NEW DISCOVERIES IN VOID AGREEMENTS: RESTITUTION IN INDIA, PAKISTAN AND MALAYSIA

INTRODUCTION

The obligation to make compensation in respect of the contract discovered to be void is like a phoenix that can be raised again by one of the parties from the dead ashes of its former self. Before the new right can come into being the old right must die.[1]

This refers to the equity of restitution or recompense under section 65 of the Indian Contract Act, 1872, section 65 of the Contract Act of Pakistan and section 66 of the Contracts Act, 1950 (revised 1974) of Malaysia. These sections are *in pari materia* thus:

> 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.

Illustrations are appended to this section. In 1958, the Law Commission of India in their report on the Indian Contract Act recommended the deletion of all illustrations from the Act.[2] This has, however, not yet seen the light of the day.

The above is the only provision relating to refund in case of void agreements in the Contract Acts in the three countries. No other section has any bearing on the subject. Of course, section 64 of the Indian and Pakistan Contract Acts and section 65 of the Malaysian Contracts Act, provide for refund in cases of voidable agreements, while a group of five sections, *in pari materia* with one another, beginning from section 68 in the first two Acts and from section 69 in the third Act deals with restitution in cases of quasi-contracts. All this is beyond our scope.

Furthermore, the above quoted provisions have two limbs: the first deals with restitution when an agreement is discovered to be void; the second deals with restitution when an agreement becomes void. This article concerns the first, and not the second.

It is trite that contracts constitute wealth and in the modern age of

[1] These are the remarks by Mr. Justice G.K. Mitter in *N.C. Coal Co., v. Union of India*, A.I.R. 1956 Cal. 138, at 144; see to similar effect *Province of West Pakistan v. Asghar Ali Mohd. Ali & Co.*, P.L.D. 1968 Kar. 196 at 206.

[2] Law Commission of India, 13th Report Contract Act, 1872 at 14(1958).

industrialisation and expansion of economic wants, too many agreements are made all of which law cannot enforce. This results in voidness or voidness-cum-illegality in many instances. The question then arises of restoration of economic gains obtained by the parties under the void agreements. Hence principles of statutory restitution sometimes conflict with the parties' claims for restoring the *status quo*. The main question is this: In what cases, will the law allow restitution or recompense and to what extent? It is, therefore, proposed:

1. To study factual situations from the reported cases and to narrate them succintly. This will enable us to know the sociological trends in different countries in different periods of history and also help in understanding the rationale of decided cases. The importance of studying factual situations in a system of judicial precedent, which governs the three common law jurisdictions under review cannot be overemphasised;
2. to study judicial attitudes and judicial reasons for decisions; and,
3. to study the difficulties encountered by courts in interpreting the phrase "agreements discovered to be void" occurring in the provisions quoted above. In particular, contours of restitution will be noted:
   a) when agreements are entered into by a minor;
   b) when agreements contravene a written law which declares such agreements as unenforceable or void;
   c) when agreements contravene a statute, entailing penal consequences;
   d) when agreements relate to mistake of fact and mistake of law. The legal effects of the maxim that ignorance of law is no excuse will be noted[3]; and
   e) to conclude results from comparative study, noting particularly whether identical provisions in the three legal systems have produced identical consequences.

Decided cases from India, Pakistan and Malaysia constitute the backbone to this article (in the light of statutory provisions). These will now be examined.

INDIAN LAW

Over 100 years of the Indian Contract Act of 1872 have produced numerous cases with multiple factual situations on the subject. The judicial history of these reported cases may be divided into three well-defined periods:

A. First period (1872 to 1920) i.e. until before the decision of the Privy

[3] As to the application of the maxim and its legal effect in constitutional matters, see *Bashesbar Nath* v. *I.T. Comms.*, A.I.R. 1959 S.C. 149, at 172 (S.K. Das, J.).

Council in *Harnath Kuar* v. *Indar Bahadur* in 1921.[4]

B. Second period (1921 to 1973) i.e. until before the decision of the Supreme Court of India in *Ramagya Prasad* v. *Murli Prasad* and *Kuju Collieries* v. *Jharkhand Mines*, both decided in 1974[5].

C. Third period (1974 to 1977) i.e. the era of Supreme Court decisions and thereafter.

Some moneylending cases contravening the legislation and seeking restitution will also be noted under a separate head.

A. *First period* (1872 to 1920)

This period witnessed many relevant cases in the Indian Courts. Their main task was to ascertain whether the agreement was illegal under section 23[6] or section 24[7] of the Indian Contract Act and if so, then generally to negative restitution under section 65. In other words, where the impugned agreement fell within the mischief of any of these sections, the courts had little difficulty in arriving at a logical conclusion — that the suit was not maintainable and the plaintiff could not recover. The suit for breach of contract also failed because there was, in fact, no contract. As will be seen below, reference was made to the provisions but without a detailed examination of them.

In one of the earliest Allahabad cases, *Bhikham Singh* v. *Har Prasad*,[8] the defendants sold some *Zamidari* property to the plaintiff in violation of an Act. Since the plaintiff did not receive possession, he sued to recover it or in the alternative compensation proportionately to the amount of the consideration paid by him. The court discussed neither section 23 nor

[4] A.I.R. 1922 P.C. 403.

[5] *Ramagya Prasad* v. *Murli Prasad*, A.I.R. 1974 S.C. 1320; *Kuju Collieries* v. *Jharkhand Mines*, A.I.R. 1974 S.C. 1892. See generally *Firm Sriniwas Ram* v. *Mahabir Prasad*, A.I.R. 1951 S.C. 177.

[6] Section 23 of the Indian Contract Act reads:

> The consideration or object of an agreement is lawful, unless — it is forbidden by law — or is of such a nature that, if permitted, it would defeat the provisions of any law — or is fraudulent — or involves or implies injury to the person or property of another — or the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[7] Section 24 of the Indian Contract Act reads:

> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

[8] I.L.R. (1896) All. 35.

section 65 of the Indian Contract Act. It, however, disallowed the plaintiff's claim on the ground that "to allow a claim of this description would be to countenance an intentional violation of the law".[9] It drew support from two of its earlier decisions.[10] In one of these cases,[11] the vendor made a convenant to return a portion of the purchase money if he failed to deliver possession. The vendee was not allowed to recover possession since this would, if enforced, defeat certain statutory provisions. Referring to section 65, Mr. Justice Straight in this case, said:

> In my opinion that section has no application to a case in which two parties with full knowledge of all the facts and the law, presuming that they are well acquainted with the statutory prohibition against what they are doing, enter into a contract which is prohibited by law and the contract is executed to the full extent that it could be executed.[12]

In yet another Allahabad case,[13] the court did not mention either section 23 or section 65, although the successful appellant had strongly pleaded that the agreement was not enforceable under the former section.

In the next Allahabad case, *Dipin Rai* v. *Ram Khelawan Rao*[14], the usufructuary mortgage between the parties hit sections 10 and 20 of the Agra Tenancy Act, and was, therefore, void. The indemnity clause in plaintiff's favour did not avail him. The court imputed the knowledge of the concerned provisions to the parties and held that they were *in pari delicto*. The agreement being void *ab initio*, the application of section 65 was refused.[15] The same result followed where an agreement with the Municipal Board of Benares regarding supply of stone blast to it did not contain the Board's seal.[16] This contravened the Municipal Act. Since the agreement, for want of seal, never reached the stage of contract, it could not be said to have been discovered to be void under section 65. Furthermore, to apply this section would mean to "render nugatory the salutary

[9] *Id.* at 38.

[10] See *id.* at 36 and 37.

[11] Second Appeal No: 676 of 1894 decided on 13/7/1896. See *id.* at 37.

[12] *Ibid.*

[13] *Murlidhar* v. *Prem Raj*, I.L.R. (1900) 22 All. 205.

[14] (1910) 5I. C. 557 (Allahabad).

[15] The court said:

"In our opinion the parties must be held to have known at the date of the execution of the mortgage deed that the transfer of an ex – proprietary interest in the *Sir* land was contrary to the provisions of the Tenancy Act and, therefore, void", *id* at 558.

[16] *Radha Krishna Das* v. *The Municipal Board of Benares*, I.L.R. (1905) 27 All 592.

provisions of the Municipalities Act".[17] The court pointed out:

> As regards section 65, it seems to be applicable to cases in which an agreement is void by reason of mistake or impossibility, or in consequence of the want of a legal consideration. The illustrations annexed to this section point to this.[18]

Two more Allahabad cases disallowed recovery on the ground that they were void under section 23 or section 24 due to unlawful consideration. One of these, concerned a marriage brocage agreement.[19] It was held to be void on account of public policy but the court made no reference to section 23 or section 65. In the other case, which concerned loan, the debtor agreed with his creditor in violation of an enactment to transfer to him occupancy holding in case he failed to repay the loan.[20] The provision about the debtor's indemnity bond did not change the illegal nature of the transaction. The court made only a brief reference to section 65.

Nor did section 65 apply in an Allahabad case[21] to a suit against a minor on a promissory note executed by him, in view of the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dhurmodas Ghose*,[22] where also the minor was the defendant. In this latter case, their Lordships had emphasised that recovery could not be had against a minor under section 65 because there never was, nor could there have been ever a (valid) contract with him. In other words, section 65 did not govern cases of personal incapacity.[23] But this section applied where the lunatic sought to recover the money lent by him.[24] The ground of decision appears to have been that here the incompetent person was a promisee while in the Privy Council case he (the minor) was a promisor. The earlier judicial thinking also favoured a beneficial construction for minors.[25] The effect of Allahabad cases was as follows:—

a) The reported cases related to agreements to transfer land in con-

[17] *Id.* at 601.

[18] *Ibid.*

[19] *Girdhari Singh* v. *Neeladhar Singh*, (1912) 16 I.C. 1004 (Allahabad).

[20] *Ram Partap Rai* v. *Ram Phal Teli*, (1913) I.C. 9 (Allahabad).

[21] *Kanhai Lal* v. *Babu Ram*, (1910) 8 I.C. 888 (Allahabad).

[22] I.L.R. (1903) Cal. 539.

[23] The Law Commission of India, in their thirteenth Report (1958), has recommended to amend section 65 of the Indian Contract Act. This will be dealt with later in the text.

[24] *Jugal Kishore* v. *Chadda*, (1904) 1 All.L.J. 43.

[25] *Hanmant* v. *Jagaroo*, (1888) I.L.R. 13 Bom., 50. See excellent note on Competency to Contract in (1904) 1 All.L.J. 50.

travention of enactments, want of a statutory seal in a formal agreement, marriage brocage agreement and agreements by persons incompetent to contract.

b) Sections 23 and 65 were seldom discussed and relief was generally denied to a plaintiff.

c) The stress was, generally, on illegality under section 23 to dislodge the plaintiff's claim.

d) The parties were presumed to know from the very beginning that the agreement was void under the relevant provisions of an Act. The agreement was, thus, not discovered to be void at a later date under section 65.

e) The parties, in some cases, were regarded to be *in pari delicto*, either because they must have known about the illegality at the date of the agreement or they had executed it as best as they could.

The Bombay cases also have held that section 65 does not govern illegal agreements. But contrary to Allahabad cases, they held on the facts, at least in one case, that the parties had no knowledge about the prohibitory enactment when they entered into the illegal agreement.[26] In this case, the order of compensation was also justified on the ground of a stipulation or collateral promise of payment by the mortgagor to the mortgagee in case the latter's possession was obstructed. Giving a concurring judgement, Heaton, J., emphasised that merely because an agreement is void, it does not necessarily follow that it is discovered to be void.

The Bombay High Court has generally considered section 65 in detail while refuting the claim for restitution. This practice was, however, not adopted in the following two cases: In one case,[27] the plaintiff, under an agreement, gave some amount to a married woman to enable her to obtain divorce from her husband and then to marry the plaintiff. The agreement was held to be *contra bonos mores* and, therefore, void. Strangely enough neither section 23 nor section 65 was referred at all. This was repeated where the lessor in contravention of The Salt Act sub-leased salt pans to the sub-lessee to manufacture the salt.[28] Where, however, parties made a common mistake based upon an interpretation of an Act in making the agreement, the agreement was held to be void on the ground of common mistake of fact and section 65 applied.[29]

[26] This was the position in *Haribhai v. Nathubhai*, A.I.R. 1914 Bom. 102 where the mortgage bond was held to be void under the Bhagdari Act. The court said that the defendant did not know that the bond was void. Thus the bond was discovered to void "long after the transaction". *Id.* at 103.

[27] *Bai Vijli v. Nansa Nagar*, (1886) I.L.R. 10 Bom., 152.

[28] *Ismalji Yusufalli v. Raghunath Lachiram*, (1909) I.L.R. 33 Bom., 636.

[29] *Secretary of State of India v. Sheth Jeshingbhai Hathi-Sang*, I.L.R. (1892) 17 Bom. 407

In two leading cases, the Bombay High Court examined the scope of section 65 vis-a-vis illegal agreements, *Jijibhai Laldas* v. *Nagji Gulab*[30] and *Gulabchand Paramchand* v. *Fulbai Hari Chand*.[31] The constitution of the court in both these cases was the same. In *Jijibhai* (decided on March 9, 1909) the agreement was held to be unlawful since the alienation of land was prohibited by the terms of section 3 of the Bhagdari Act, but the agreement for restitution was held not unlawful. The court said that under section 65, "there is nothing improper in the person, who has paid the money in pursuance of such agreement, recovering it back on the discovery of the failure of the consideration."[32] The case fell both under the collateral agreement as well as under section 65. In *Gulabchand* (decided on March 23, 1909), there was a marriage brokage agreement and the plaintiff sought to recover the amount he had paid to defendant in consideration of his (the latter's) promise to marry his niece to plaintiff's son who had died of plague before marriage. The Bombay High Court held that the word "discovered" in section 65 "introduces certain difficulties in the application of the section to an agreement which is void under section 23".[33] It decided the case in plaintiff's favour on a "somewhat different ground."[34] Section 65 was thus, held inapplicable to illegal agreements.

In two Calcutta cases, the agreements were held bad for fraud and corruption. In one of these,[35] the court said that the defendant committed fraud upon his employer,[36] when he agreed, in consideration of some property to him from plaintiff, to induce his master to sell four villages to the plaintiff. The parties were found to have known of the illegality when they made the agreement. So section 65 did not apply. In the other case, plaintiff was not allowed to recover his Rs100/= which he had given to defendant for procuring for "his son the post of a permanent peon within two years."[37] The court regarded the agreement as unlawful and void under section 23 because otherwise, "bribery and corruption

[30](1909) 3 I.C. 761 (Bombay; Judgment of 9th March 1909).

[31](1909) 3 I.C. 748 (Bombay; Judgment of 23rd March 1909).

[32]*Supra* note 30 at 762.

[33]*Supra* note 31 at 769.

[34]*Ibid*. The parties were held to be not in *pari delicto*. The plaintiff's son had died before marriage and the illegal purpose was not performed. The court said:

> It is urged that the agreement before us was never discovered to be void, but was void *ab initio*. That, however, is, we think, precisely the case contemplated by the section, where the word – 'agreement', is used in sharap antithesis to the word 'contract' in the second branch of the sentence . . ." *Id.*, at 749 (Parenthesis supplied).

[35]*Nathu Khan* v. *Sawak Keori*, (1911) I.C. 161 (Calcutta).

[36]*Id.*, at 162.

[37]*Ledu Coachman* v. *Hiralal Bose*, (1915) 299 I.C. 625, at same page (Calcutta).

would be encouraged".[38] In its view, section 65 can aptly be applied where an agreement is subsequently found to be void on account of some latent defect or circumstances unknown to parties at the date of the agreement, or where an agreement becomes void by circumstances which supervene.[39]

The Lahore High Court discussed the application of section 65 where plaintiff sought to recover the money paid as marriage brocage to the defendant who betrothed his daughter to the plaintiff's son.[40] The court refused to aid the plaintiff on the ground that ". . . although the matter has often been the subject of doubt, the prevailing view is that it does not apply to contracts which are known to be void *ab initio* by reason of the illegality of the consideration".[41] In other words, the parties imputedly must have known of the illegality of their agreement when they made it, so that the agreement was not discovered to be void under section 65.

