2019 INSC 1091

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 7630-7631 OF 2019

(Arising out of S.L.P.(C) Nos. 29205-29206 of 2015)

SMT. NARAYANAMMA & ANR. Etc. Etc. .... APPELLANT(S)

VERSUS

SRI GOVINDAPPA & ORS. Etc. Etc. .... RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

Leave granted.

2. The present appeals arise out of the common judgment and order passed by the Single Judge of the Karnataka High Court in Regular Second Appeal No. 1925 of 2008 and Regular Second Appeal No. 1834 of 2008 thereby dismissing both the appeals.

3. For the sake of convenience, the parties shall be referred hereinafter as per their status shown in the plaint before the trial court. The suit O.S. No. 93/1999 was filed by the plaintiff Govindappa, who is the son of Bale Krishnappa. Originally the suit property belonged to one Bale Venkataramanappa, who was the brother of Bale Krishnappa. Said Bale Venkataramanappa has entered into an agreement to sell with the plaintiff, specific performance of which is sought in the present suit. The son of the Bale Venkataramanappa, M.V. Nagaraj was defendant No. 1, who has been represented through Legal representatives in the appellate courts since deceased. The wife and daughter of Anjanappa, who was another son of Venkataramanappa are the defendant Nos. 2 & 3 to the suit respectively. The daughter and wife of Bale Venkataramanappa are defendant Nos. 4 & 5 to the suit respectively. The R.S.A. No. 1925/2008 is filed by the original defendant Nos. 4 & 5, who are daughter and wife of Bale Venkataramanappa. The R.S.A. No. 1834/2008 has been filed by the legal representatives of the original defendant No. 1, M.V. Nagaraj and the original defendant Nos. 2 & 3, who are wife and daughter of Anjanappa. The suit was filed *inter alia* contending that the defendants did not come forward to execute

the sale deed in respect of the agreement to sell. After the notice was issued by the Civil Judge (Junior Division) & JMFC, Hoskote, the defendants appeared before the Court. However, they did not file the written statement. The power of attorney holder of the plaintiff is examined as PW-1. The plaintiff also examined two witnesses in support of his case, i.e., PW-2 and PW-3. He produced documentary evidence Exhibits P-1 to P-34 in support of his case. The defendants did not cross-examine the plaintiff. The trial court, upon appraisal of Exhibit P-1, i.e., the agreement to sell dated 15.05.1990, held that the suit property was granted in favour of the defendant and as per the grant certificate, there was a 15 years bar on alienation of the suit property. The period of the said bar was to expire on 13.10.1988. It was, therefore, held by the trial Judge that since the said agreement was executed during the non-alienation period of 15 years, the agreement was void and non-executable. It was held that since the said agreement was contrary to the statutory bar, it was void in law and as such the suit for specific performance of the contract was not maintainable.

4. Being aggrieved thereby, the plaintiff filed Regular Appeal No. 86 of 2004 before the Principal District & Session Judge,

Bangalore. Before the appellate court, though the defendants had put in their appearance, the Advocate did not appear to argue the matter. The first appellate court held that the father of Original defendant No. 1, namely, Bale Venkataramanappa, had mortgaged the suit property by a registered mortgage deed on 23.04.1990. It further held that on 15.05.1990 he had also entered into an agreement to sell with the plaintiff. It was further held that, the entire sum of Rs. 46,000/- agreed to be paid to Bale Venkataramanappa was received by him. It was further found that the plaintiff had already been put in possession of the suit property. The first appellate court held that, the reasoning of the trial court that the non-alienation clause prohibits alienation was not apt. On this reasoning, the appeal was allowed.

