. Johnson*, (1775) 1 Cowp 341 at p. 343 : 98 ER 1120 at p. 1121] . Lord Mansfield held : (ER p. 1121)

“The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.”

63. *The Principles of Law of Restitution* subsequently notes that in *pari delicto* *potior est conditio possidentis* is a way of qualifying the *ex turpi causa* defence [Graham Virgo, *The Principles of the Law of Restitution* (3rd Edn., OUP) p. 711.] :

“This in *pari delicto* principle enables the court to analyse the particular circumstances of the case to determine whether the claimant is less responsible for the illegality than the defendant, for then, as between the claimant and the defendant, the just result is that the claimant should not be denied relief, since the parties are not in *pari delicto*. But where the claimant is more responsible for the illegality or the parties are considered to be equally responsible, the in *pari delicto* principle applies and restitution will be denied.”

64. Thus, when the party claiming restitution is equally or more responsible for the illegality of a contract, they are considered in *pari delicto*.

65. In the decision of the UK Supreme Court in *Patel v. Mirza* [*Patel v. Mirza*, (2016) 3 WLR 399 : 2016 UKSC 42] , Lord Sumption, JSC has succinctly explained the nature of the inquiry to determine whether a party is in *pari delicto* : (WLR pp. 466-67, paras 241-43)



*“241. To the principle that a person may not rely on his own illegal act in support of his claim, there are significant exceptions, which are as old as the principle itself and generally inherent in it. These are broadly summed up in the proposition that the illegality principle is available only where the parties were in *pari delicto* in relation to the illegal act. This principle must not be misunderstood. It does not authorise a general inquiry into their relative blameworthiness. The question is whether they were **[Ed.]** : The word between two asterisks has been emphasised in original as well.] legally **[Ed.]** : The word between two asterisks has been emphasised in original as well.] on the same footing. The case law discloses two main categories of case where the law regards the parties as not being in *pari delicto*, but both are based on the same principle.*

242. One comprises cases in which the claimant's participation in the illegal act is treated as involuntary : for example, it may have been brought about by fraud, undue influence or duress on the part of the defendant who seeks to invoke the defence. ...

243. The other category comprises cases in which the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal. The paradigm case is a rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant. Such a rule will commonly require the plaintiff to have a remedy notwithstanding that he participated in its breach.”

(emphasis supplied)

*Thus, in determining a claim of restitution, the claiming party's legal footing in relation to the illegal act (and in comparison to the defendant) must be understood. Unless the party claiming restitution participated in the illegal act involuntarily or the rule of law offers them protection against the defendant, they would be held to be in *pari delicto* and therefore, their claim for restitution will fail.*

66. *The position in India is similar to that of Kuju Collieries Ltd. v. Jharkhand Mines Ltd. [Kuju Collieries Ltd. v. Jharkhand Mines Ltd., (1974) 2 SCC 533] , where a Bench of three learned Judges of this Court relied on a judgment [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] of a five-Judge Bench of the then Hyderabad High Court. While construing the provisions of Section 65, this Court held : (Kuju Collieries case [Kuju Collieries Ltd. v. Jharkhand Mines Ltd., (1974) 2 SCC 533] , SCC pp. 536-37, para 8)*

“8. A Full Bench of five Judges of the Hyderabad High Court in Budhulal v. Deccan Banking Co. [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] speaking through our Brother, Jaganmohan Reddy, J. as he then was, referred with approval to these observations [Harnath Kuar v. Indar Bahadur Singh, 1922 SCC OnLine PC 64] of the Privy Council. They then went on to refer to the observations of Pollock and Mulla in their treatise on Indian Contract and Specific Relief



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Acts, 7th Edn. to the effect that Section 65 of the Contract Act, 1872 does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English law will be the best guide. They then referred to the reasoning of the learned authors that if the view of the Privy Council is right, namely, that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe : (Budhulal case [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] , SCC OnLine Hyd paras 33-36)

'33. In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words "when an agreement is discovered to be void" means nothing more nor less than : when the plaintiff comes to know or finds out that the agreement is void. The word "discovery" would imply the pre-existence of something which is subsequently found out and it may be observed that Section 66, Hyderabad Contract Act makes the knowledge (Ilm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65 of the Contract Act, 1872 or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

34. A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the plaintiff — in pari delicto potior est conditio defendentio.

35. Section 84 of the Trusts Act, 1882, however, has made an exception in a case:



“84. Transfer for illegal purpose.—Where the owner of property transfers it to another for illegal purpose and such purpose is not carried 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.”

36. This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void *ab initio* and there would be no room for the subsequent discovery of that fact.’

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are *in pari delicto* the courts do not assist them.”

(emphasis supplied)

While upholding the view of the Hyderabad High Court, this Court held “it [the Full Bench [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] of the Hyderabad High Court] has rightly pointed out that if both the transferor and transferee are *in pari delicto* the courts do not assist them”.

67. In an earlier decision of this Court in *Immani Appa Rao v. Gollapalli Ramalingamurthi* [*Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] (“*Immani Appa Rao*”), a three-Judge Bench held that where both the parties before the Court are confederates in the fraud, the Court must lean in favour of the approach which would be less injurious to public interest. P.B. Gajendragadkar, J. (as he then was), speaking for the Court, held : (AIR p. 375, para 12)

“12. Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasised that the doctrine which is pre-eminently applicable to the present case is *ex dolo malo non oritur actio* or *ex turpi causa non oritur actio*. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in *in pari delicto potior est conditio possidentis*; where each party is equally in fraud the law favours him who is actually in possession, or where both parties are equally guilty the estate will lie where it falls. On the other hand, Respondent 1 argues that the proper maxim to apply is *nemo allegans suam turpitudinem audiendum est*, whoever has first to plead *turpitudinem* should fail; that party fails who first has to allege fraud in which he participated. In other words, the principle invoked by Respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present



case it is necessary to recall what Lord Wright, M.R. observed about these maxims in *Berg v. Sadler* [*Berg v. Sadler*, (1937) 2 KB 158 (CA)] , KB at p. 162. Referring to the maxim *ex turpi causa non oritur actio* Lord Wright observed that : (KB p. 162)

‘... This [maxim], though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities.’