The Madras High Court has considered the subject – matter in a series of cases. In perhaps the earliest case that of *Krishnan* v. *Sankara Varma*,[42] decided in 1886, the court allowed recovery although the primary agreement was illegal, on the ground that the collateral agreement of payment had failed. Here plaintiff had loaned to defendants Rs. 4000/= (the balance was to be paid later) to enable them to pay off the debt which they had incurred in managing the temple property. The court held that the agreement was illegal because this involved the transfer of the defendant's hereditary right of management. Neither the plaintiff nor did the defendants know that the assignment was invalid in law. The court regarded the case as one of mutual mistake of law, but allowed recovery because of the failure of the collateral agreement. The court assumed that section 65 does not vary the rule that a party cannot be relieved on the ground of mistake of law.

In another case, the Madras High treated the release of debt as a mistake of fact under section 20 of the Indian Contract Act and granted relief.[43] This section did not apply where plaintiff claimed to recover money which he had deposited with defendant as security for performing his wagering agreement. "s. 30 makes a wagering contract void *ab initio* and to such a class of contracts s. 65 has no application".[43a] The agreement

[38] *Id.*, at 628.

[39] See *Ibid.*

[40] *Hira* v. *Jowala*, A.I.R. 1915 Lah. 480.

[41] *Id.*, at 481.

[42] I.L.R. (1886) 9 Mad. 441.

[43] *Madras Consolidated Sugar and Spirit Factories Ltd.*, v. *William Sissmore Shaw*, (1904) 14 M.L.J. 443.

[43a] *Venkataraju* v. *Ramanujam*, A.I.R. 1918 Mad. 163.

was not discovered to be void, since the agreement was void *ab initio*. The Court followed the Bombay[44] and Calcutta[45] cases which had held similarly. It regarded a marriage brocage agreement as being against public policy and, therefore, as unlawful and void. Recovery was refused because the parties must have known of the illegality when they made the agreement.[46] The court exploded the distinction, evolved in a Calcutta case,[47] which allowed recovery (under the doctrine of *in pari delicto*) in cases of breaches of positive law or public policy but not in cases involving unlawful object or immorality. In other words, there are no different shades of illegal agreements and section 23 maintains no such distinction.

The Oudh Judicial Commissioner's Court followed the Madras High Court's theory of collateral agreement in a case where the mortgage deed was not validly attested as required under section 59 of the Transfer of Property Act, 1882. In other words, section 65 would apply where the collateral agreement failed because the primary agreement had failed due to illegality. The court did not meet the theory that such a distinction would amount to enforcement of a void agreement. The Sind Judicial Commissioner's Court negatived the use of section 65 to an agreement, intended to stifle a prosecution, because "both parties must have known that it was illegal to stifle a prosecution".[49]

This period (1872–1920) concludes as follows:

a) In cases of illegal agreements, the application of section 65 was refused. The distinction between the varying shades of illegality under section 23 was not uniformly adopted.

b) In cases of mistake of fact under section 20 of the Indian Contract Act, recovery was allowed, but not in cases of mistake of law under section 21.

[44] *Parshottam Vebhai v. Chhotra Singji Madhavsanji*, I.L.R. (1917) 41 Bom., 546.

[45] *Ledu Coachman v Hiralal Bose*, I.L.R. (1916) 43 Cal. 115.

[46] *Srinivasa v. Sesha Aiyer*, A.I.R. 1918 Mad. 444.

[47] See *supra* note 45, where the court said:

> It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it". *Id.* at 120–21.

[48] *Ganga Prasad v. Ram Samujh*, A.I.R. 1918 Oudh 22.

[49] *Hemandan Ramakhiomal v. Chellaram Daloomal*, (1912) I.C. 836 (Sind), 837. See *Mir Mahomed v. Khubomal*, (1913) 21 I.C. 517 (Sind), where section 65 did not apply to a sale void *ab initio*.

c) In cases of illegal agreements, parties, in many cases, were imputed to have known of the illegality with the result that the agreement was not discovered to be void under section 65.

d) In some cases, collateral agreements of repayment or recompense upon failure of the primary agreement were recognised and recovery was allowed because these were not *per se* illegal.

e) In some cases, neither section 23 nor section 65 was referred to at all. These were, sometimes, cases of marriage brocage agreements.

f) In many cases of illegal agreements, courts refused recovery on the ancillary ground that the agreement was unlawful under section 23. In other words, section 23 was the anti-thesis to section 65; where one applied, the other did not.

g) In one case, the court allowed recovery to a minor plaintiff (who was a promisee and not a promisor) under the agreement.

h) In some cases, the doctrine of *in pari delicto* was applied (both on the faith of English decisions and its recognition under section 84 of the Indian Trusts Act).

i) In some cases, the court stressed that in order to claim relief the parties must be ignorant of illegality on the date of agreement.

B. *Second Period* (1921 to 1973)

The second period begins with the landmark Privy Council case, noted below, and contains several other Privy Council and High Court cases.

(i) *Privy Council decisions between 1921–1949*

This period covers cases decided by the Privy Council on illegality under section 65 beginning from the year 1921. The Privy Council heralded a new era in *Harnath Kuar* v. *Indar Bahadur*,[50] by holding for the first time that section 65 applies to agreements void *ab initio*. The facts were that the deceased husband (Rachpal) of the plaintiff (Harnath Kuar) had loaned to the defendant (Indar Bahadur) a sum of Rs20,000 for the following litigation in the year 1878: Indar Bahadur had filed a suit in the court of Deputy Commissioner for a declaration which was decreed in October 1878, that the alleged will in favour of the issueless widows by their husband, who was the last male owner, empowering them to adopt was "void and invalid",[51] and that Indar Bahadur was "entitled to succeed to . . . estates on the death of the last surviving widow."[52] In January 1880, on the faith of the above decree in his favour and upon receipt of a

[50] A.I.R. 1922 P.C. 403; (1922) 50 I.A. 69; (1923) 44 Mad., L.J. 489; the Judgment of their Lordships of the Privy Council was given by Sir Lawrence Jenkins.

[51] *Id.*, at 404 (A.I.R.).

[52] *Ibid.*

further sum of Rs5,000 in that year, Indar Bahadur (defendant in the present case) purported to sell to plaintiff's husband certain villages which formed part of an estate under the Oudh Estate Act whereunder the vendor was merely a reversioner, having merely an expectancy interest and was not competent to transfer the villages. In 1911, the defendant (the vendor Indar Bahadur) obtained possession of these villages. In 1914, the plaintiff (Harnath Kuar) sued to recover possession of them or in the alternative the return of money. The lower courts in India decided against the plaintiff because at the relevant date, the defendant had no interest *in praesenti* to transfer the villages; his interest was merely an expectancy. On appeal, their Lordships of the Privy Council held that the Deputy Commissioner by decree could not create a present interest in the defendant as against an expectancy interest under the above Act. The plaintiff's claim for possession of the villages was rightly rejected below. There the refund was barred by limitation. As to refund of money, their Lordships cautioned that the case had to be decided, not on the principles of English Law, but under section 65 of the Indian Contract Act. The plaintiff was held entitled to recover compensation (but not possession) thereunder and the suit was held to be within time. To arrive at this conclusion, the court referred to the definitions of agreement and contract in the above Act and said.

> An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.[53]

In several Indian decisions, examined below, these words acquired the status of a statement of law on the subject of restitution in case of illegal agreements and are referred to in the following pages as the *oft-quoted statement* of the Privy Council. In the above case, their Lordships concluded:

> There are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to private rights of Indar Singh . . . and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted . . . .[54]

In the following year, *Harnath Kuar* was quoted with approval by their Lordships of the Privy Council in the context of a transfer of an expectant interest which was held void in law.[55] *Harnath Kuar* found further

[53] *Id.*, at 405.

[54] *Ibid.*

[55] *Annada Mohan* v. *Gour Mohan*, A.I.R. 1923 P.C. 189.

support of the Privy Council in *Nisar Ahmad* v. *Mohan Manucha* (1940),[56] where the subsequent mortgage of the property was executed without the permission of the Deputy Commissioner contrary to the provisions of the Civil Procedure Code and was, therefore, void *ab initio*. The subsequent mortgage was held to be *discovered* to be void (on the analogy of *Harnath Kuar,* it appears). But neither this nor any other Privy Council case was (expressly) referred to. Section 23 was not mentioned and section 65 engaged only a minor attention.

Furthermore in *Raja Mohan* v. *Manzoor Ahmad,*[57] (1943), a judgment-debtor mortgaged a village without the written permission of the Collector contrary to the Civil Procedure Code. The transaction was held to be an honest and open one and for ten years the mortgagor had paid interest to the mortgagee. The Privy Council cited the above decisions with approval and held that the case fell under section 65. Sections 23 and 24 were not alluded to in this judgment. In a case from Palestine, decided in 1948, the Privy Council held that the subscribers were entitled to recover their money where there had been an *ultra vires* issues of shares.[58]

A careful study of *Harnath Kuar* reveals, it is submitted with respect, that it was decided in a different manner and the language of the oft-quoted statement of the judgment is of wide import, capable of construing section 65 quite liberally as has been done in some later Privy Council, High Court and Supreme Court cases. It has, however, to be realised that the remarks therein were made "in the peculiar circumstances of this case."[59] Within a few months of its birth, the judgment received a highly inspiring but critical review in an Indian Journal.[60]

1. The judgment speaks that "the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation."[61] In other words, the discovery under section 65 was made not when the sale deed was purported to have been made but at a latter date. It has been said that in referring to the period of limitation, their Lordships did not pinpoint the provision of the Limitation Act which

[56] A.I.R. 1960 P.C. 204.

[57] A.I.R. 1943 P.C. 29; see generally *Hanraj* v. *Debra Dun* M.E.T. Co., A.I.R. 1933 P.C. 63 dealing with date of discovery of void agreements.

[58] *Margaret Linz* v. *Electric Wire Co.,* A.I.R. 1949 P.C. 51.

[59] *Supra* note 50 at 405 (A.I.R.).

[60] See critical note on *Harnath Kuar* v. *Indar Bahadur Singh,* in (1923) 44 Mad., L.J. 41–47). Many of the points of criticism stated in the text above are based upon this review which needs to be widely noted.

[61] *Supra* note 50 at 405 (A.I.R.)

would be attracted in this case.[62]

2. The language of the oft-quoted statement is wide enough to put at naught the decision of their Lordships of the Privy Council in *Mohori Bibee*, where Sir Ford North, delivering the judgment of the Board, said:

> It is sufficient to say that this section (65) like section 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.[63]

While in *Mohori Bibee* voidness arose due to personal incapacity of the minor, in *Harnath Kuar* voidness arose "because the subject-matter was incapable of being bound in the manner stipulated"[64] In the former case, section 65 does not apply, in the latter, it does. A foreign scholar, who reads *Harnath Kuar* without the necessary contextual reference is bound to falter in wilderness and may conclude that voidness under section 65 includes agreements which are void due to personal incapacity.[65] It appears from certain remarks of Mr. Justice Bose in a full bench Nagpur case,[66] that since *Harnath Kuar* section 65 applies to all cases of void agreements irrespective whether the voidness arises because of illegality or incapacity to contact. Mr. Justice Digby, in the same case, however, referring to *Mohori Bibee*, said that the law is settled by the Privy Council that "the section (65) presupposes a competency in the parties to contract, and hence it does not apply to an agreement with a minor".[67] It was, however, in *Raja Mohan* v. *Manzoor Ahmad* (1943) that the Privy Council circuitously and without naming *Mohori Bibee* confirmed it with reference to section 65 thus:

> The principle underlying s. 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. *If* it be settled law that the incapacity imposed on a judgment debtor by para 11 of sch. 3 is an incapacity to affect his property and not a general incapacity to contract; it follows that the convenant to repay is not made void by the mere operation of the paragraph.[68]

[62] See *supra* note 60 at 41.

[63] See *supra* note 22: (1903) 30 I.A. 114 at 124. Parenthesis supplied.

[64] *Supra* note 50 at 405 (A.I.R.).

[65] It is strange that the case of *Janardhan* v. *Vishwanath*, A.I.R. 1927 Nag. 116, concerning enforceability of a promissory note against the minor, where section 65 was held inapplicable quoted neither *Mohori Bibee* nor *Harnath Kuar*.

[66] *Asaram* v. *Ludheshwar*, A.I.R. 1938 Nag. 334, at 344 (column 2; see remarks of Bose, J.).

[67] *Id.*, at 355 (column 2; see remarks of Digby, J.). Parenthesis supplied.

[68] *Supra* note 57 at 32. Emphasis added.

3. The judgment does not discuss whether the discovery of an agreement is confined to cases of mistake of fact or mistake of law. The pleadings of the parties had raised rival contentions in this behalf.[69] Any direct statement of their Lordships on this subject would have removed misty clouds so that the landscape of section 65 could be clearly visible. If strict regard be had to the remarks of their Lordships in *Harnath Kuar* that there was misapprehension as to the private rights of Indar Bahadur Singh (which was created by a declaratory decree of the Deputy Commissioner in his favour and where the words "heir" and "entitled" were used) then section 65 covers cases of mistake of fact alone and certainly not cases of mistake of law.

That the mistake as to private right is a mistake of fact and not of law is well-established in common law jurisdictions. In England, its authority was founded by the House of Lords in *Cooper v. Phibbs*,[70]

[69] In *Harnath Kuar* v. *Indar Bahadur Singh*, as reported in the Law Reports, (1922–23) vol. 50 Indian Appeals 69, at 73, De Gruyther, K.C. Parikh, and C.S. Chaudhuri for the respondent said, *inter alia:*

> The appellant has no rights under section 65 of the Indian Contract Act, 1872. That section does not relate to an agreement which was void in law, as this was, when it was made; it relates only to one which is found to be unenforceable owing to the discovery of some fact; for instance under section 20, by it being discovered that there was a common mistake of fact. *Id.*, at 73.

Referring to section 65, Sir George Lowndes K.C. in reply said:

> The section is not in terms confined to a discovery of fact. *Id.*, at 73.

In *Thakurain Harnath Kaur v. Thakur Indar Bahadur Singh*, as reported in (1923) 44 The Madras Law Journal 489 (P.C.), the reply is as under:

> The contention that the discovery should be one of fact and not of law cannot be sustained as the words of the section are wide enough to exclude this contention. *Id.*, at 491.

[70] (1867) L.R. 2 H.L. 149. As to India, see Pollock and Mulla, Indian Contract and Specified Relief Acts 192 (9th edn. by Mr. Justice J.L. Kapur 1972). There are many Indian cases on the subject. See, for example, *Ram Chandra* v. *Ganesh Chandra*, A.I.R. 1917 Cal. 786 (there was a doubt whether mineral rights could be transferred in view of certain Privy Council decisions); *Appavoo* v. *S.I.Ry. Co*, A.I.R. 1929 Mad. 177, at same page; *Ramanujulu* v. *Gajaraja*, A.I.R. 1950 Mad., 146 (here mistake arose because of an earlier decision which was overruled by a later full bench decision. The sale and mortgage transaction was executed between the dates of two decisions in 1935.) In this case, single judge Mr. Justice Viswanathan Sastri said:

> It is said that a mistake of law does not vitiate an agreement as all persons are presumed to know the law. Like most maxims of the law, the maxim, that ignorance of law does not furnish an excuse or defence, has but a limited application and it is not proper, in my opinion to fetter the law by maxims of this kind".
>
> *Id.* at 148. In *Balaji Ganoba* v. *Annapurnabai*, A.I.R. 1952 Nag. 2, 3–4, single judge, Mr. Justice Deo said that in view of the general language of section 21, Contract Act relief is not given against a mistake of law. However,

Furthermore, according to an American jurist, Professor Corbin, "mistake as to a person's existing legal rights is treated as a mistake of fact in determining whether . . . restitution should be decreed. This is true even though the mistake as to rights was directly caused by a mistake or ignorance of some general rule of law".[71] This may make the distinction between mistake of fact and mistake of law very thin.

The impression, however, that *Harnath Kuar* is confined to cases of mistake of fact alone is substantially nullified when it is borne in mind that their Lordships used these words in the context of the law of limitation and also if regard is had to their oft-quoted statement.

4. The recitals in the sale-deed purport to suggest that the imperfect nature of the transaction was known to the parties because the vendor's liability to give possession thereunder arose only when he received the possession of the villages (which he did in the year 1911).