5. Being aggrieved by the judgment and order passed by the first appellate court, the original defendant Nos. 4 and 5 had filed Regular Second Appeal No. 1925 of 2008 whereas, legal representatives of defendant No. 1 and original defendant Nos. 2 and 3 have filed Regular Second Appeal No. 1834 of 2008. Two points were raised before the High Court on behalf of the defendants. Firstly, that the suit which was filed in the year

1999 for specific performance of agreement to sell entered into on 15.05.1990 was beyond limitation. Secondly, that in view of provisions of Section 61 of the Karnataka Land Reforms Act, 1961 (hereinafter referred to as "the Reforms Act"), the agreement was not enforceable. The High Court observed that, as a matter of fact, the trial court ought not to have framed such an issue. It further observed that, though in the suit for specific performance of contract it was necessary to frame the issue with regard to readiness and willingness of the plaintiff to perform his part of the contract along with other issues, neither the trial court nor the first appellate court had framed such an issue. According to the High Court, in the absence of the defendants neither filing the written statement nor contesting the suit, the finding as recorded by the first appellate court was correct in law. The High Court concurred with the finding of the first appellate court that since the entire amount was received by Bale Venkataramanappa, father of defendant No.1, and also from the recital of the agreement to sell, it was clear that the possession was also handed over. As such, the High Court held that the finding of the first appellate court was correct. Being aggrieved thereby, defendants have approached this Court.

6. Mr. Shailesh Madiyal, learned counsel appearing on behalf of the defendants (appellants herein), submitted that in view of the provisions of Section 61 of the Reforms Act, the predecessor-in-interest of the defendants, i.e., Bale Venkataramanappa could not have transferred the said land, as such, the agreement to sell was void in law and, therefore, not enforceable. He submitted that the finding as recorded by the trial Judge was correct in law, which ought not to have been interfered with by the first appellate court. It is further submitted that the High Court was also not correct in law in upholding the finding of the first appellate court.

7. The original plaintiff (respondent(s) herein), on the contrary, submitted that the provisions of Section 61 of the Reforms Act would prohibit only the sale, gift, exchange, mortgage, lease or assignment and would not prohibit an agreement to sell. It is submitted that once the period of restriction of 15 years is over, the agreement to sell, though executed during the period of 15 years, becomes enforceable in law. It is submitted that, in the present case, Bale Venkataramanappa had received the entire consideration and had also handed over the possession as per the agreement to

sell. It is further submitted that, the pleadings in the plaint were not controverted by either filing written statement nor leading any evidence and in this view of the matter, the first appellate court and the High Court were justified in decreeing the suit.

8. The facts in the present case are not in dispute. On 20.10.1976, the suit property, i.e., 1 acre 6 guntas bearing Survey No. 57 situated at Mutkur Village, Angondanahalli Hobli, Hoskote Taluk, Bangalore District, was given as a grant in favour of Bale Venkataramanappa. The said grant was under the provisions of the Reforms Act. On 13.09.1983, the premium was paid by Bale Venkataramanappa and the grant was confirmed in his favour with a non-alienation clause of 15 years. On 15.09.1983, there was a mutation entry in the revenue records entering the name of said Bale Venkataramanappa with an endorsement that the land shall not be alienated for a period of 15 years. On 23.04.1990, Bale Venkataramanappa, by a registered mortgage deed, mortgaged the suit land in favour of the plaintiff for a sum of Rs. 20,000/-. The mortgage deed recites about the receipt of the entire mortgaged amount by Bale Venkataramanappa. Under the mortgage deed, Bale Venkataramanappa had agreed to repay the loan within a

period of one year. However, within a period of one month, Bale Venkataramanappa executed an agreement to sell dated 15.05.1990 in favour of the plaintiff. The agreement to sell recites that he was in need of money for his legal necessities and to repay his hand loans and for his domestic needs and, therefore, he had agreed to sell the suit property for a sum of Rs. 46,000/-. He acknowledges the receipt of entire amount of consideration, i.e., Rs. 46,000/-. The recital in the agreement to sell reads that at the time of execution of the agreement, the possession of the suit property is handed over to the plaintiff. Further, the recital reads that the plaintiff shall take the consent of the officers of the Tribunal or the concerned officers at his own cost for transferring the property in the name of the plaintiff.

9. It could thus be seen that, initially the property was mortgaged on 23.04.1990, and within a period of one month the agreement to sell is executed. At the time of the agreement itself, the entire consideration amount is said to have been received by Bale Venkataramanappa and also the possession is handed over to the plaintiff.