Therefore, in deciding the question raised in the present appeal it would be necessary for us to consider carefully the true scope and effect of the maxims pressed into service by the rival parties, and to enquire which of the maxims would be relevant and applicable in the circumstances of the case. It is common ground that the approach of the Court in determining the present dispute must be conditioned solely by considerations of public policy. Which principle would be more conducive to, and more consistent with, public interest, that is the crux of the matter. To put it differently, having regard to the fact that both the parties before the Court are confederates in the fraud, which approach would be less injurious to public interest. Whichever approach is adopted one party would succeed and the other would fail, and so it is necessary to enquire as to which party's success would be less injurious to public interest.”

(emphasis supplied)

68. The principle which was enunciated in the judgment in *Immani Appa Rao* [*Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] has been more recently applied in a decision of a three-Judge Bench of this Court in *Narayanamma v. Govindappa* [*Narayanamma v. Govindappa*, (2019) 19 SCC 42 : (2020) 4 SCC (Civ) 363] . The Court held : (Narayanamma case [*Narayanamma v. Govindappa*, (2019) 19 SCC 42 : (2020) 4 SCC (Civ) 363] , SCC p. 59, para 28)

“28. Now, let us apply the other test laid down in *Immani Appa Rao* [*Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] . At the cost of repetition, both the parties are common participator in the illegality. In such a situation, the balance of justice would tilt in whose favour is the question. As held in *Immani Appa Rao* [*Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] , if the decree is granted in favour of the plaintiff on the basis of an illegal agreement which is hit by a statute, it will be rendering an active assistance of the court in enforcing an agreement which is contrary to law. As against this, if the balance is tilted towards the defendants, no doubt that they would stand benefited even in spite of their predecessor-in-title committing an illegality. However, what the court would be doing is only rendering an assistance which is purely of a passive character. As held by Gajendragadkar, J. in *Immani Appa Rao* [*Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739 : AIR 1962 SC 370] , the first course would be clearly and patently inconsistent with the public interest whereas, the latter course is lesser injurious to public interest than the former.”



69. Hence, in adjudicating a claim of restitution under Section 65 of the Contract Act, the court must determine the illegality which caused the contract to become void and the role the party claiming restitution has played in it. If the party claiming restitution was equally or more responsible for the illegality (in comparison to the defendant), there shall be no cause for restitution. This has to be determined on the facts of each individual case.

29.The Apex Court has dealt with in detail the scope of Section 65, qua a situation where both parties had entered into a contract, where the object of the agreement was illegal to the knowledge of both the parties and both the parties are *in pari delicto*.

30.The Apex Court took into consideration the earlier view that held the feild to the effect that where both the parties had entered into an agreement knowing fully well that the object of the agreement was illegal, the agreement would be void *ab initio* and there would be no role for any of the parties to raise any claim arising out of such illegal agreement.

31.The Apex Court also takes into consideration the subsequent view which held that where both the parties are confederates in the fraud, the Court must lean in favour of the approach which would be less injurious to the public interest. In other words, the Court must enquire as to which party's success would be less injurious to the public interest. Ultimately, while declaring the ratio at paragraph 69 of the judgment, the Apex Court made it abundantly clear that while adjudicating a claim of restitution under Section 65 of the Contract



Act, the Court must determine the illegality which caused the contract to become void and the Court must also see the role played by the party who is claiming restitution. This is a test which has to be applied on a case to case basis. If ultimately, the party claiming restitution is equally or more responsible for the illegality, in such an event, he cannot seek for restitution.

32. When the above ratio is applied to the facts of the present case, it is seen that the party which is now seeking for restitution by means of refund of the advance amount is the respondent. Hence, this Court has to see the part that was played by the respondent while bringing about the illegal contract. Both the parties were aware of the fact that the subject lands were classified as meikkal lands and it belonged to the Government. Therefore, the agreement has been brought forth to deal with a Government land, about which both parties were aware and therefore the respondent is equally responsible for the illegality committed by means of entering into an agreement which agreement has been held to be void *ab initio*. Under such circumstances, there is no question of adjudicating the claim of restitution made by the respondent, presumably relying upon Section 65 of the Contract Act.

33. The above settled position of law was not properly considered by the sole Arbitrator and as a result, this Court finds that the award is in patent contravention of the applicable substantive law and the sole Arbitrator has also



disregarded the settled principle of law as enunciated by the Apex Court. It also militates against the most basic notions of justice. It also infracts the fundamental policy of Indian law since it disregards the orders of the presidentially superior Courts which have a binding effect. Accordingly, the award passed by the sole Arbitrator is liable to be interfered with and the award passed by the sole Arbitrator dated 18.03.2020 is hereby set aside.

34.In the result, this Arbitration Original Petition (Com.Div.) stands allowed. There shall be no order as to costs.

03-12-2025

Index:Yes
Speaking/Non-speaking order
Internet:Yes
Neutral Citation:Yes
kp



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To



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Association

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N.ANAND VENKATESH J.

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**Arb O.P(COM.DIV.) No. 192
of 2021**

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