While *Harnath Kuar* opened the door doubtfully for recovery in all cases of illegal transactions, two of the later Privy Council cases, where the agreement was clearly void for lack of permission of the Collector under an enactment allowed recovery under section 65. In these two cases, the agreements were unlawful within the meaning of section 23, because if enforced they would defeat the provisions of the Code of Civil Procedure. In these cases, section 23 was not mentioned. The Privy Council had no occasion to deal with other kinds of illegal agreements which may be void due to stifling of criminal prosecution or dealing with a penal statute or breach of a mandatory provision or affront to public safety and tranquality. Nevertheless the Privy Council cases constituted a milestone on the road to restitution for illegality and the former trend of the Indian High Courts sometimes not even to discuss section 65, while dealing with refund, received some jolt.

ii) *Law Commission* (1958)

In 1958, the Law Commission of India expressed its unhappiness over the interpretation of section 65 by the Privy Council in *Mohori Bibee*, which had the necessary effect of protecting the minor completely in all

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modern authority has shown that the doctrine in question is not acceptable without rather large qualifications". *Id.*, at 3. See *Hemumal* v. *Hyderabad Committee*, A.I.R. 1920 Sind 59, where the court said that ". . . the mistake of the parties in supposing that the Municipality had power to acquire the land under section 92, Municipal Act, is really a mistake of fact and not a mistake of law . . ." *Id.*, at 60.

As to Pakistan, see *Shaukat Mahmood*, the Contract Act 151 (1st. edn. 1969).

[71] See 3 Corbin, Contracts section 620 at 770–71 (1960).

circumstances (including in a case of fraudulent misrepresentation of his age by him). There is no other section in the Contract Act whereunder the minor can be liable for restitution (excluding, of course, the case of necessaries of life). The Law Commission stated:

> We feel that the Judicial Committee had not correctly interpreted section 65 and we are of the opinion that an agreement is 'void' or 'is discovered to be void' even though the invalidity arises by reason of the incapacity of a party to contract. We recommend that an Explanation be added to section 65 to indicate that section should be applicable where a minor enters into an agreement on the false representation that he is major.[72]

It recommended thus:[73]

> "For section 65 of the principal Act, the following section shall be substituted, namely:
>
> 65. Obligation of person who has received advantage under void agreement or contract that becomes void or is avoided.
>
> *Where* an agreement *between parties competent to contract* is discovered to be void, or when a contract becomes void or *is avoided by a party entitled to do so,* any person who has received an advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he has received it
>
> Explanation 1 –
>
> *An agreement which is void by reason of the minority of any party thereto is governed by provisions of this section, if the agreement is entered into by the minor falsely respresenting that he is major.*
>
> Explanation 2 –
>
> An agreement which is void by reason of non-compliance with any requirement relating to form or sanction of any authority, prescribed by or under any law, is governed by the provisions of this section."

This recommendation, however, has not yet been discussed in the Indian Parliament. It may be remembered here that the new Specific Relief Act, 1963, has inserted the following provisions in section 33(2)(b) at the instance of the Law Commission:

> Where a defendant successfully resists any suit on the ground – that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872, the Court may, if the defendant has received any benefit under the agreement from the other party, require

[72] Law Commission of India, Thirteenth Report 20 (1958).

[73] *Id.*, at 81.

him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

The re-wording of section 65, it is submitted with respect, is open to several objections:

First, the words "between parties competent to contract", would exclude cases where the parties are not competent to contract under a legislation, e.g., a transfer of land by an agriculturist to a non-agriculturist or by a member of a scheduled caste to a member of non-scheduled caste in violation of a supposed protective legislation which prohibits such transfer. Perhaps this is not the object of law reform. It would be better to rephrase the above words as: "between parties competent to contract under section 11 of the Indian Contract Act, 1872". This will no doubt, allow restitution in the circumstances exemplified above. Both the above phraseologies, however, make section 65 out of bounds for the minor even though he is a promisee – plaintiff. This does not appear to be the intention of the Law Commission. In fact, as stated earlier, some High Courts in India have allowed recovery to minors in such cases. Rethinking is, therefore, necessary to avoid the harm which may be caused to the minor or his property if the above recommendation is accepted without the desirable amendment.

Second, the words "is avoided by a party entitled to do so" would include cases of voidable agreements for which section 64 makes a complete provision and for which the commission has suggested no change. Perhaps the recommendation is intended to cover those voidable cases where there is legislative option to a promisee under which if he avoids the agreement he becomes entitled to claim benefit under section 65.

Third, explanation 1 should be re-worded so as to be a *proviso* to the main section to conform to the intention of the recommendation.

Fourth, explanation 2 should then be renumbered as explanation 1.

Lastly, it is not understood why a minor should escape restituting the thing or money if it is traceable with him at the date of the notice or institution of the suit even where he did not make fraudulent misrepresentation of his age, provided that the claimant was innocent or guiltless.

The Law Commission thought that section 65 would not be applicable to illegal agreements.

After the decisions in *Harnath Kuar* and other Privy Council cases, it was left to the High Courts in India to apply the precedents. It now remains to be seen how *Harnath Kuar* was interpreted by Indian Courts, until the matter was clinched by the Supreme Court of India in 1974.

iii) *High Court Decisions* (1922 to 1973)

In the fifty years following *Harnath Kuar*, very many cases sought relief

under section 65. Obviously all these cases cannot be examined. The study will, therefore, be limited to selected cases.

After the decision in *Harnath Kuar* and other Privy Council cases, one notices a great change not only in the trend of decisions generally, but also in the manner of arriving at decisions. Sections 23 and 24 cease to be discussed even when section 65 is held to be inapplicable. The attention of the High Courts, as one would have naturally expected, is focussed both on facts and the oft-quoted statement of the Privy Council in *Harnath Kuar*. The High Courts which have still barred compensation for unlawful agreements regard this case as having been decided in the context of mistake of fact or misapprehension of the private rights of the party. In some of these cases, the oft-quoted statement finds no place. Judicial decisions extending the scope of section 65 to illegal agreements are numerous. Following the oft-quoted statement in *Harnath Kuar*, Hyderabad, Nagpur, Gujarat and Rajasthan decisions extended the principle of restitution to illegal agreements. Andhra Pradesh and Patna decisions were sometimes conflicting. The Madras High Court largely followed the old view, but has, on the whole, applied the above case quite judiciously and cautiously.

In *Bahadur* v. *Mohammad Din*,[74] the sole question before the Lahore High Court was whether the vendee who had professed to be an agriculturist and was later found to be non-agriculturist could recover the price of the land (which he purported to buy) from the vendor, although it was opposed to the Punjab Alienation of Land Act. The court held that the case fell within section 65. It distinguished this case, where the transaction was merely void, from the Allahabad decision in *Har Prasad* v.*Sheo Govind* where the agreement was "forbidden by the provisions of the Agra Tenancy Act".[75] In *Prabhu Mal* v. *Babu Ram*,[76] the court had no difficulty in dismissing a claim based on an illegal transaction where the parties had known its nature.

In the post-*Harnath Kuar* era also section 65 was held not to be applicable against a minor, although there was no such bar when he was a plaintiff.[77]

[74] A.I.R. 1934 Lah. 979.

[75] A.I.R. 1922 All 134.

[76] A.I.R. 1926 Lah. 159; *L.I.C.* v. *K.A. Madhava Rao*, A.I.R. 1972 Mad. 112.

[77] See also *Mt. Bachai* v. *Hayat Mohammad*, A.I.R. 1937 Oudh 521 where the court held that the vendee knew that the minor had a certified guardian. Also section 65 was not to be enforced against a minor. But section 65 would apply where the suit is by a minor for restitution or compensation. See *A.A. Khan* v. *Ameer Khan*, A.I.R. 1952 Mys. 131; *Uttam Chand* v. *Mohandas*, A.I.R. 1954 Raj. 50.

In an early Madras case,[78] involving transfer of a *spes successionis*, the agreement was regarded as void and forbidden under the Transfer of Property Act but the amount was held refundable (subject, of course, to the law of limitation). Section 65 was held inapplicable where the agreement was void under the Forward Contract Prohibition Order, 1943, if the parties knew of the illegality.[79]

The Madras High Court refused to apply section 65 to an illegal agreement, being in contravention of an Act for which criminal penalties were provided.[80] In this case, the plaintiff paid to the defendants certain amounts for purchasing benami in the latter's names three shops wherein business had to be managed by the plaintiff. The plaintiff then asked the defendants to execute a deed of transfer in his name which the defendants declined. The plaintiff, thereupon, claimed recovery of the above amount. The Madras Division Bench, confirming the decision of the single judge, held that the arrangement that the plaintiff should manage the shops for which the defendants had a licence to sell wine was a contravention of the Madras Abkari Act, for which the Act provided the penalty. Thus the agreement was illegal and the plaintiff could not recover his claim. The court did not refer to *Harnath Kuar* but distinguished the instant case from its earlier decision,[81] where the lawyer's agreement with the client for charging of the fee was neither in writing nor filed with the court, although this was required under the Legal Practitioners Act. The court allowed the lawyer's claim for reimbursement. The Madras High Court maintained the line of reasoning which it had adopted in an earlier case in *Chennayya* v. *Janikamma*,[82] where a partnership between plaintiff and defendant in violation of the prohibition under the Abkari Act was declared as illegal and void *ab initio*. The court, refused to decree refund of money to plaintiff because section 65 does not remedy unlawful agreements.

In a recent case (1970),[83] the full bench of the Madras High Court considered only one case – that of *Harnath Kuar* – and held that its

[78] *Auryaprabhakara Rau* v. *Gummudu Sanyasi*, A.I.R. 1925 Mad. 885.

[79] *Hussain Kasam Dada* v. *V.C. Association*, A.I.R. 1954 Mad. 528.

[80] *Venkata Subbayya* v. *Attar Sheik Mastan*, A.I.R. 1949 Mad. 252. In *Lakshmanprasad.* v. *Achuttan Nair*, A.I.R. 1955 Mad. 662, the customer could not recover the price of the car in excess of the control price but in *Somraj* v. *Jethamal*, A.I.R. 1957 Raj 392, the tenant could recover the amount in excess of the standard rent fixed under the rent control legislation.

[81] *Thangammal Ayiyar* v. *Krishnan*, A.I.R. 1930 Mad. 132.

[82] A.I.R. 1944 Mad. 415.

[83] *Board of Revenue* v. *B.P. Eswaran*, A.I.R. 1970 Mad. 349 (F.B.)

principle was applicable where there was a conveyance *simpliciter* and the title of the vendor failed; it would not apply where there was a conveyance (wherein the title failed) and also an indemnity agreement. The latter was a composite deed wherein the parties fixed liquidated damages or specified compensation with or without the sources of compensation. The collateral agreement could be operated upon independently of section 65.

In *Inderjit Singh* v. *Sunder Singh*,[84] a single judge of the Rajasthan High Court made a thorough examination of the problem of illegality and recoverability in the light of numerous decisions, including Privy Council decisions, but not including *Harnath Kuar*. Here the agreement was held illegal under section 23 and had been partly performed. The defendant had a valid permit for plying buses on a certain route. He entered into a partnership agreement with the plaintiff as to this business. The plaintiff filed a suit claiming the amount that he had given under the agreement. The trial court decreed the plaintiff's claim partially. On appeal, the District Judge reduced the amount and held that the partnership agreement was illegal because it amounted to a transfer of the permit of the vehicle, but granted relief to the plaintiff under section 65. On further appeal, the Rajasthan High Court held that the agreement was illegal, being in contravention of section 59 of the Motor Vehicles Act and was an offence thereunder but the illegality was known to the parties when they made the agreement. In a brilliant judgment, the learned judge referred to the definitions of "void" and "becomes void" and remarked that these definitions covered "all void agreements."[85] In his view, therefore, agreements void for unlawful consideration or object could not be excluded from section 65. The plaintiff, therefore, lost the appeal, though he won on the abstract principle of the law.

The new trend of widening the scope of restitution started forcefully with the unanimous judgment of the five judges in a full bench decision of the Hyderabad High Court in *Budhulal* v. *Deccan Banking Co.*[86] In this case a promissory note was payable to bearer on demand and was hit by the Hyderabad Paper Currency Act. Its contravention was an offence punishable with fine. The plaintiff claimed recovery on the pronote and defendants pleaded illegality. Jaganmohan Reddy, J., (as he then was) with whom other judges concurred (Siadatali Khan, J., gave a separate concurring judgement) held that the agreement was void and discovered to be void under section 66 of the Hyderabad Contract Act which corresponded to section 65 of the Indian Contract Act. He did not agree

[84] A.I.R. 1969 Raj. 155.

[85] *Id.*, at 159.

[86] A.I.R. 1955 Hyd., 69.

with the view of Pollock and Mulla that agreements which were void under section 23 (relating to unlawful consideration) of the Indian Act, did not fall under the recovery provisions. The learned judge also drew support from *Harnath Kuar* and other Privy Council cases. It was found *as a fact* that the parties had regarded their transaction as legal when they made it, and the defendant did not deny the legality even when the suit was launched. The agreement was thus truly discovered to be void under section 66 of the Hyderabad Contract Act. The plaintiff's claim was decreed. Siadatali Khan, J., also followed *Harnath Kuar*, in the light of the oft-quoted statement, to allow refund in cases of unlawful agreements.

Hyderabad's *Budhulal* became a torch-bearer to an Andhra (division bench) decision (as also to the Rajasthan case afore-mentioned) in *Sivaramakrishnaih* v. *Narahari Rao*.[87] Here the plaintiff sold to defendant 1, some bags of paddy in criminal breach of the Madras Foodgrains Procurement Order, 1947. The trial court found that the agreement was a breach of the above Order because the defendant had no licence and the plaintiff had no knowledge of the illegality. The plaintiff's claim was decreed. *Budhulal* was approved and *Harnath Kuar* was omitted. The Andhra High Court reversed its earlier decision[88] which had maintained the distinction between merely void and unenforceable agreements on the one hand and unlawful and illegal agreements on the other. Thus section 65

> does not recognise the distinction between a contract being illegal by reason of its being opposed to public policy or morality and contract void for other reasons. The section is couched in wide language and talks of void contracts in general. There does not seem to be any ground for differentiating one contract from the other in regard to the applicability of that section.[89]

In a subsequent Andhra decision,[90] a single judge, BhimasanKaram, J., held section 65 inapplicable where the defendant had not received an advantage under the agreement. He made an *obiter* attack on the aforementioned earlier Andhra case, because the decision therein was "clearly subversive of the very foundations on which the administration of justice according to law rests — that no litigant can plead ignorance of law".[91] He strongly adovated the setting up of a full bench when, in future, such questions arose and felt that the Hyderabad reasoning which

[87] A.I.R. 1960 A.P. 186.

[88] *Sriramulu* v. *Deputy Registrar of Co-Operative Societies*, 1957 Andh. L.T. 607.

[89] *Supra* note 87 at 189.

[90] *Krishna Rao* v. *Kodandarama*, A.I.R. 1960 A.P. 190.

[91] *Id.*, at 193.

was followed by the Andhra division bench "was based upon some decisions of the Privy Council which did not consider the applicability of section 65 to agreements falling within section 23 of the Contract Act."[92]

It is submitted with respect that decisions of the Privy Council in some cases to allow the transfer, purportedly made by the judgment debtors, without permission of the Collector, did defeat the provisions of the Civil Procedure Code under the above section 23. The Privy Council cases, however, did not encounter other types of serious illegality.

In a more recent High Court case,[93] the plaintiff transferred his telephone to be installed at the defendant's premises without the sanction from the government and this constituted an offence subject to penalty. The plaintiff claimed recovery of the amount of telephone bills. It was decided that the illegal purpose had been carried out and there was no *locus poenitentiae* between parties to enable the plaintiff to recover. Section 65 was not discussed. But the lower court had refused recovery to plaintiff because the agreement was illegal under section 23.

The Gujarat High Court in *Mohanlal* v. *Yakubkhan*[94] affirmed the judgment of the lower courts and gave relief although the (agreement for) settlement of the amount between parties hit the Bombay Agricultural Debtors Relief Act. The court followed *Harnath Kuar* and postulated that after this decision there was no scope for the argument that section 65 did not apply to agreements void *ab initio*.