10. It appears, that there were also parallel proceedings before the revenue authorities. After the death of Bale Venkataramanappa, the plaintiff filed an application on 12.05.1997 before the Tehsildar, Hoskote, for mutating his name in place of Bale Venkataramanappa. The Tehsildar, without any notice, carried out the mutation and entered the name of the plaintiff in the revenue records. The defendants challenged the same before the Assistant Commissioner, Doddabalapura Division. The said appeal was allowed on 27.06.2008. Accordingly, the revenue records were corrected and the defendants' names were entered on 24.10.2009. The said Order came to be challenged by the plaintiff before the High Court by way of Writ Petition Nos. 22243-22244 of 2011. The High Court *vide* Order dated 26.07.2011, dismissed the said petitions.

11. The short question that arises for consideration in the present appeals is, as to whether the agreement to sell dated 15.05.1990 executed by Bale Venkataramanappa in favour of the plaintiff would be enforceable in law or not.

12. For appreciating the said issue, it would be necessary to refer to Section 61 of the Reforms Act, which reads thus:

> **"61. Restriction on transfer of land of which tenant has become occupant**.—
>
> (1) Notwithstanding anything contained in any law, no land of which the occupancy has been granted to any person under this Chapter shall, within fifteen years from the date of the final order passed by the Tribunal under sub-section (4) or sub-section (5) or sub-section (5A) of section 48A be transferred by sale, gift, exchange, mortgage, lease or assignment; but the land may be partitioned among members of the holder's joint family,
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> (2) Notwithstanding anything contained in sub-section (1), it shall be lawful for the occupant registered as such or his successor-in-title to take a loan and mortgage or create a charge on his interest in the land in favour of the State Government, a financial institution, a co-operative land development bank, a co-operative society or a company as defined in Section 3 of the Companies Act, 1956 in which not less than fifty one per cent of the paid-up share capital is held by the State Government or a Corporation owned or controlled by the Central Government or the State Government or both for development of land or improvement of agricultural practices; or for raising educational loan to prosecute the higher studies of the children of such person and without prejudice to any other remedy provided by any law, in the event of his making default in payment of such loan in accordance with the terms and conditions on which such loan was granted, it shall be lawful to cause his interest in the land to be attached and sold and the proceeds to be utilised in the payment of such loan.
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> **Explanation**. – For the purpose of this sub-section, "Higher Studies" means the further studies after Pre-university Examination or 12th Standard Examination conducted by CBSE or ICSE or any Diploma courses.

> (3) Any transfer or partition of land in contravention of Sub-section (1) shall be invalid and such land shall vest in the State Government free from all encumbrances and shall be disposed in accordance with the provisions of Section 77."

13. A perusal of the said provision would clearly show that, notwithstanding anything contained in any law, no land of which the occupancy has been granted to any person under the said Chapter shall, within 15 years from the date of the final order passed by the Tribunal under sub-section (4) or sub-section (5) or sub-section (5-A) of Section 48-A of the Reforms Act be transferred by sale, gift, exchange, mortgage, lease or assignment. However, the land may be partitioned among members of the holders of the joint family. No doubt, that sub-section (2) of Section 61 of the Reforms Act permits the registered occupant or his successor-in-title, to take a loan and mortgage or create a charge on his interest in the land in favour of the State Government, a financial institution, a co-operative land development bank, a co-operative society or a company as defined in Section 3 of the Companies Act, 1956 in which not less than 51% of the paid-up share capital is held by the State Government or a Corporation owned or controlled by the Central Government or the State Government or both. However, such a loan can be taken only for the purpose of development of

land or improvement of agricultural practices or for raising educational loan to prosecute higher studies of the children of such person. It further provides that, in the event of such a person making default in payment of such loan in accordance with the terms and conditions on which such loan was granted, it shall be lawful to cause his interest in the land be attached and sold and the proceeds to be utilised in the payment of such loan. Sub-section (3) of the said Section specifically provides that any transfer or partition of land in contravention of sub-section (1) shall be invalid and such land shall vest in the State Government free, from all encumbrances and shall be disposed in accordance with the provisions of Section 77 of the Reforms Act.