Perhaps the earliest full bench decision in India which grappled with the statutory restitution in cases of illegal agreements and followed *Harnath Kuar* is the case of *Asaram* v. *Ludheshwar*,[95] decided by three learned judges and presided over by the Chief Justice in 1938. Acknowledging the

[92] *Ibid.*

[93] *Seethramasastry* v. *N. Kalwar & Sons*, A.I.R. 1968 A.P. 315. See *Manikyam* v. *M. Satyanarayam*, A.I.R. 1972 A.P. 367 where the court did not discuss the section but disallowed compensation under section 70. It distinguished thereunder different shades of illegality, one capable of being relieved and the other not (being serious). The difference, however, may have been occasioned by the use of the word "lawfully" which occurs in section 70 but not in section 65. In *R. Pallamsetti* v. *D. Sriramulu*, A.I.R. 1968 A.P. 375, agreement to celebrate the marriage of two minors was held to be against section 23 of the Indian Contract Act, being opposed to public policy and also being opposed to section 5(3) of the Hindu Marriage Act. Refund was allowed because the illegal purpose had not been partly performed. See also *Satyanarayana* v. *Appa Rao*, A.I.R. 1966 A.P. 209, money was held not recoverable where it was invested as a capital to carry on an illegal partnership. Here partnership had run for about two years. See *Gurunadha Rao* v. *B. Rosaiah*, A.I.R. 1959 A.P. 277.

[94] A.I.R. 1967 Guj. 46.

[95] A.I.R. 1938 Nag. 335.

authority of *Harnath Kuar*, the full bench held that section 65 applied to illegal agreements. The court had the power to adjust equities between the parties when the agreement failed due to illegality. In such a case, the court was not enforcing or recognising the illegal agreement. In his separate judgment, Digby, J., argued that section 23 which declares that "every agreement of which the object or consideration is unlawful is void . . . lays down a legal right and not a procedure for enforcing it."[96] In other words, section 23 provides the legal right and section 65, the remedy.

The earlier reaction of the Patna High Court as represented in *Dhanna Mundia* v. *Mt. Kosila Banian*,97 was to restrict the ratio of *Harnath Kuar* to its facts and to interpret it as a case "on mutual mistake of the parties as to the true nature of the rights of Inder Singh."[98] The court, therefore, omitted the oft-quoted statement of the Privy Council and dwelt on the reasoning relating to misapprehension of private rights of parties. In *Dhanna Mundia*, plaintiff transferred his holding to defendants in contravention of an Act which required transfer within the members of the same community. The defendant was not allowed restitution. For if section 65 applied, "the door will be left wide open for evading the provisions of statues".[99] It further held that the parties must be presumed to have known when they made the contract that the agreement was contrary to the statute. Old decisions, prior to *Harnath Kuar*, were cited but other Privy Council cases were not noted.

The later decision of the Patna High Court in *Abhi Singh* v. *Daro Bhogta*,[100] however, fell in line with other High Courts. Although the facts were similar to the above case, that case was not referred at all in the instant case. Allowing the plaintiff to recover possession of the property from the vendee, subject to his return of money, the court said that the Privy Council had "repeatedly held"[101] that section 65 applied to the situation in hand. Refund was allowed not on the maxim, he who seeks equity must do equity, but on the principle of restitution embedded in section 65.

On the peculiar facts of a case, the Allahabad High Court allowed plaintiff to recover his deposit because the transaction was not known to

96 *Id.*, at 354.

97 A.I.R. 1941 Pat. 510.

98 *Id.*, at 512.

99 *Id.*, at 511.

100 A.I.R. 1952 Pat. 455.

101 *Id.*, at 456.

be illegal to the parties when they entered into it.[102]

The Calcutta,[103] Madhya Bharat[104] and Assam High Courts[105] have said that section 65 does not apply where the agreement is void for illegality. The Bombay High Court did not extend the principle of restitution to fraudulent agreements.[106] The result applied because the agreement was fraudulent as against the real heir and also it stifled a criminal prosecution for forgery, a non-compoundable offence.[107] The court regarded *Harnath Kuar* as applicable to agreements void *ab initio*. In its view, however, its ratio was limited to cases of misapprehension of private rights and certainly this Privy Council case was not to apply where the parties knew from the beginning about the illegal nature of the agreement. Thus recovery will be refused if agreements are "tainted with fraud or other moral turpitude".[108]

A case before the Kerala High Court fell within the ambit of impossibility of performance so that recovery was allowed under section

[102] *National Chamber of Commerce* v. *Nitya Nandan* A.I.R. 1963 All. 294. For a proper appreciation of the facts of this case, see the report. See *Audhesh Singh* v. *Rajeshwari Singh*, A.I.R. 1951 All. 630, where plaintiff was made liable to pay compensation to defendant and the Privy Council case of *Mohan Manucha* v. *Manzoor Ahmed*, A.I.R. 1943 P.C. 29 was cited.

[103] *Anath Bandhu* v. *Dominion of India*, A.I.R. 1955 Cal. 626, related to the constitutional requirement of a formal contract. Section 65 was held inapplicable because the agreement is not discovered to be void. The court stressed that if this section applied to such a case section 65 would have said: "whenever an agreement is void" and not "discovered to be void" *Id.*, at 629.

[104] In the Madhya Bharat case of *Ranjeetsing Murlisingh* v. *Ramlal Shivlal*, A.I.R. 1951 M.B. 113, plaintiff gave to defendant, a jobber in a mill, Rs 60/- on the latter's promise to arrange a permanent job for him in the mill. Plaintiff (thereby) got a temporary job and was dismissed a month later. The court held that the agreement was against public policy under section 23 and therefore section 65 did not apply. *Harnath Kuar* was distinguished on facts.

[105] See *N. Purkayastha* v. *Union of India*, A.I.R. 1955 Assam 33, where the court said that in case of illegal agreements under section 24, "section 65 may not apply". *Id.*, at 43.

[106] *Rudragowda* v. *Gangowda*, A.I.R. 1938 Bom. 54; *Bhiku Appa Kura* v. *Dattatrayya Chandrayya*, A.I.R. 1947 Bom. 392, approving the first case at 394.

[107] *Rudragowda* v. *Gongowda*, *ibid.*

[108] See *supra* note 106 at 394. In fact, the court after affirming its earlier decision, *supra* note 106, said:

> "Obviously section 65 does not apply to agreements which are void *ab initio*". *Ibid.*

This appears to be a contradiction with the dictum in Harnath Kuar. The remarks of the honourable court seem to refer only to illegal agreements under sections 23 and 24 and not to other agreements which are merely void *ab initio*.

65.[109] Regarding the meaning of the phrase discovered to be void, it explained:

> It is true that parties are presumed to know the law. When an agreement is entered into for an illegal purpose or with an illegal object, the parties must be presumed to have known that such purpose or object is illegal and in such a case even if it is pleaded that the parties had not actually known that the contract was illegal, section 65 cannot have application as the case would not be one where agreement was "discovered" to be void.[110]

This principle thus enunciated did not apply to the instant case which concerned mere want of authority that may not be presumed to be known to the other. In other words, there are different shades of void agreements, requiring different treatments.

(The study of restitution in cases of formal agreements is beyond the scope of this article).

The above discussion exhibits overwhelming trends among the High Courts in India to construe *Harnath Kuar* as giving relief for even unlawful agreements under section 23. Some judicial caveats have refused refund in cases of fraud, public policy and moral turpitude. Cases treating the above Privy Council case as one of mistake of fact are in singular minority.

Reasons, for and against refund, in cases of illegal agreements are spelt out below:

For recovery

1. The Indian Contract Act, "defines and amends certain parts of the law relating to contracts".[111] Therefore the old rule that "the loss will remain where it lies",[112] no longer holds good.
2. Section 65 is a remedial section which enacts equity of reimbursement and restitution.[113] It should be liberally interpreted.[114]
3. Section 23 related to legal rights and section 65 to their remedy.

[109] *Ayissa* v. *Prabhakaran*, A.I.R. 1971 Ker. 239 (concerning contract of sale by an incompetent guardian on behalf of minor).

[110] *Id.*, at 242.

[111] See preamble, Indian Contract Act, 1872.

[112] See *Asaram* v. *Ludheshwar*, *Supra* note 66, at 355. These are the remarks by Mr. Justice Digby.

[113] See *Punjab Government* v. *Baij Nath*, A.I.R. 1945 Lah. 164, at 168, where Mr. Justice Mahajan said:

> Section 65, Contract Act, only modifies the rule of equity which is otherwise well-known.

[114] See *N. Purkayastha* v. *Union of India*, *supra* note 105; *Ram Nagina* v. *G.G. in Council*, A.I.R. 1952 Cal. 306.

4. When a court decrees refund, it does not enforce the illegal agreement, but merely restores the parties to their *status quo ante* position.

5. In a Nagpur case, Digby, J. made a forceful plea for refund thus:

> On the applicability of S. 65 to illegal agreements, the authorities against its application are for less convincing than might at first sight appear and I have not succeeded in finding any reported case, which in the light of the law as now established that a void agreement is discovered to be void on the date when it is made and that s. 65 applies to agreements void *ab initio* disposes of the simple and convincing reasoning (in *Gulab Chand Param Chand* v. *Fulbai*, (1909) 3 I.C. 748)".[115]

6. The refund for illegal agreements in supported by the oft-quoted remarks in *Harnath Kuar*.[116]

7. The matter has to be decided without reference to English law.[117]

8. The language of section 65 is plain and does not exclude recovery in cases of illegal agreements. This section, however, does not apply against the minor, though it applies where he (as plaintiff) claims refund.

9. Sections 10, 23, 24 and 70 of the Indian Contract Act use the word lawful or lawfully which is absent from section 65.

10. Section 72 of the Indian Contract Act allows compensation in case of mistake of fact as well as mistake of law.[118] This analogy may be applied to section 65.

11. The maxim ignorance of law is no excuse (*ignorantia juris neminem excusat*) has a restricted scope and applies

> for if this were not so it would become often impossible to get enforcement of the law against the delinquent, but the maxim does not extend to beyond making it impossible for the delinquent to plead ignorance of the law as a justification for his breach and thereby escaping either the penal consequences or other consequences visited by that law. It does no more than that.[119]

[115] *Supra* note 112. Parenthesis supplied. The reference, however, is based on the language of the judgment.

[116] *Ibid*. In fact, this is the direct or indirect reasoning of other Privy Council cases also.

[117] *Harnath Kuar* v. *Indar Bahadur*, A.I.R. 1922 P.C. 403.

[118] *State of Madras* v. *Gannon Dunkerley & Co.*, A.I.R. 1958 S.C. 560.

[119] *National Chamber of Commerce* v. *Nitya Nandan, supra* note 102 at 299. See *Lord Denning in Kariri Cotton Co. Ltd.*, v. *Ran Chhoddas Keshavji Dewani*, 1960 A.C. 192 at 204, where he says that "it is not correct to say that every one is presumed to know the law. The true position is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat". Quoted in the above Allahabad case, *ibid*.

Against recovery

1. Section 65 was intended to be applied to cases of mistake of facts as shown by its illustration (a). When an agreement is illegal or unlawful it is void *ab initio*. There is thus no question of agreement being discovered to be void under section 65. In *Anath Bandhu* v. *Dominion of India*, Mukharji, J., said:

> That the word discovered to be void is not a cloak or excuse for ignorance of law at the time of the contract. The word "discovered" must . . . mean that with available materials at the time of the agreement it could not be known that the agreement was void but subsequent materials or events not available at the time of the agreement, disclose that it was void, and even void to such an extent as renders it void *ab initio*.[120]

The learned judge drew support for his conclusion from illustration appended to section 65, including illustration (a) as indicated earlier.[121]

2. It would spoil the administration of justice if a party could successfully plead that he (or both the parties) did not know that the agreement was illegal when they entered into it.[122]

3. Restitution in cases of illegal agreements under section 65 means recognising them contrary to the provisions of section 23. In other words, restitution permits indirectly what has been prohibited directly. It would, in many cases, frustrate the objects of the concerned enactments. Agreements involving bribery, criminal offences, moral turpitude and those basically upsetting the foundations of a civilised society should not be encouraged by permitting refund.

There are thus some weighty arguments for an against recoverability for illegal agreements.[123]

C. *Third Period* (1974 to 1977)

i) *Supreme Court decisions*

The question of recovery for illegal agreements arose before the Supreme Court in a couple of cases[121] in 1974 and was elaborately discussed in

[120] A.I.R. 1955 Cal. 626, at 629.

[121] Illustration (a) to section 65 reads:

> A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

[122] See *Krishna Rao* v. *Kodandarama*, *supra* note 90.

[123] As to the meaning of the word "discovery", see *National Chamber of Commerce* v. *Nitya Nandan*, *supra* note 119.

[124] See *Kuju Collieries* v. *JharKhand Mines*, *supra* note 5; *Ramagaya Prasad* v. *Murli Prasad*, *supra* note 5 wherein the leading full bench decision of the Hyderabad High Court in *Budhulai* v. *Deccan Banking Co., Ltd.*, A.I.R. 1955 Hyd. 69 (supra noted in the text) was approved.

Kuju Collieries v. *Jharkhand Mines*,[125] A bench of three judges[126] here approved the full bench decision of the Hyderabad High Court in *Budhulal*, one decision of the Andhra High Court[127] and their own earlier decision[128] and held section 65 applicable to illegal agreements.

In this Supreme Court case, a lease was granted in contravention of section 4 of the Mines and Minerals (Regulation and Development) Act, 1948 which made the lease void. The lessee claimed refund of money. The trial court found that plaintiff was already in the business of mining; he had the benefit of the legal advice of lawyers and solicitors had drawn up the lease-deed. It held, therefore, that the plaintiff could not plead ignorance of the law. Plaintiff was non-suited. The High Court upheld this judgment, stating that neither section 65 nor section 72 applied. On further appeal, the Supreme Court approved *Harnath Kuar* (and the oft-quoted statement of the law therein) but held that in view of the above findings, the agreement could not be said to have been discovered to be void at a later date: ". . . the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors. So there was no occasion for the plaintiff to have been under any kind of ignorance of law under the Act and the Rules" [129] The Supreme Court agreed with the trial court "that the plaintiff should have been aware of the illegality of the agreement".[130] No contrary decisions were discussed.

This case established that refund may be claimed, if other ingredients of section 65 are complied with, even if the breached statute provides for penal consequences. The Hyderabad and Andhara decisions, which bore the Supreme Court's imprimatur were clearly cases of this nature. Also the knowledge of law at the relevant time must be proved as a fact or the circumstances must be such that can reasonably impute such knowledge to the parties. It, therefore, appears that if a client, already in business, seeks a legal advice, the onus is upon him that he had not acquired the necessary knowledge of the illegality at the date of the agreement.

The mining statute, contravened in the above case, did not affect the masses at large. Perhaps it is still an open question, though to a much lesser

[125] *Ibid.*,

[126] One of the learned judges had adorned the Hyderabad bench

[126] One of the learned judges had adorned the Hyderabad bench in *Budhulal* and also in both the Supreme Court cases mentioned in *supra* note 124.

[127] *Sivaramakrishnaih* v. *Narahari Rao*, *supra* note 87.

[128] *Ramagya Prasad* v. *Murli Prasad*, *supra* note 124.

[129] *Id.* at 1896. Neither section 70 nor section 72 applied to the case.

[130] *Ibid.*

extent, whether the Supreme Court would permit recovery where illegal agreements concern fraud, forgery, bribery, corruption and moral turpitude. A blanket provision for restitution applicable in all cases of illegal agreements would not be in the interest of the nation.

ii) *Thereafter* (1977)

P.N. Dorairaj v. *N.G. Rajan*[131] applied the aforementioned Supreme Court decisions and allowed refund, although the agreement of partnership was illegal under the Madras Cinema (Regulation) Act, 1955. In this case, the license was in the name of defendant 1, but the business was run by the partnership consisting of plaintiff and the two defendants. The plaintiff was unaware of the illegality and was held entitled to recover his share capital, "whatever may be the legal position of the partnership agreement".[132]

Moneylending transactions

In some moneylending transactions, *Harnath Kuar* was interpreted differently in the same court in different cases.