14. This Court in the case of *Kedar Nath Motani and Ors. vs. Prahlad Rai and Ors.*[1] had an occasion to consider the question of application of the maxims *ex turpi causa non oritur actio* and *ex dolo malo non oritur actio.* This Court has referred to various English judgments in paragraphs 11, 12 and 14, which read thus:

> **"11.** Coming now to the question whether the appellants' suit was rightly dismissed by the High Court on the

1 (1960) 1 SCR 861

application of the maxim, *ex turpi causa* etc., we have first to see what are the specific facts on which this contention is based. The case of the appellants was that the property was taken benami in the names of Prahlad Rai and others to avoid the implication of clause 16. In making the application to the Bettiah Raj the signatures of Prahlad Rai and others were made by Radhumal or someone under his instructions, because the relationship between Radhumal, Prahlad Rai and others was so intimate that it was considered unnecessary to trouble them. Inasmuch, as the matter was brought to the notice of the Assistant Manager of the Court of Wards, all these facts were capable of being investigated, including the making of the signatures by Radhumal. No doubt, the making of the signatures of another person without his consent, express or implied, is an offence under the ordinary law, but the intention was not so much to forge the signatures but to present the application in the names of those persons. However it be, we proceed on the assumption that there was some illegality committed by Radhumal in approaching the Bettiah Raj and also in the execution of the B.H. forms, which were also signed with the names of these persons. The question is whether this illegality is sufficient to non-suit the plaintiffs on the application of the maxim.

12. The law was stated as far back as 1775 by Lord Mansfield in *Holman* v. *Johnson,* (1775) 1 Cowp 341, 343 : 98 ER 1120, 1121, in the following words:

> "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 an 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. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

There are, however, some exceptions or "supposed exceptions" to the rule of *turpi causa*. In *Salmond and*

William on Contracts, four such exceptions have been mentioned, and the fourth of these exceptions is based on the right of *restitutio in integrum*, where the relationship of trustee and beneficiary is involved. Salmond stated the law in these words at p. 352 of his Book (2nd Edn.):

> "So if A employs B to commit a robbery, A cannot sue B for the proceeds. And the position would be the same if A were to vest property in B upon trust to carry out some fraudulent scheme: A could not sue B for an account of the profits. But if B, who is A's agent or trustee, receives on A's account money paid by C pursuant to an illegal contract between A and C the position is otherwise and A can recover the property from B, although he could not have claimed it from C. In such cases public policy requires that the rule of *turpis causa* shall be excluded by the more important and imperative rule that agents and trustees must faithfully perform the duties of their office."

Williston in his Book on *Contracts* (Revised Edn.), Vol. VI, has discussed this matter at p. 5069, para 1785 and in paras 1771 to 1774, he has noted certain exceptional cases, and has observed as follows:

> "If recovery is to be allowed by either partner or principal in any case, it must be where the illegality is of so light or venial a character that it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gain the benefit of an illegal transaction."

Even in India, certain exceptions to the rule of *turpi causa* have been accepted. Examples of those cases are found in *Palaniyappa Chettiar* v. *Chockalingam Chettiar* (1920) ILR 44 Mad 334] and *Bhola Nath* v. *Mul Chand,* (1903) ILR 25 All 639.

14. Recently, the Court of Appeal in *Bowmakers Ltd.* v. *Barnet Instruments, Ld.* (1945) 1 KB 65] reviewed the law on the subject, and laid down that every illegality did not entitle the Court to refuse a judgment to a plaintiff. Du Parcq, L.J., observed as follows:

> "In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."
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> We are aware that Prof. Hamson has criticised this case in (1949) 10 Cambridge Law Journal, 249, and has forborne its application, except in the clearest possible circumstances. The law has been also considered by Pritchard, J., in *Bigos* v. *Bousted* (1951) 1 All ER 92, where all the authorities are referred to."

15. The three-Judge Bench of this Court, after referring to the aforesaid judgments, speaking through M. Hidayatullah, J. (as His Lordship then was), observes thus:

> **"15.** The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

16. It could thus be seen, that this Court has held that the correct position of law is that, what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. This Court further held, that if the illegality is trivial or venial and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. It has further been held, that a strict view must be taken of the plaintiff's conduct and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. However, if the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose is achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.