In *Govind Singh* v. *Vali Mohammad*,[133] decided by a division bench, plaintiff (moneylender) had not taken a licence under the Hyderabad Moneylenders Act but sought to recover the money lent to defendant. Dismissing the plaintiff respondent's claim, the High Court said:

> A contract which is not in accordance with the statutory requirements is not a contract at all and does not become void and is not discovered to be void in the sense of s. 65, Contract Act. If we give relief to the plaintiff under s. 65, Contract Act, then for all practical purposes, the Moneylenders' Act becomes ineffective.[134]

Rejecting the argument based on *Harnath Kuar*, the High Court said:

> We have carefully gone through that judgment and we find that the facts of that case were different to the case under discussion. In that case, the true nature of the rights was not discovered by the plaintiff in time, whereas in this case, the plaintiff should have known that he was entering into a contract which he was not entitled to do.[135]

[131] A.I.R. 1977 Mad. 243; see *D.M. Breweries* v. *Postmaster, Jammu*, A.I.R. 1977 J. & K. 86, 90.

[132] *Id.* at 247.

[133] A.I.R. 1951 Hyd. 44(D.B.) The failure to obtain licence is made penal under the Act.

[134] *Id.* at 44–45.

[135] *Ibid.* See to similar effect *Mohd. bin Salam* v. *Fakr Mohd.*, I.L.R. (1951) Hyd. 349 supporting *Govinda Singh* case, *supra* 133.

A year later, a single judge in *Desai Bhao* v. *Karviram Gonda* criticised *Govind Singh:*

> No authority has been cited. I have in a full Bench case held that section 66 of the Hyderabad Contract Act (. . .) leaves no room for denying the return of the benefit derived under a void contract.[136]

The learned judge did not accept the argument of the court in *Govind Singh* that if the pronote was enforced, the Moneylenders' Act would become infructuous.

In a Patna case, under the Bihar Moneylenders (Regulation of Transaction) Act, 1939, section 65 was not applied because "the contract in this case has not failed; it is merely the right to sue for recovery of the loan that is barred".[137]

In a recent Supreme Court case (1970), *Kaloji Talusappa* v. *Khyanagouda,*[138] the plaintiff did not possess a licence under the Hyderabad Moneylenders Act (1349 fasli) on the date of the moneylending transaction. Under section 3 (5b) of this Act, the breach was punishable "with rigorous imprisonment for a term which may extend to six months or with fine or with both".[139] The plaintiff sought recovery of the loan under the deed of mortgage and the promissory note. The trial court held the amounts unrecoverable. The High Court and the Supreme Court respectively dismissed the appeal and confirmed the decision of the trial court. The Supreme Court did not refer to *Harnath Kuar* or any other decision nor any provision of the Hyderabad and the Indian Contract Acts.[140] In an earlier case,[141] the Supreme Court allowed the moneylender to recover the loan given in excess of the maximum amount prescribed in his certificate of registration. This was held not to have defeated the purpose of the legislation. Section 65 was not discussed and the decision, it seems, was based on the policy of the law.

The Supreme Court case of 1970, aforementioned, should now be read in the light of its later decisions in non-moneylending cases of 1974.

[136] A.I.R. 1952 Hyd. 142, 143.

[137] *Jugal Prasad* v. *Bhadai Das*, A.I.R. 1953 Pat. 259, 263.

[138] A.I.R. 1970 S.C. 1420,

[139] *Ibid.*

[140] The argument of the Supreme Court was simple and logical thus:

> Since the plaintiff was at the date of transactions of license, carrying on business as a money lender without a license, the Court was bound to dismiss his suit for recovery of the amounts advanced in the course of his business as a moneylender. *Id.* at 1421.

[141] *Sant Saran Lal* v. *Parsuram*, A.I.R. 1966 S.C. 1852.

PAKISTAN LAW

The judicial history of the statutory phrase "agreements discovered to be void" in Pakistan is interesting. Since its inception to date,[142] ten cases, construing the various factual situations, have come to light. Jurisdictionwise, one Supreme Court case,[143] four Dacca cases,[144] three Lahore cases[145] and two Karachi cases[146] have occurred. Subjectmatterwise, these cases fall into three main divisions: cases tainted with illegality due to public policy, cases where the agreement was void for lack of seal of the corporation, cases where the agreement was illegal concerning domestic relations and commercial transactions. These cases raised the question whether the agreement was discovered to be void.

The principle of restitution incorporated in section 65 of the Contract Act of Pakistan is an "equitable principle which is applied notwithstanding the agreement or the contract and in fact inspite of it".[147] The restoration is made not under any agreement but under section 65. This section, therefore, does not apply where the agreement has always been valid and was never void or even voidable under the Contract Act.[148] Nor does it apply to agreements where the voidness or illegality was known to plaintiff at the time of the agreement.[149]

Two cases concerned recovery by the plaintiff against the defendant where the agreements were void due to the lack of seal under statutory requirement. In both these cases, section 65 applied. In one of them,[150] the agreement to lease in writing did not bear the seal of the municipal

[142] The cases sorted here are upto December 1977.

[143] *Small Town Committee* v. *Firm Muhammad Sadiq-Barkat Ali*, P.L.D. 1960. S.C. (Pak) 394.

[144] *P.K. Basak & Co. Ltd.* v. *Gossen & Co., Ltd.*, P.L.D. 1957 Dacca 233; *Federation of Pakistan* v. *Dawood Corpn. Ltd.*, P.L.D. 1958 Dacca 472; *Hossain Ali Khan* v. *Firoza Begum*, P.L.D. 1971 Dacca 112; *Amanullah* v. *Karnaphuli Paper Mills Ltd.*, 1971, Dacca Law Cas. 544.

[145] *Umar Hayat* v. *Mathela*, P.L.D. 1953 Lah. 410; *Akbar Hussain* v. *West Punjab Province*, P.L.D. 1954 Lah. 188; *Fazal Din* v. *Mun. Com. Lyallpur*, P.L.D. 1956 (W.P.) Lah. 916.

[146] *Pakistan* v. *American President Lines Ltd.*, P.L.D. 1962 (W.P.) Kar. 87; *Province of West Pakistan* v. *Asghar Ali Mohd. Ali & Co.*, P.L.D. 1968 Kar. 196.

[147] *Province of West Pakistan* v. *Asghar Ali Mohd. Ali & Co.*, *Id.* at 206.

[148] *Umar Hayat* v. *Mathela*, *supra* note 145 (concerning sale of land).

[149] *Amanullah* v. *Karnaphuli Paper Mills Ltd.*, *supra* note 144; see *Federation of Pakistan* v. *Dawood Corpn. Ltd.*, *supra* note 144, where the arrangement between parties did not infringe section 23 of the Contract Act, and section 65 was not applied to recovery of certain amount paid as import duty because the payment was made voluntarily and with full knowledge of facts. *Id.* at 478–79.

[150] *Fazal Din* v. *Mun. Com. Lyallpur*, *supra* note 145.

committee. Possession of some vacant land was given to the lessee under the agreement. The court held that in the eye of law there was no contract which bound the corporation. The agreement was, thus, void. The municipal committee was held entitled to restoration of benefit under section 65 would govern even if the agreement was unenforceable or void evidence of the benefit, if any, received by the defendant. It did not examine *Harnath Kuar* or other cases on the point. The same question rose again before another court, though in a minor form.[151] It held that section 65 would govern even if the agreement was unenforceable or void for want of formalities. It approved an Indian case which had examined the matter in detail and cited precedents to support recoverability in such cases.[152]

A catena of cases concerned restitution where the agreement failed on account of illegality under section 23 or 24 of the Contract Act, which are *in pari materia* with the Indian counterpart. A solitary Supreme Court case in Pakistan disposed of the question rather summarily, after holding that the agreement was void under section 23.[153] In this case, the facts were thus: under section 41 of the Punjab Small Towns Act, 1922, the Town Committee, Ramnagar, had issued a general order whereby fresh fruits or vegetables within this town in case of sale by wholesale or by auction could be sold only within the municipal market. Fees were levied on sale and were payable to municipal contractors. The committee executed a formal contract with the contractors. It filed a suit against the latter for recovery of certain amounts payable to it under the contract. The trial court non-suited the plaintiff. This decision was reversed on appeal. On further appeal, the Lahore High Court reaffirmed the decision of the trial court in favour of the defendant. The agreement was held to be unlawful under section 23 because it created a monopoly.

The Supreme Court of Pakistan arrived at the same result that the agreement with the contractors was void but on a different ground:

> That the General Order was *ultra vires* of the Act and . . . the action taken by the Committee, in farming out its right to buy fees in the market, was also tainted by the same illegality.[154]

On behalf of the Committee, a strong plea was made for the application of section 65, that is for recovery, because the agreement was discovered to be void and for remanding the case to the lower court for ascertaining the quantum of benefit received by the appellant under the agreement.

[151] *Pakistan v. American President Lines Ltd., supra* note 146.

[152] *Dharmeswar* v. *Union of India*, A.I.R. 1955 Assam 86.

[153] *Small Town Committee* v. *Firm Muhammad Sadiq-Barkat Ali, supra* note 143.

[154] *Id.*, at 400.

The Supreme Court refused to accede to this prayer because the municipal council had already received from the contractors in this case more amount through fees than it had received through auction in previous years.

Thus the Supreme Court of Pakistan in strict adherance to the *ultra vires* nature of the committee's act and the illegality of the agreement did not permit restoration of benefit. It even disposed of the remedial prayer of the plaintiff-respondent (municipal committee) without any detailed examination or discussion of any case or even any evidence as to the knowledge of illegality on the part of the parties at the time when they entered into the agreement. Under these circumstances, it is not altogether safe to conclude that section 65 excludes recovery for illegal agreements. Probably agreements void for illegality could not, in the court's view, invoke restitution under section 65.

There have been, however, four decisions of different High Courts in Pakistan, both before and after this Supreme Court case, where the dicta of courts dwelt on section 65 vis-a-vis section 23. In these later cases, the Supreme Court case was neither discussed nor referred to.

A couple of Dacca cases held that illegal agreements were beyond the pale of section 65. In other words, the court would not order restitution where the agreement was unlawful or illegal within the meaning of section 23.

In the first Dacca case,[155] the plaintiff and the defendant (private limited companies) were doing electric jobs, including the supply of electric materials. The first appellate court found that there was a secret agreement between them, as alleged by defendant, whereunder whichever of the two secured a contract both would execute it jointly and share the profits equally. Plaintiff filed a suit to recover a sum of Rs 2,500/= paid to defendants by cheque, allegedly as loan. In reality, however, it was a share of profits to the defendants as above. The Dacca High Court held that the agreement was against public policy and illegal under section 23. It emphasied:

> We must point out that section 65 of the Contract Act does not apply to contracts void under the provisions of sections 23 and 24 of the said Act, for the latter are void *ab initio* and cannot be said to have become void or to have been discovered to be void.[156]

The *stare decisis* is that the word "discovered" is the antithesis to illegal agreements which are void since inception.[157] There is no question of discovery in such cases. The court regarded this argument as sufficient

[155] *P.K. Basak & Co. Ltd. v. Gozzen & Co. Ltd., supra* note 144.

[156] *Id.* at 241.

[157] As to the application of the doctrine of *in pari delicto*, see *ibid.*

to defeat the plaintiff's claim for recovery. But it sounds strange that *Harnath Kuar* was not mentioned at all. Although a commercial venture, the agreement was held to be against public policy under section 23. It was not an agreement relating to moral turpitude or a criminal offence. Perhaps the weakest case on illegality met the harshest treatment on recovery. Nevertheless, the High Court in unequivocal terms rated all illegal agreements equally under section 23. This made the law too explicit and simple. It may be remarked in passing that none of the Indian cases, for or against the above view found any place in the judgment.

The divisional bench in the second Dacca case,[158] which was decided fourteen years later, followed on the close heels of the earlier divisional bench case, although the two benches were nominally constituted differently. The instant case concerned domestic relations as against commercial transaction in the earlier case. Here the facts were these. In a pervious suit, one Firoza Begum had filed a suit against defendant claiming maintenance for herself as wife and also for their lawful minor son. That suit resulted in a compromise (*solenama*) duly signed by her and a compromise decree was passed in terms thereof wherein she had admitted that she was not a lawfully wedded wife of the defendant and further admitted "that the son that is born to her is not of the defendant. Her son is not entitled to any monthly maintenance from the defendant".[159] She received Rs2,300/= as consideration for the compromise.

In the present case, Firoza Begum alleged that compromise decree was obtained by fraud by the defendant since she had not known of the terms of the compromise. This plea was, however, not accepted by court. Affirming the decisions of the lower appellate court, the Dacca High Court held that the compromise was unlawful under section 23 of the Contract Act, because it purported to reduce the status of the son to an illegitimate son when he was not a party to the suit. In terms of rule 3 of order XXII of the Code of Civil Procedure, the court could pass the compromise decree only when the agreement or compromise was lawful.

The defendant appellant claimed recovery of Rs 2,300/= from the plaintiff, Firoza Begum, and the court echoed its earlier decision in *P.K. Basak & Co. Ltd. v. Gossen & Co. Ltd.* and regarded it as a "complete answer"[160] to the defendant's claim. In other words, no restitution or recompense would be decreed by court if the same was founded upon an agreement which was void for illegality. Thus even the maxim, he who seeks equity must do equity, did not apply in the instant case. It is

[158] *Hossain Ali Khan v. Firiza Begum*, *supra* note 144.

[159] *Id.* at 115–16.

[160] *Id.* at 117.

interesting to note that neither *Harnath Kuar* nor the Supreme Court of Pakistan case mentioned above, nor even the Karachi case (mentioned below) which took a contrary view were considered by the Dacca High Court.

The scope of section 65 and the question of restoration of benefit in case of unlawful agreements was considered in some detail by the Karachi Bench of the West Pakistan High Court in *Province of West Pakistan* v. *Asghar Ali Mohd. Ali & Co.*161 There plaintiff purchased iron scrap at Rs10,10 per ton at an auction by the Superintending Engineer, Hyderabad in contravention of the Iron & Steel (Control of Production of Imports) Order, 1948 which had fixed the maximum price of such scrap at Rs500 per ton. The plaintiff had no notice of this provision and made the bid at Rs1,010/= against the reserved price of Rs1,000/= fixed by the department. On discovery that the bid was higher than the fixed price, the plaintiff claimed (in the alternative) the difference between the price paid and the control price. The trial court decreed the plaintiff's claim. The High Court held that the agreement was void under section 23, because it was forbidden by the Control Order (presumably punishments and penalties were also imposed for breach). It examined the plaintiff's claim in the light of statutory provisions and decided cases and said that under section 65, restoration of advantage was allowed in two situations: First, where the agreement is discovered to be void; second, when the agreement becomes void. It then quoted the definitions of void agreement and contract as contained in section 2 of the Contract Act. It also quoted, the oft-quoted statement of their Lordships of the Privy Council in *Harnath Kuar*, where the word "discovered" in section 65 was held to include agreements that were void *ab initio*.

In a Lahore case, *Akbar Hussain* v. *West Punjab Provinces*,[163] section 65 was applied in favour of the provincial government and the appellants were held bound to restore to the government the benefit which they had received by sale of articles of excise "which they could not have sold without a licence".[164]

With the separation of the Dacca judiciary, the West Pakistan cases remain in the field to provide a wide scope to the equitable restitution as enshrined in the earlier part of section 65. The final word however,

[161] *Supra* note 146.

[162] The quotation is as follows:

> An agreement, therefore, discovered to be void is one discovered to be not enforceble by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. *Id.* at 201.

[163] *Supra* note 145.

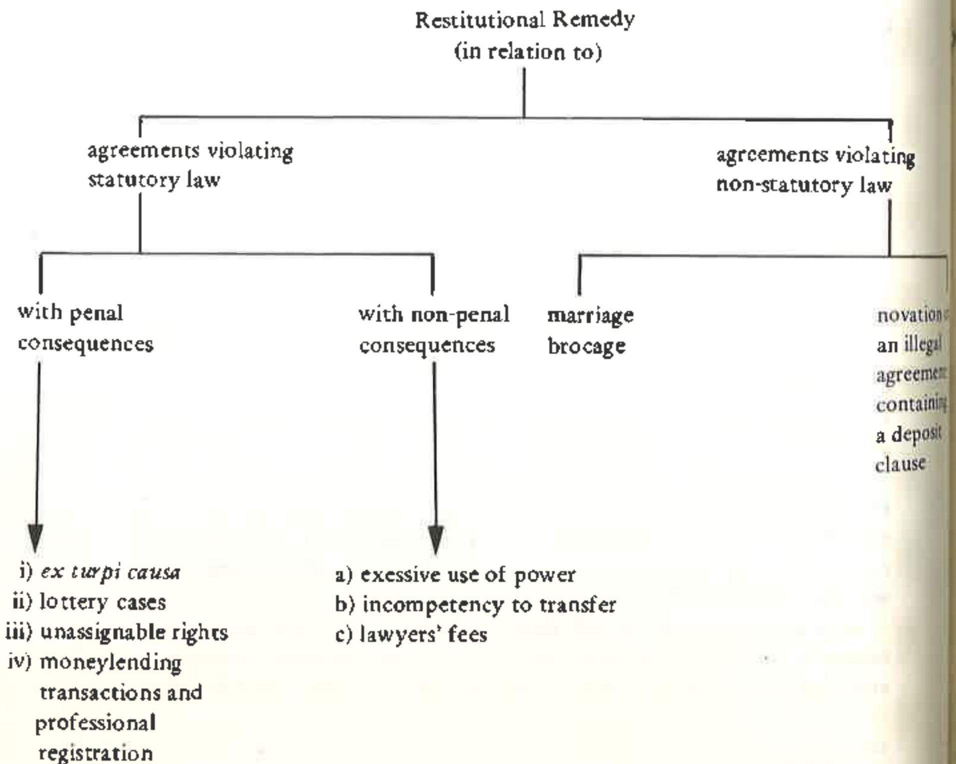
[164] *Id.* at 200. For full facts, refer to the report.

remains to be noted. It may be that ultimately the plaintiff has his day in Court!

MALAYSIAN LAW

The provisions of the Indian Contract Act made their debut in the Contract Enactment of 1899, applicable to the federated Malay States of Perak, Selangor, Negeri Sembilan and Pahang. The Contracts Act, 1950 (revised 1974) based thereupon, applies to the whole of Malaysia..

Broadly speaking, cases on the subject, fall into two main divisions, with further classifications as follows:



i) *Ex turpi causa* maxim

In some cases, which went to the Privy Council from Malaysia, their Lordships applied the maxim: *Ex turpi causa non oritur actio* (no disgrace-

ful matter can ground an action).[165] Thus in *Palaniappa Chettiar* v. *Arunasalam*,[166] the plaintiff (father) had purportedly transferred a piece of land to the defendant (his son) in contravention of Rubber regulations, 1934, and this made his action punishable as an offence thereunder. Lord Denning applied the above maxim and did not allow the plaintiff to recover the property from his son. The reason was that the plaintiff had to prove his own illegality in order to succeed in his action.

In another case, *Chai Sau Yin* v. *Liew Kwee Sam*,[167] only one of the defendants held a licence to purchase rubber under the Rubber Supervision Enactment, 1937. He formed a partnership. Plaintiff-respondent claimed the price of the rubber supplied to it. He had been selling these goods to the partnership with knowledge that one of the partners held the licence, but made no efforts to ascertain about the other members. The enactment imposed a penalty for transfer of the licence. The question arose whether the plaintiff was entitled to recover the price of the rubber or in the alternative the rubber. The trial court upheld the plaintiff's claim for the price. And the Court of Appeal affirmed this judgment on the ground that the sale, in fact, had been made to the duly licensed purchaser — a partner who was "the agent of the partners and no more".[168] Their Lordships of the Privy Council on the other hand, held that the license was personal and not assignable under the enactment and further

> . . . there is no question of recovering or returning the rubber and if the contracts are illegal he cannot obtain the assistance of the Courts to obtain the price fixed by them.[169]

Thus the agreement for sale being illegal, the plaintiff-respondent lost the case in the Privy Council. In other words, the necessary concomitent of an illegal agreement is non-recovery. In the above two cases, their Lordships did not discuss section 24 (dealing with unlawful consideration) nor *Harnath Kuar*. They appear to have been guided solely by the proposition that an illegal agreement does not entitle a party to recover on his action. In the third case,[170] however, where the plaintiff claimed his lorry in detinue from defendant, the previous owner who had taken it away from the plaintiff's house in his absence, their Lordships allowed its s.

[165] Earl Jowitt, (General Editor with Clifford Walsh as editor). *Dictionary of English law* 745 (edn. 1959).

[166] (1962) 28 M.L.J. 143 (P.C.)

[167] (1962) 28 M.L.J. 152 (P.C.)

[168] *Id.* at 153.

[169] *Ibid.*

[170] *Sajan Singh* v. *Sardara Ali*, (1960) 26 M.L.J. 52 (P.C.).

recovery. For the plaintiff was not required to prove the illegal transfer of the haulage permit to him along with the lorry by the defendant. The plaintiff's action in detinue was independent of the illegal agreement and this constituted an exception to the above maxim.

These cases show that their Lordships were swayed by the illegal nature of the transactions, depriving plaintiffs of their remedy unless the case fell within an exception.

ii) *Lottery cases*

Several lottery cases fell under the Common Gaming Houses enactments whereunder plaintiffs claimed the balance of the prizemoney from defendant. In most of these cases, defendants had resold the lottery tickets to plaintiffs. Some of these cases also involved the distinction between public and private lottery to determine enforceability of the agreement.[171] The former constituted an offence under the enactment, the latter did not.

Thus in *G. Benjamin* v. *Y.M. Esmailjee,*[172] the defendant was a n nber of the Penang Turf Club, which held a lottery. He purchased 200 lottery tickets therefrom and sold one of them to the plaintiff and it won the prizemoney. The club paid the money to the defendant who gave to the plaintiff only $565 and the latter claimed the balance of $7,671.

Under section 9 of the Common Gaming Houses Enactment, 1912, it was provided:

> Every sale or contract of sale of a lottery ticket is hereby declared to be void and no action shall be maintainable by any person in respect of any such sale or contract except by the purchaser for the return of the money or other consideration (if any) paid thereon.

Plaintiff, obviously, did not claim the return of his ticket money. His agreement being illegal, his illogical claim for recovery of the balance money could not be entertained.

The Court held:

> The plaintiff and defendant are parties to an agreement and contract which is illegal and void.[173]

It further held that the defendant organised a separate and distinct lottery in which both the palintiff and the defendant were principals. The plaintiff had no cause of action because the agreement was illegal.

A similar result followed in a Singapore case on[174] similar facts on

[171] For criteria to distinguish between a *bona fide* private lottery and a public lottery, see *Kader Batcha* v. *Public Prosecutor,* (1935) F.M.S.L.R. 18.

[172] (1936) M.L.J. Rep. 201.

[173] *Ibid.*

[174] *Mui Wing Shui* v. *Ngeow Joo Chong,* (1964) 30 M.L.J. 458. The editorial note

identical provisions.[174]

In yet another case, *Seong Sam* v. *Goon Food On,*[175] the plaintiff claimed the balance of the prize money which his public lottery ticket had won. The defendant pleaded the bar of section 30(i) of the Contract Enactment, 1899 (which is identical with section 31(i) of the Contracts Act, 1950 (revised 1974),[176] and section 2(i) and section 7(i) of the Gaming Common Houses Ordinance which respectively define a lottery ticket and punish any person who pays or deposits any money or money's worth in the business of a common gaming house etc. Mudie, J., stated:

> To buy a ticket in a public lottery is an offence. An agreement for the purchase of such a ticket is, therefore, illegal, and not merely void. In my opinion an agreement to dispose of moneys which may be received in respect of a prize in a public lottery partakes of the illegality which attaches to the agreement to purchase a ticket in the public lottery. By becoming a party to such an agreement, the plaintiff made herself a party to the illegality on which the agreement is founded.[177]

Since the plaintiff's action arose out of an illegal transaction recovery of the balance of the prize money could not be allowed. The court noted several English and one Malaysian case and laid down the following two propositions regarding the recovery of prize money:

(a) That ". . . where the illegality is a distinct transaction which has no connection with the cause of action, the plaintiff is entitled to recover."[178]

(b) That where the ticket relates to a private lottery and not to a public lottery, the agreement is void but not illegal,[179] there being no offence in this case. In other words, the collateral agreement of wager will lead to recovery where the agreement is merely void.

regrets that *Palaniappa Chettiar* v. *Arunasalam* was not cited.

Section 11 of the Common Gaming Houses (No. 2 of 1961) Ordinance is identical with section 9 of the corresponsing enactment of 1912 (Federated Malay States) except that this latter Act is commaless but uses one parenthesis, while the former one uses three commas and no parenthesis. For recovery of deposit, see the 1961 Ordinance above.

[175] (1933–34) F.M.S.L.R. 169.

[176] It runs thus:

> Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won one any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

[177] *Supra* note 175 at 174.

[178] *Id.* at 172.

[179] *Id.* at 178.

In *Lim Lian Wah* v. *Lee Ah Kiew, Lim Thian Hock,*[180] the court applied the distinction in (b) and allowed the plaintiff to recover he prize money which her agent (second defendant) had received on her behalf. The court noted section 30 of the Contract Enactment, 1899, but did not refer to the law of agency. It, however, relied on an Indian case.[181] In other words, where the lottery is a private one and purchase of its lottery ticket does not amount to criminal offence, the plaintiff is entitled to recover the money received on his or her behalf by the agent.

This principle was applied in its negative aspect in *Low Choong* and *Koh Choon* v. *Limsan Kang Say Khoo,* 182 where the plaintiffs (treasurer and Assistant treasurer) were denied recovery from the defendants whom they had appointed to collect money for the construction of a Chinese temple by sale of public lottery tickets. The agreement was illegal and a criminal offence and the defendants were not bound to render account to the plaintiff. Section 218 of the Contract Enactment was held not to apply because the present situation constituted an exception. Under this section:

> Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

iii) *Assignment cases*

Some cases decided by the Malaysian Courts dealt with the question of restitution where the parties in contravention of legislation which intended to advance certain purposes and to prohibit others as mentioned therein, transferred certain personal and unassignable rights. This was an offence. In many such illegal agreements relief was refused, it appears, on the ground that the illegal purpose had been substantially performed and the parties apparently knew about the illegality when they made the agreements.

In *Chai Sau Yin,* discussed earlier, plaintiff's claim for recovery of price from partnership was disallowed because only one partner held a license. Lord Hodson, giving the judgment of their Lordships, said:

> Their Lordships agree . . . that the purposes of the enactment are wider than those which have been called mere revenue enactments and are intended to ensure the carrying on of an industry on which

[180] (1933) 7 F.M.S.L.R. 66.

[181] *Bhola Nath* v. *Mul Chand,* (1903) I.L.R. 25 All. 639. (Note: In *Seong Sam* v. *Goon Food On, supra* note 175 Mudie, J., criticised the language of the headnote of *Lim Lian Wah* v. *Lee Ah Kiew, Lim Thian Hock, id.* at 180, because the headnote used the words "illegal contract" and "illegality" while the text in this case allowing recovery on private lottery which was not an offence had avoided the use of the above words and used the term void agreement. In *Ramaswamy* v. *Muniappan,* (1940) F.M.S.L.R. 44, 46, Horne, J., said: "I can find no unlawful object or purpose in this Kutu . . ."

[182] (1935) 4 M.L.J. 43.

the prosperity of the country is to some extent dependent.[183]

Section 66 was not alluded to. The decision is based on furthering the policy of the concerned legislation.

In *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[184] an agreement to assign licensed rights in timber extraction etc. was held to be illegal under the Forest Law. The court treated the dicta of earlier decisions as "in point".[185]

In one of these cases, *Leong Poh Chin* v. *Chin Thin Sin*,[186] the plaintiff lent to the defendant $1000 in consideration of the latter purporting to transfer his rights and liabilities under a permit to the plaintiff's wife in contravention of the Forest Enactment. She performed the agreement "in purported exercise of rights"[187] so transferred to her. The consideration for the loan being illegal, the plaintiff's claim for recovery of the debt was dismissed. The main stress in this case was on the question of pleading illegality and the duty of the court to take its notice, even though it was not pleaded. The question of recovery was not discussed at length, nor were any provisions of the Contract Act referred.

In another case, *Tan Bing Hock* v. *Abu Samah*,[188] defendant transferred (for a consideration of $2000) his rights to plaintiff to "fell, transport and sell timber from the . . . area".[189] The plaintiff's action for breach of contract against the defendant and also for recovery failed because the transfer of the license to the plaintiff was illegal, being against the forest regulations. Also the parties knew of the illegality and were, therefore, *in pari delicto*.

The evidence showed that at the relevant time, the plaintiff also knew that the defendant had a license to extract timber. He was thus held not to be ignorant of the law. Gill, J., further stated:

> In the present case the only property which can be said to have passed to the plaintiff under the illegal contract is the timber which he extracted from the forest. The defendant can no more recover the

[183] *Supra* note 167 at 153.

[184] (1971) 2 M.L.J. 161. In *Hussanjan* v. *Haji Nik Yahya bin Nik Daud & Ors.*, (1973) 1 M.L.J. 9, the agreement between parties was found to be in contravention of the Malay Reservations Enactment, 1930 and, therefore, void. Plaintiff lost.

[185] *Id.* at 164.

[186] (1959) M.L.J. 246

[187] *Id.* at 247.

[188] (1967) 2 M.L.J. 148; (1968) 1 M.L.J. 221; see to similar effect *Haji Taib* v. *Ismail*, (1971) 2 M.L.J. 36, concerning transaction of padi land between parties in violation of Padi Cultivators (Control of Rent and Security of Tenure) Ordinance, 1955. Plaintiff lost. Parties were in *pari delicto*.

[189] *Id.* at 221 (1968).

value of this timber than the plaintiff can recover damages from the defendant under the illegal contract.[190]

The legal position being clear, the court did not mention either the Malaysian provisions or the Indian decisions.

Tan Bing Hock was approved by the Federal Court on similar facts in *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.*[191] (1977). Plaintiff-appellant who had assigned his special personal licence in the extraction and sale of timber contrary to the Forest Enactment, 1968 lost his claim both in the lower court and the Federal Court. The court would not aid recovery on an illegal agreement. The Federal Court decided the case in the context of forest legislation, rules and regulations, without feeling the need to resort to contract legislation.

Where the agreement of the parties violated the penal provisions of the Indian Foreign Exchange Regulations Act, 1947, the plaintiff could not claim the assistance of the court because the "illegal purpose had been substantially performed".[192] The contract was held illegal.

The above decisions are remarkable, not for negativing plaintiff's claims, but for not discussing the scope of section 66 of the Malaysian Contracts Act. It appears that in the courts' view the factual situations in those cases involved the settled propositions of law which did not warrant the statutory discussions.

However in *Ahmad bin Udoh & Anor.* v. *Ng Aik Chong*,[193] which involved the common type of situation discussed above, the court availed itself of an opportunity to demarcate the four walls of section 66. Here the plaintiff paid to the defendant $1500 for agreeing to lease to him two pieces of land for six years in contravention of the Padi Cultivators Ordinance 1965, which made the breach penal. When the plaintiff's man came to plough the land, the defendant did not allow him to work. Thereupon the plaintiff claimed to recover his amount. The trial court found that the parties were ignorant of the illegality when they made the contract and also the illegal purpose had not been carried out. The case was thus, held to be discovered to be void. The court approvingly quoted *Harnath Kuar*. On appeal, the Federal Court affirmed this decision. The learned Lord President thoroughly examined the statutory provisions, courts' decisions and also a textual reference of certain textbook writers and based his conclusion on the findings of the lower court. The agreement was held to be discovered to be avoid. Notable among the cases

[190] *Id.* at 222.

[191] (1977) 2 M.L.J. 200 (F.C.).

[192] *Abdul Shukor v. Hood Mohamed*, (1968) 1 M.L.J. 258 at 261.

[193] (1969) 2 M.L.J. 116.

approved by the honourable Lord President were the Privy Council decision in *Harnath Kuar* and a five-judge full bench decision of the (Indian) Hyderabad High Court in *Budhulal* v. *Deccan Banking co.*,[194] While in *Harnath Kuar*, the Privy Council applied section 65 of the Indian Contract Act to a case of non-compliance with statutory provisions, in the latter case, the Hyderabad High Court applied section 66 of the Hyderabad Contract Act (which is identical with Indian and Malaysian counterparts). These two cases find place earlier in this article and received the seal of approval of the Supreme Court of India in 1974.

The above Malaysian cases concerned the breach of Civil statutes entailing penal consequences and not penal statutes involving penal offences.