17. Subsequently, another three-Judge Bench of this Court in *Immani Appa Rao and Ors. vs. Gollapalli Ramalingamurthi and Ors.*[2] again had an occasion to consider

2 (1962) 3 SCR 739

the issue with regard to applicability of the aforesaid two maxims. This Court speaking through P.B. Gajendragadkar, J. (as His Lordship then was) observed thus:

> **"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 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 turpitudinum audiendum est*, whoever has first to plead *turpitudinum* 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 and Moore*, (1937) 2 KB 158 at p. 62. Referring to the maxim *ex turpi causa non oritur actio* Lord Wright observed that "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.

13. Out of the two confederates in fraud Respondent 1 wants a decree to be passed in his favour and that means he wants the active assistance of the Court in reaching the properties possession of which has been withheld from him by Respondent 2 and the appellants. Now, if the defence raised by the appellants is shut out Respondent 1 would be entitled to a decree because there is an ostensible deed of conveyance which purports to convey title to him in respect of the properties in question; but, in the circumstances, passing a decree in favour of Respondent 1 would be actively assisting Respondent 1 to give effect to the fraud to which he was a party and in that sense the Court would be allowed to be used as an instrument of fraud, and that is clearly and patently inconsistent with public interest.

14. On the other hand, if the Court decides to allow the plea of fraud to be raised the Court would be in a position to hold an enquiry on the point and determine whether it is a case of mutual fraud and whether the fraud intended by both the parties has been effectively carried out. If it is found that both the parties are equally guilty and that the fraud intended by them has been carried out the position would be that the party raising the defence is not asking the Court's assistance in any active manner; all that the defence suggests is that a confederate in fraud should not be permitted to obtain a decree from the Court because the document of title on which the claim is based really conveys no title at all. It is true that as a result of permitting Respondent 2 and the appellants to prove their plea they would incidentally be assisted in retaining their possession; but this assistance is of a purely passive character and all that the Court is doing in effect is that on the facts proved it proposes to allow possession to rest where it lies. It appears to us that this latter course is less injurious to public interest than the former."

18. This Court held that, which principle is to be applied in the facts of the case would depend upon the question, as to which principle is more consistent with public interest. The Court finds that, when both the parties before the Court are confederates in the fraud, the Court will have to find out which approach would be less injurious to public interest. The Court observed that, whichever approach is adopted, one party would succeed and the other would fail and, therefore, it is necessary to enquire as to which party's success would be less injurious to public interest. The Court in the facts of the said case finds that if the decree was to be passed in favour of respondent No. 1 (who was the plaintiff), it would be actively assisting respondent No. 1 to give effect to the fraud to which he was a party and it has been held that in that sense the Court would be allowed to be used as an instrument of fraud and that is clearly and patently inconsistent with public interest.

19. It has further been held, that if both the parties are equally guilty and the fraud intended by them had been carried out, the position would be that, the party raising the defence is not asking the Court's assistance in any active manner. It has been held, that all the defence suggested is that a confederate in fraud shall not be permitted to obtain a decree from the Court

because the documents of title, on which the claim is based really conveys no title at all. In the facts of the said case, it was held, that though the result thereof would be assisting the defence therein to retain their possession, for such an assistance would be purely of passive character and all that the Court would do in effect is that on the facts proved, it proposes to allow possession to rest where it lies. It has been held that, latter course appears to be less injurious to public interest than the former one. This Court in the said judgment has digested the English law on the issue in the following paragraphs, which read thus:

> "19. In support of the contrary view reliance is usually placed on an early English decision in Doe, Dem. Roberts against Roberts, Widow, 106 ER 401 . In that case it was held that "no man can be allowed to allege his own fraud to avoid his own deed; and, therefore, where a deed of conveyance of an estate from one brother to another was executed, to give the latter a colourable qualification to kill game. The document was as against the parties to it valid and so sufficient to support an ejectment for the premises". In dealing with the question raised Bayley, J. observed "by the production of the deed, the plaintiff established a prima facie title; and we cannot allow the defendant to be heard in a court of justice to say that his own deed is to be avoided by his own fraud;" and Holroyd, J. added that "a deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud in order to invalidate his own deed".
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> 20. This decision has, however, been commented on by Taylor in his Law of Evidence. According to Taylor "it seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a

fraudulent, illegal or immoral purpose [Taylor's "Law of Evidence", Vol. 11th, Edn. p. 97, para 93]". The learned author then refers to the case of Roberts, 106 ER 401 and adds "in the subsequent case of Prole v. Wiggins, (1837) 3 Bing. NC 235 : 6 LJCP 2 : 43 R.R. 621, Sir Nicholas Tindal observed that this decision rested on the fact that the defence set up was inconsistent with the deed". Taylor then adds that "the case, however, can scarcely be supported by this circumstance, for in an action of ejectment by the grantee of an annuity to recover premises on which it was secured, the grantor was allowed to show that the premises were of less value than the annuity, and consequently, that the deed required enrolment, although he had expressly covenanted in the deed that the premises were of greater value..." According to the learned author "the better opinion seems to be that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void *ab initio*; for although a party will thus in curtain cases be enabled to take advantage of his own wrong, yet this evil is of a trifling nature in comparison with the flagrant evasion of the law that would result from the adoption of an opposite rule" (p. 98). Indeed, according to Taylor, "although illegality is not pleaded by the defendant nor sought to be relied upon by him by way of defence, yet the court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio. No polluted hand shall touch the pure fountain of Justice" (p. 93).

21. To the same effect is the opinion of Story [Story's Equity Jurisprudence, Vol. I, s. 421; English edition by Randall, 1920, s. 298.] : "In general, where parties are concerned in illegal agreements or other transactions, whether they are mala prohibita or mala in se, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon the known maxim in pari delicto potior est conditio defendentis et possidentis. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his inequity. But the modern doctrine has adopted a more severely just and probably politic and moral rule, which is, to leave the parties where it finds them giving no relief and no countenance to claims of this sort."

20. It could thus be seen that, although illegality is not pleaded by the defendant nor is relied upon by him by way of defence, yet the court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action *ex turpi causa non oritur actio*. It has been held, that no polluted hand shall touch the pure fountain of justice. It has further been held, that where parties are concerned in illegal agreements or other transactions, courts of equity following the rule of law as to participators in common crime will not interpose to grant any relief, acting upon the maxim in *pari delicto potior est conditio defendetis et possidentis*.

21. In the case of *Nathu Prasad vs. Ranchhod Prasad and Ors.*[3] the three-Judge Bench of this Court had an occasion to consider somewhat similar provisions which read thus:

> **"2.** Section 73 of the Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 (Act No. 66 of 1950) provides:
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> "No Pakka tenant shall sub-let for any period whatsoever any land comprised in his holdings except in the cases provided for in Section 74.
>
> *Explanation.*— * * *."

3 (1969) 3 SCC 11

Section 74 deals with sub-letting by disabled persons. Since the plaintiff is not a disabled person, the section need not be read. Section 75 provides:

> "A sub-lease of the whole or any part of the holding of a Pakka tenant effected properly and legally prior to the commencement of this Act shall terminate after the expiry of the period of sub-lease or 4 years after the commencement of this Act, whichever period is less."

Section 76 provides:

> "(1) If the sub-lessee does not hand over possession of the land sub-let to him after the sub-lease ceases to be in force under Sections 74 and 75 to the lessor or his legal heir … he shall be deemed to be a trespasser and shall be liable to ejectment in accordance with the provisions of this Act.
> (2) * * *."

Section 78 provides:

> "(1) Any person who in contravention of the provisions of this Act, obtains possession of any land by virtue of a bequest, gift sale, mortgage or sub-lease, or of any agreement purporting to be a bequest, gift, sale, mortgage or sub-lease shall be deemed to be a trespasser and shall be liable to ejectment in accordance with the provisions of Section 58."