In addition, there are Malay Reservations Enactments of the various states whereunder an agreement purporting to transfer land or any interest therein or a transfer of land by a Malay to a non-Malay is null and void and does not operate to convey any title or interest in land in favour of the non-Malay, except in the limited cases permissible under the enactments themselves; even a consideration or rent paid by a transferee is unrecoverable under certain provisions.[195]

[194] A.I.R. 1955 Hyd. 69(F.B.)

[195] Thus section 12(i) abd (ii)(a) and (b) of the Malay Reservations Enactment, 1930 (No. 18) of the State of Kelantan provide:

(i) All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void.

(ii)(a) No money paid or valuable thing handed over in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation Land contrary to the provisions of this Enactment shall be recoverable.

(b) No action shall lie for breach of contract in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Reservation Land contrary to the provisions of this Enactment. (Amended by Enactment No. 7 of 1938).

Again under section 20(i) of the Malay Reservations Enactment, 1936 of the State of Johore, "no rent paid in pursuance of any such dealing, disposal or attempt shall be recoverable in any Court." Furthermore, under clause (ii) of section 20, no action for breach of contract can lie in the above respect. Section 19(i) and (ii), of the F.M.S. Malay Reservations Enactment, 1933 (Chapter 142) have the same provision as in Johore. Under section 7 of the Enactment No. 63 (Malay Reservations) of the State of Kedah, the land is forfeited to the Sultan.

Perhaps it may be interesting to refer to some cases on the subject. In *Haji Hamid bin Ariffin & Anor* v. *Ahmad bin Mahmud*, (1976) 2 M.L.J. 79 (F.C.), the question arose as to what was the legal effect of a transfer of land by a Malay to a Siamese lady who had purportedly resold the land to other Malays under section 6 of the Malay Reservation Enactment (No. 63) of the State of Kedah. It was held that the purported transfer in favour of the Siamese lady was void *ab initio* and as such she could not pass a good title to any person, including a Malay. See *Chew Woon Kiat* v.

iv) *Moneylending transactions and professional registration cases*

Three cases are noted. In one of these cases,[196] the defendant-respondent gave to the plaintiff-appellant a promissory note which was unenforceable under section 4 of the Moneylenders. Ordinance, 1936.[197] The trial court dismissed the plaintiff's claim, ordered it to be cancelled and ordered the title deeds to be returned to the defendant who had deposited them with the former. On appeal, the judgment was upheld. The court approved an earlier Malaysian case, and some English cases, and said:

> . . . it would be contrary to the clear intention of the Moneylenders Ordinance to permit the appellant to retain the title deeds deposited with him by the respondent for the purpose of enforcing a contract unenforceable under the law.[198]

Recovery of the title deeds by the defendant stems out from the distinction (which the court seems to maintain) between an unenforceable agreement which is merely void and an illegal agreement.[199]

The question raised its head in an acute form in the recent landmark case of *Menaka v. Lum Kum Chum*,[200] decided by the Privy Council. The plaintiff-appellant had a licence to carry on the business of moneylending under the firm name of "AR.PR.Firm". This firm advanced a loan of $20,000 to the defendant – respondent under a memorandum wherein he gave security of his six pieces of land to the plaintiff. Both the memorandum of loan and the memorandum creating the charge, were also signed by the moneylender's attorney (a clerk of the firm) as "Menaka

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Timah binti Haji Karim & Anor, (1976) 1 M.L.J. 123 (F.C.) decided under the Malay Reservations Enactment No. 17 of 1360 of the State of Trengganu. *Hussanjan v. Haji Nik Yahya bin Nik Daud & Ors.*, (1973) 1 M.L.J. 9, decided under the Malay Reservations Enactment, 1930 of the State of Kelantan.

It is thus obvious that any case involving question of recovery, concerning the Malay Reservations of Land will be decided under the special legislation and its policy.

[196] *Ar. Ve. Palanisamy Servai v. S.V. Lingham*, (1954) 20 M.L.J. 145.

[197] Under this provision, of the now repealed Ordinance, the pronote was unenforceable "unless a note of memorandum in writing of the contract in the English language be signed by the parties to the contract or their respective agents . . ."

[198] *R.M.N. Sathappa Chettiar v. Song Thwee Oon*, (1939) M.L.J. 180, at same page; (1939) S.S.L.R. 118.

[199] See *id.* at 121 where the same distinction has been maintained by Manning, J.

[200] (1977) 1 M.L.J. 91 (P.C.); *sub-nom* in trial court *Menaka v. Ng Siew San*, (1973) 1 M.L.J. 50, and in the Federal Court as *Ng Siew San v. Menaka*, (1973) 2 M.L.J. 154. Upon death of the borrower (defendant – respondent), his widow was brought on the record as an executrix.

Wife of M. Deivarayan by her Attorney".[201] The defendant paid two instalments of interest i.e., $600 and then defaulted. The plaintiff applied to enforce the charge by sale of the defendant's land by public auction. The defendant pleaded that the memoranda were "illegal and void and were therefore unenforceable",[202] because these had contravened the penal provisions of the Moneylenders Ordinance, 1951.

The trial court accepted the above argument, but held that the non-compliance with the Ordinance only made the agreement unenforcable; i.e., void but not illegal or unlawful:

> This is not a case where the consideration or object of the agreement is illegal and void for that reason. Nor is the agreement tainted with fraud or other moral turpitude . . ."[203]

The rationale of the lower court seems to be that plaintiff will not be given the assistance of the court under the first limb of section 66, where the consideration is unlawful, perhaps even if the parties are ignorant of the illegality. This reasoning is inapplicable to statutorily unenforceable agreements.[204] The case of *Harnath Kuar* was quoted in support of section 66. But it appears to have been accepted as applicable to non-compliance cases, not concerning cases of moral turpitude and the like. Thus the plaintiff got a decree for $19,400—$600 paid as interest by the defendant were adjusted by the trial court towards the principal. The transaction was held unenforceable. No interest was allowed. The plaintiff appealed.

The Federal Court by a 2:1 majority confirmed the judgment of the lower court, except as to non-payment of interest which was awarded "from the date of the institution of the suit".[205] The learned Lord President Azmi, in his individual judgment, with whom Suffian, F.J., (as he then was) concurred, did not agree with the reasoning of the lower court as to the distinction between unenforceable agreements and other

[201] *Id.* at 93 (P.C.)

[202] *Id.* at 92 (P.C.)

[203] *Supra* note 200 at 53 (1973). In *Karuppiah Pillai v. Kaka Singh,* (1973) 1 M.L.J. 96, an oral agreement for repayment and the security were held to be uneforceable under the Moneylenders Ordinance, 1951.

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[204] The trial court regards the contract as illegal under the Ordinance without the consideration being unlawful. In other words, the illegality is associated with the statute and not with the consideration or object.

[205] *Supra* note 200 at 157 (Federal Court). Mr. Ong Hock Sim, F.J. gave a dissenting judgment holding "that there has been no contravention of section 8(b) and (c) (of the Moneylenders Ordinance, 1951) which are wholly inapplicable". *Id.* at 159. Parenthesis supplied.

illegal contracts. He quoted section 24 of the Contracts Act and rightly concluded that "... the agreement in the instant case being forbidden by law is thereby void".[206] He noted the finding of the lower court that the parties were unaware of the illegality of the transaction and decreed restitution under section 66 because

> the transaction in question was an open and honest transaction. The relevant documents were prepared by a Solicitor who appeared to be so concerned with complying with the provisions of the Land Code that he overlooked the provisions of section 8 of the Moneylenders Ordinance. It is obvious from the facts of the case that Menaka would have gained nothing from all this.[207]

The scope of section 66 was not discussed but the Indian case of *Kanuri Sivarama Krishnaiah v. Vemuri Venkata Narchari Rao,*[208] quoted by the trial court as to the scope of restitution under section 66 was approved by the learned Lord President in his judgment. The *Harnath Kuar* case was not pressed into aid, although its decision was applied for awarding interest to the plaintiff.

On further appeal by the moneylender, their Lordships of the Privy Council agreed that the transaction had hit the moneylending legislation and that under the void agreement, the moneylender had received the advantage of $600 and the borrower of $20,000. In other words, the borrower was bound to return to the moneylender the sum of $19,400, as decreed by the lower courts. Their Lordships also approved the view of the Federal Court as to the award of interest. *Harnath Kuar* was not at all discussed as to the scope of restitution in cases of void agreements but their Lordships did approve it for the purpose of awarding interest. Some other Privy Council cases, however, which went on appeal from India, were referred to for drawing the limits of restitution under section 66.[209]

Their Lordships by approving the decision of the lower courts on the principle of recovery also implicitly approved the reasoning thereunder. But they did not depart from the old principles nor did they enunciate any new principles which might serve as beacon light in the thorny path of restitution. However the following may be noted:

1. The *Menaka* case which allowed restitution, concerns breach of a civil statute, not applying to the people at large but intended to protect a

[206] *Id.* at 157 (Federal Court).

[207] *Ibid.*

[208] A.I.R. 1960 A.P. 186.

[209] *Govindram Seksaria v. Radbone,* (1947) L.R. 74 Ind. App. 295, 303, is a case of frustration and refund under the second limb of section 65 of the Indian Contract Act, 1872; *Babu Raja Mohan Manucha v. Babu Manzoor Ahmad Khan,* (1942) L.R. 70. Ind. App. 1, 10.

particular class of society only, although the breach attracts penal consequences.

2. The part or quasi compliance with the provisions of the legislation did not relieve the plaintiff of the consequences of breach. But the circumstances did create a dissenting opinion in the Federal Court.

3. Their Lordships of the Privy Council did not fix the four corners of section 66. Affirmatively, the section applies in all cases of non-compliance of statutory provisions, whether the consequences for breach are penal or non-penal provided that the claimant entered into the transaction, as stated by the Federal Court, honestly, or as stated by the Privy Council, in good faith. In other words, the plaintiff, under section 66 must not have been tainted with illegality.

4. Strong expressions of opinion of the trial court innovating the distinction between mere unenforceable agreements, being void, and illegal agreements, having unlawful consideration, met only a half-way demolition in the Federal Court. There the learned Lord President regarded the breach, though correctly, as merely forbidden by the law under section 24. The judgment of their Lordships of the Privy Council echoed that the agreement was unenforceable under the legislation and was void under section 2(g) of the Contract Act. There are no more clarifications on this point. But the doubt thereby created is that agreements based on unlawful consideration, affecting a large segment of public dealing, such as those relating to sale of public office, moral turpitude and corruption in society will be kept out of the restitutional bar of section 66. Under the strict theory of judicial precedent, therefore, the *Menaka* case is not a blanket handle to be used in every type of illegality. It is submitted that the Federal Court's approval in *Ahmad bin Udoh & Anor* of the Hyderabad's *Budhulal* does not necessarily clinch the issue in favour of illegality since this latter case was a commercial case relating to paper currency legislation only.

5. The Federal Court did not interfere with the finding of the lower court as to the ignorance of the law on the part of the plaintiff who had a registered firm name under the Moneylenders' legislation and had been doing business for some time and in fact had some previous dealings with the defendant. It stated the circumstances under which the solicitor "overlooked" the provisions of the moneylending legislation. And the knowledge of the solicitor was not the knowledge of the client. The question of imputing knowledge to the client under such circumstances in fulfilment of one of the ingredients of section 66 has become more important as shown in the Indian Supreme Court case of *Kuju Collieries* v. *Jharkhand Mines.*[210] The conclusion appears to be that even though

[210] A.I.R. 1974 S.C. 1892.

knowledge of illegality has to be proved as a fact under section 66, the circumstances of a case may raise the question of inference of knowledge where the claimant has been dealing in the business for a fairly long time, had flawless previous dealings and had also the full opportunity of legal advice whereunder the documents of the transaction were finalised for him. If that is so, it will be a case of legal presumption only which may be rebutted by satisfactory evidence to the contrary.

One is reminded of *Yong Ung Kai* v. *Enting*, where Mc Gilligan, J., imputed knowledge of law to the parties where they were already in business. He spoke:

> Neither of the parties is a new comer to the business of the sale and extraction of timber, and both of them must have known, at the time of making the agreement, that it could only be carried out if whatever licence and whatever permission ... was necessary could be, and was, obtained."[211]

At another place he added:

> Here I believe that, if some bystander at the making of their agreement had said "Don't forget about the licence and permission you have to get" the parties would have replied, in effect, 'of course not! we know."[212]

In other words, Mc Gilligan, J., imported the theory that where parties have been dealing, as in this case, with the business at hand, it may be implied that necessary requirements of the law are known to them or are a part of the commonsense of their business dealings. But neither the Federal Court nor the Privy Council germinated any such theory.

6. It is pertinent to note that in none of the aforementioned cases, was the court called upon to anatomise the legal proverb: Ignorance of law is no excuse. It is true that the maxim has no application in these cases. It has already been shown in the earlier section on Indian law that there is no maxim that every body is presumed to know the law of the land. Knowledge of the illegality under a legislation or the general law on the part of the parties has therefore to be proved as a fact or necessarily inferred from the circumstances of the case, as the case may be.

Lack of registration

Raymond Banham & Anor. v. *Consolidated Hotels Ltd.*[213] raised the question of non-recoverability where the plaintiffs, partners of a firm of consulting Mechanical and Electrical Engineers were not registered under

[211] (1965) 2 M.L.J. 98, 99.

[212] *Id.* at 100.

[213] (1976) 1 M.L.J. 5.

the Professional Engineers Act which constituted a penalty. The agreement was held to be illegal and the claim was, therefore, dismissed. The court said:

> Although moral turpitude in the sense of dishonesty or fraud has not been revealed . . . the fact remains that services were being performed under this contract by the plaintiff's firm which were illegal in that their engineers never took steps to get themselves registered.[214]

It further held:

> . . . to hold that the contract is illegal *ab initio* may appear to be harsh but such is the position with regard to illegal contracts where both parties have contravened the law and the plaintiffs . . . are left without a remedy. Ignorance of the law or even innocent participation in such a contract cannot avail the plaintiffs . . .. The defendants accordingly succeed, notwithstanding their own participation in this illegal contract . . .[215]

The court cited some English decisions in support but neither section 66 nor *Menaka* was cited. The breach was regarded as serious by the court and the consequences of the illegality dominated the course of decision.

v.) Breach of non-penal provisions

Three cases have come to light on the subject and in each of them the defendants were made liable to reimburse plaintiffs for the advantage the former had received under the contracts.

In one of these cases, *Chung Peng Chee* v. *Cho Yew Fai & Ors.*,[216] the trustees in order to pay off a loan on the temple, agreed to sell the shophouse attached to it. The purchaser paid the sale price to the trustees. The agreement being in excess of the powers of the trustees was held unenforceable under section 20(e) of the Specific Relief (Malay States) Ordinance, 1950. The court referred to, but did not discuss section 66. It said:

> Clearly, if the agreement cannot be enforced, the defendants must repay to the plaintiff the amount which the surviving trustees received from him.[217]

Harnath Kuar was not quoted. The court, however, did emphasise that the party who has gained any advantage under the contract must return it. It is useful to add that the agreement of the parties did

[214] *Id.* at 7.

[215] *Id.* at 8.

[216] (1954) 20 M.L.J. 100.

[217] *Id.* at 101.

contain a provision that the defendants (trustees) have to obtain the permission of the Gavenor for the transfer and that the agreement was to become null and void in case of refusal. The price was, thus, to be paid back to the purchaser in the above contingency. But in marked contrast to some Indian cases, the Malaysian court did not base its decision on the collateral agreement, which operates on failure of the main agreement.

In *Wong Lee Sing* v. *Mansor*,[218] the defendant agreed to sell to the plaintiff one lot of land which belonged to another and received $1200 as deposit. Allowing the plaintiff's claim for refund, the court regarded this as

> a clear case of the application of section 66 of the Contracts Ordinance. The defendants had entered into an agreement representing to the plaintiff that he was in a position to transfer the land to the plaintiff. The plaintiff subsequently found that the defendant was in no position to do so as he had no title to the land.[219]

Here the agreement was void due to the incompetency of the defendant to transfer the land. The agreement was not illegal and no policy of the law was involved.

Freeman and Madge v. *Tan Soo*[220] was decided under the Advocates and Solicitors Enactment, 1914. Its section 22, stated that "it shall be lawful for an advocate and solicitor to make an agreement in writing . . . ."[221] It is silent about oral agreements which are thus not recognized by the Act and are, therefore, not enforceable by it. In this case there was an oral agreement between the Advocates and Solicitors, on the one hand and the client on the other. The remuneration clause, in part, appeared to be champertous also. The court held that the oral agreement had "no statutory validity".[221] Regarding the claim of the above firm, the court held that it fell under section 65 of the Contract Enactment. Judging the contract to be void *ab initio*, the court said:

> the position of the parties being the same as though no agreement had been entered into. In such circumstances the law implies that a member of the profession who has rendered services is entitled to be paid his proper charges . . . and that is by way of taxation.[222]

The court did not discuss the rationale of section 65 of the Contract Enactment but relied on an Indian case, dealing with a similar factual situation under a similar statute.[223] The agreement was held to be merely

[218] (1972) 2 M.L.J. 154.

[219] *Id.* at 155.

[220] (1931–32) F.M.S.L.R. 248.

[221] *Id.* at 250.

[222] *Id.* at 254.

[223] *Thangammal* v. *Krishnan*, (1930) I.L.R. 53 Mad. 309, 317.

void but not illegal. No reference was made to *Harnath Kuar.*[224]

These two Malaysian cases reflected views on the scope of statutory restitution in cases of mere civil breach or non-fulfiment of a statutory requirement. The plaintiff's claim to restitution was not unjustly allowed in these cases.

Marriage brocage agreements

In a landmark case, *Khem Singh* v. *Anokh Singh,*[225] following an Indian case,[226] the court held that marriage brocage agreements are void. Here the plaintiff had paid to defendant several sums of money to arrange a bride for him from India. He later decided to arrange his marriage locally and sought to recover the various sums from the defendant. The court did not agree with those Indian decisions which held that section 65 of the Indian Contract Act applied only to discovery of facts. It thoroughtly discussed *Harnath Kuar* and pointed out that the pleadings of the defendant – respondent in this direction did not find favour with their Lordships of the Privy Council in that case. The court emphasised that the Privy Council in that case

> did decide that section 65 applies to an agreement void *ab initio* and the judgment is not inconsistent with my view that it is immaterial when, or by whom, or for what reason the agreement is discovered to be void.[227]

The defendant was thus, compelled under section 66 to restore to the plaintiff whatever advantage he had received under the contract. It is obvious that the parties were ignorant of the void nature of the marriage brocage agreement when they entered into the agreement. In the court's view, the phrase 'discovered to be void' "means no more than 'if discovered to be void".[228]

Novation with a deposit clause

In *Sin Hwa Chinese Goods Co.* v. *Wadhumal Dalamal*[229] an agreement

[224]In *Thangammal* v. *Krishnan,id.,* the Indian Court, no doubt, relied on *Harnath Kuar* to hold that section 65 of the Indian Contract Act, 1872, applies to agreements which are void *ab initio.*

[225](1933) 7 F.M.S.L.R. 199. See *Alang Kangkong bin Kulop Brahim* v. *Pandak Brahim,* (1934) M.L.J. 65, following *Khem Singh* v. *Anokh Singh, supra.*

[226]*Srinivasa* v. *Sesha,* (1918) I.L.R. 41 Mad. 197. In a Penang case, however, where the parties were Hindus, the court held such an agreement as valid, see *Karpen Tandil* v. *Karpen,* (1895) 3 S.S.L.R. 58.

[227]*Supra* note 225 at 211.

[228]*Id.* at 209.

[229](1955) 21 M.L.J. 29.

between the parties for sale of a certain brand of fountain pens was found to be in breach of trademark law. When the suit on this agreement was pending, the parties novated their agreement, which stipulated for adjustment of the purchaser's (defendant's) deposit of $1000 with the seller in the pending case. It was held that the new agreement was not void and that the defendant had committed breach of contract which made him liable for damages. The case was remanded to the lower court for a new trial to ascertain the amount of damages. It appears that the adjustment of the deposit of the earlier (void) agreement to the latter (valid) agreement was unobjectionable to the court.

Minor's agreement and restitution

The judicial history[230] of restitution in Malaysia made a turning point in the recent case of *Leha binti Jusoh (administratrix)* v. *Awang Johari bin Hashim*,[231] decided by the Federal Court. There the plaintiff minor's claim as vendee was defeated under section 66, Contracts Act, 1950. The void agreement between the minor vendee and the major vendor had been executed by the payment of consideration by the former and delivery of

[230]The case of *Mohori Bibee* v. *Dhurmodas Ghose*, (1903) I.L.R. 30 Cal. 539 (see *supra* note 22) has been accepted in Malaysia. See *Govt. of Malaysia* v. *Gurcharan Singh & Ors.*, (1971) 1 M.L.J. 221, concerning the scholarship agreement entered into by a minor and dealing with the question of necessaries of life also for him; *Rajeswary & Anor* v. *Balakrishnan & Ors.*, (1958) 3 Malayan cases 178, concerning contract of marriage between Ceylonese Hindus. Good, J., who delivered the judgment in this case, commented on *Mobori Bibee* and thought that its rationale was limited to "business contracts". *Id.* at 193, and was not applicable to marriage contract as at hand. He further said:

> I should have thought that it was opened to serious doubt whether the Indian legislature when it enacted the Indian Contract Act ever contemplated that it would have any application to marriage contracts, for the reason that it is well-known fact, ... that marriage contracts in India are commonly made between minors or between an adult and a minor . . .. It is difficult to believe that it was the intention of the legislature to deny to a minor party to such a contract any remedy for its breach. *Id.* at 193.

In this case, Good, J., distinguished the above marriage contract case with the case of *Tan Hee Juan v. Teh Boon Kiat*, (1934) 3 M.L.J. 960, concerning transfer of land by infant. Referring to the *Tan Hee Juan's* case, *supra*, he said: "The court made an order declaring the transfer void as it was bound to do in the light of *Mohori Bibee's* case, *supra*". *Id.* at 195. In the *Tan Hee Juan* case the court held the transfer by the minor as void, but did not permit restitution of the purchase price to the defendant. See S.K. Chan, a case note on *V. Rajeswary v. V. Balakrishnan*, entitled, Minor's Capacity To Sue For Breach of Promise of Marriage – What Is Sauce For The Goose Is Not Sauce For The Gander, (1961) 3 Malaya L.R. 127–130. See *infra* note 231.

[231]Unpublished judgment, Federal Court Civil Appeal No: 77 of 1976, dated December 8, 1977.

possession by the latter. After the death of the vendor, the minor, as plaintiff, claimed that (a) the administratrix of the deceased's estate held the property in contructive trust for him under the circumstances and, (b) he was entitled to the possession of the land occupied by him under the agreement.

The High Court at Alor Star held that the agreement was void and incapable of specific performance. But it allowed the plaintiff's claim on the ground of constructive trust. On appeal, the Federal Court unanimously reversed the lower court's decision on the question of trust. It agreed that the minor's agreement was void and could not be enforced on the strength of the Privy Council decision in *Mohori Bibee* v. *Dhurmodas Ghose*. In its view, the plaintiff's prayer of a declaration of trust meant "in effect to enforce an agreement which is void *ab initio*."[232] The court thus ordered the appellant "to repay the $5000 purchase price on the Respondent's vacating the lands occupied by him, pursuant to section 66 of the Contract Act."[233] Section 66 was not discussed. *Harnath Kuar* was not quoted.

This decision is in direct antagonism to *Mohori Bibee*, which held section 65 of the Indian Contract Act, in *pari materia* with section 66 of the (Malaysian) Contracts Act, 1950, inapplicable to minors. The Federal Court accepted *Mohori Bibee* in part and rejected it in part. Its contribution lies in creating simultaneously a *pro* and *con* climate about *Mohori Bibee* and taking the logical consequences of the minor's agreement to their extreme. In other words, the Federal Court harmonised, through a new economic equity, section 11 and section 66 of the Contracts Act, 1950. The decree passed in favour of appellant was, in effect, a decree against respondent (minor) on a void agreement. This restored the parties to the *status quo*. But it has far-reaching consequences. It would create complicated questions of recovery where the property bought by or pledged to a minor in consideration of loan by him is movable and has been consumed by him or by his transferee. Where the property is in existence and available with the minor, no such difficulty arises. Again, section 66 may apply in the case of a purchase as well as a sale by a minor. And it should not matter whether he is a plaintiff or a defendant.

The Malaysian law of restitution affords the following propositions of law:

1. Where the agreement between parties is merely void, unenforceable or illegal, it shall not be enforced nor compensation be provided for its breach.

[232] *Id.*, last but one para.

[233] *Id.*, last para.

2. Where the plaintiff's claim arises independently of the illegal agreement, recovery may be allowed as an exception to the rule of *ex turpi causa non oritur actio*.

3. Where in cases of lottery, there is a statutory provision for return of the amount of the lottery ticket, it will be allowed to the claimant.

4. Where a lottery transaction is merely void but not illegal because the agreement did not violate penal provisions or provisions involving penal consequences, the collateral agreement with the agent will entitle the principal to recover any money which the former may have received on his behalf.

5. Where the breach relates to non-compliance, including breach of a civil enactment, involving penal consequences, restitution may follow where no serious policy of the law is involved.

6. Where a statute renders an agreement merely unenforceable and not illegal — there being no unlawful consideration — the distinction between these two concepts may be in the offing for the benefit of the claimant.

7. Where the agreement between parties smacks of corruption or moral turpitude, it is an open question whether recovery will be allowed. It is pertinent to remark that in *Menaka* the learned Lord President had called the transaction of loan between the parties an honest and open one and provided relief only in those circumstances. It appears doubtful whether the acceptance of *Harnath Kaur* and *Budhulal* by the Federal Court regarding the scope of section 66 will provide relief in all types of illegal and void agreements.

8. Where, under section 66, there is a question of knowledge of the illegality on the part of the parties, the knowledge must be proved as a fact. Exploding the common myth and belief and rejecting the argument of the prosecution, Raja Azlan Shah, F.J. in *Public Prosecutor* v. *Datuk Haji Harun bin Haji Idris* (1977), said:

> I would like to correct the false impression that every person is presumed to know the law. It would be contrary to common sense and reason if it were so. The rule is that ignorance of the law shall not excuse a man or relieve him from the consequence of a crime.[234]

Thus knowledge of the law must be proved as a fact or reasonably drawn from circumstances.

Results from comparative study

1. In India, factual situations concerning void or illegal agreements have been too numerous and too diverse to be typified here, such as those relating to transfer of padi land without permission, transfer of land by a

[234] (1977) 1 M.L.J. 15.

member of a scheduled caste to a non-scheduled caste without permission, transfer of land by judgment debtor without permission, transfer of land by a reversioner, sublease of a mining land; illegal transfer of telephone, transfer of permit to ply lorry without permission, wagering transaction, recovery of presents in cases of bigamous marriage and marriage between two minors which does not come about, compromise of noncompoundable offence, recovery of payment made under breach of Foreign Exchange Act, recovery of excess cotton price and car price paid beyond the control order price, recovery of excess rent paid over the fixed standard rent, loan transactions and agreement of lawyer's fees in contravention of the concerned legislation.

In Pakistan, factual situations have been limited to agreements in exercise of *ultra vires* powers, non-compliance with seal requirement, agreement against public policy in commercial transaction, unlawful compromise in domestic relation and recovery of excess scrap iron price paid beyond the control order (fixed) price. The parties involved have been private citizens, family relations, municipal committee and government.

In Malaysia, factual situations relate to lottery cases, transfer of personal and unassignable license in timber extraction etc., illegal transfer of padi land, loan transactions and agreement about lawyer's fees and non-compliance with legislation, use of excess legal power and marriage brocage agreement.

2. In India, before the decision in *Harnath Kuar*, claims for restitution in cases of illegal agreements were generally dismissed, although in some cases refund was allowed where collateral agreements of payment existed. After *Harnath Kuar*, the wheel of decision was upturned in favour of restitution, although complete unanimity on this point did not prevail because that case had led to conflicting interpretations.

In Pakistan, *Harnath Kuar* has received scant attention. But, at least in one case, its oft-quoted statement of law has been expressly accepted.

In Malaysia *Harnath Kuar* has been discussed in just a few cases, and contrary to Indian courts, the Malaysian Courts have accepted only one interpretation of it — that section 66 applies to agreements void *ab initio*. In the Privy Council cases, which went from Malaysia, *Harnath Kuar* was hardly discussed on the subject. In the Privy Council cases, however, which went from India, the theme of that case was echoed and re-echoed in case after case.

3. The scope of restitution in cases of illegal agreements is widest in India, partly uncertain in Malaysia, particularly the balance is against restitution where the transaction between parties may be dishonest, fraudulent or practices fraud on the administration[235] and conflicting in

[235] See *P.T. International Nickel Indonesia v. General Trading Corpn. (M) Sdn. Bhd.*, 1978 1 M.L.J. 1.

Pakistan. With the separation of the Decca judiciary, winds may blow in favour of restitution.

4. In cases of breaches of moneylending legislation, Indian and Malaysian cases stand in contrast to each other. Pakistan cases, on this subject, have not come to light.

5. In all the three jurisdictions under review, where the parties were *in pari delicto* restitution was disallowed. In one Pakistan case, it has been held that section 65 applies in cases of executory as well as executed agreements.

6. In India, the Supreme Court has imputed knowledge of the law to a party who was already in business and the documents were finalised through legal advice. In Malaysia, neither the Privy Council nor Federal Court has expressed any opinion on this point, although a lower court in a case of frustration, held to the same effect as did the Indian Supreme Court.

In India, opinion has been expressed for and against the existence of the maxim that every person is presumed to know the law of the land. In Malaysia, the existence of such a maxim has been emphatically denied in a criminal case.

7. In all the three jurisdictions under review, the maxim: *ex turpi causa non oritur actio*, applies and the plaintiff's action for enforcement of an illegal agreement will fail.

8. In India, section 65 does not apply against a minor, though there are decisions which have allowed restitution to a minor where he has been a plaintiff. A Malaysian decision has limited the effect of *Mohori Bibee* vis-a-vis section 66 to business agreements and has not extended it to marriage agreements. In another Malaysian case, a minor plaintiff (vendee) was obliged under section 66 to redeliver the property to defendant.

In this age of economic expansion and proliferation of legislation, the factual situations regarding illegal agreements are so diverse and breaches of law sometimes so major, sometimes so negligible and sometimes so technical that the present restitutional provisions in the three countries are by no means exhaustive to meet all of them. The law of restitution relating to minors is also in an unsatisfactory state. The recommendations of the Law Commission of India are neither comprehensive nor happily worded. Law reform is the need of the hour!

I.C. Saxena.*

*Professor of Comparative Law, Faculty of Law, University of Malaya.

COVER WITHOUT COVER

CHOP ENG THYE CO. v. MALAYSIA NATIONAL INSURANCE SDN. BERHAD[1]

The facts were as follows: In March 1971 the plaintiffs applied to the defendant insurance company for a fire insurance cover in the sum of $20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of premium amounting to $1,000.50 the insurance company issued a protection note in favour of the plaintiffs. On April 6, 1971 the smoke house and all its contents were destroyed by fire. The plaintiffs claim for their alleged loss was rejected by the defendant. The plaintiffs sued by filing their writ of summons on May 16, 1972, that is, about thirteen months after the occurrence of the fire.

The defendant contended, *inter alia*, that they were not liable under the cover note by virtue of a condition in the contemplated policy that the defendants shall not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration.[2] The cover note expressly stated that it was subject to the clauses and conditions of the insurer's printed form of policy. The fire and its consequent loss took place on April 6, 1971 but it was not until May 16, 1972 that the writ of summons was filed against the defendant. The plaintiffs argued that they were not bound by the contemplated policy's terms and conditions because the policy was never given to them. Did the express stipulation in the cover note bind the plaintiffs and the defendant insurer to the terms of that policy? Ajaib Singh J. held that they were bound saying,[3]

> "The answer to this question would appear to be that by incorporating the clauses and conditions of the defendants' fire insurance policy in the cover note and by the plaintiffs' acceptance of the cover note in that form and content both the plaintiffs and the defendants rendered themselves bound by those clauses and conditions."

[1] [1977] 1 M.L.J. 161.

[2] The defendant also pleaded that they were not liable because (a) the cover note was issued by a person not duly appointed as their agent and (b) the assured had received $7,000 from two other fire policies issued by different insurers and in doing so had received more than the indemnity they were entitled to.

[3] *Ibid.* at page 165.