In the said case, the plaintiff/appellant before the Supreme Court was a recorded *pattedar* tenant and had granted a sub-lease of land to respondent Nos. 1 and 2 for five years. The suit was filed on the ground that sub-lease was in contravention of Section 73 of the Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 (Act No. 66 of 1950) and that the said respondents had trespassed in the land. The trial

court had decreed the suit. The first appellate court had also confirmed the same. However, the same was reversed by the High Court in the second appeal. Allowing the appeal and reversing the judgment of the High Court, this Court held that a person inducted as a sub-lessee contrary to the provisions of Section 78 of the Tenancy Act did not acquire any right under a contract of sub-letting and his possession was not protected.

22. We have to apply the principles of law as deduced by this Court in the case of *Kedar Nath and Immani Appa Rao* (supra), to the facts of the present case.

23. The transaction between the late Bale Venkataramanappa and the plaintiff is not disputed. Initially the said Bale Venkataramanappa had executed a registered mortgage deed in favour of the plaintiff. Within a month, he entered into an agreement to sell wherein, the entire consideration for the transfer as well as handing over of the possession was acknowledged. It could thus be seen, that the transaction was nothing short of a transfer of property. Under Section 61 of the Reforms Act, there is a complete prohibition on such mortgage or transfer for a period of 15 years from the

date of grant. Sub-section (1) of Section 61 of the Reforms Act begins with a non-obstante clause. It is thus clear that, the unambiguous legislative intent is that no such mortgage, transfer, sale etc. would be permitted for a period of 15 years from the date of grant. Undisputedly, even according to the plaintiff, the grant is of the year 1983, as such, the transfer in question in the year 1990 is beyond any doubt within the prohibited period of 15 years. Sub-section (3) of Section 61 of the Reforms Act makes the legislative intent very clear. It provides, that any transfer in violation of sub-section (1) shall be invalid and it also provides for the consequence for such invalid transaction.

24. Undisputedly, both, the predecessor-in-title of the defendant(s) as well as the plaintiff, are confederates in this illegality. Both, the plaintiff and the predecessor-in-title of the defendant(s) can be said to be equally responsible for violation of law.

25. However, the ticklish question that arises in such a situation is: “the decision of this Court would weigh in side of which party”? As held by Hidayatullah, J. in *Kedar Nath Motani* (supra), the question that would arise for consideration is as to

whether the plaintiff can rest his claim without relying upon the illegal transaction or as to whether the plaintiff can rest his claim on something else without relying on the illegal transaction. Undisputedly, in the present case, the claim of the plaintiff is entirely based upon the agreement to sell dated 15.05.1990, which is clearly hit by Section 61 of the Reforms Act. There is no other foundation for the claim of the plaintiff except the one based on the agreement to sell, which is hit by Section 61 of the Act. In such a case, as observed by Taylor, in his "Law of Evidence" which has been approved by Gajendragadkar, J. in Immani Appa Rao (supra), although illegality is not pleaded by the defendant nor sought to be relied upon him by way of defence, yet the Court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action *ex turpi causa non oritur actio i.e. N*o polluted hand shall touch the pure fountain of justice. Equally, as observed in Story's Equity Jurisprudence, which again is approved in Immani Appa Rao (supra), where the parties are concerned with illegal agreements or other transactions, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon

the maxim *in pari delicto potior est conditio defendentis et possidentis*.

26. It could thus be seen that, the trial Judge upon finding that the agreement of sale was hit by Section 61 of the Reforms Act, had rightly dismissed the suit of the plaintiff.

27. Now, let us apply the another test laid down in the case of *Immani Appa Rao* (supra). 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* (supra), 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* (supra), 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.

28. In the result, the appeals deserve to be allowed and are accordingly allowed. The judgment and order passed by the High Court of Karnataka dated 08.06.2015 and the Order passed by the Fast Track Court-III, Bangalore Rural District, Bangalore, dated 17.06.2008 are quashed and set aside. The order dated 23.01.2004 dismissing the suit passed by the trial court is upheld.

29. The parties shall bear their own costs.

.....J.
[ARUN MISHRA]

.....J.
[M. R. SHAH]

.....J.
[B.R. GAVAI]

NEW DELHI;
SEPTEMBER 26, 2019.