Delhi High Court Virender Singh vs Laxmi Narain And Anr. on 1 November, 2006 Equivalent citations: I (2007) BC 530, 2007 CriLJ 2262 Author: B D Ahmed Bench: B D Ahmed JUDGMENT Badar Durrez Ahmed, J. 1. This revision petition is directed against the judgment and order dated 17.12.2004, whereby the appeal preferred by the petitioner against the judgment dated 21.08.2004, passed by the learned Metropolitan Magistrate, was dismissed. By the judgment dated 21.08.2004 and order dated 09.09.2004, the learned Metropolitan Magistrate, New Delhi, had convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act) and directed him to be released on probation for a period of one year on furnishing a personal bond in the sum of Rs.25,000/- with one surety of the like amount and to pay a compensation of Rs.1,20,000/- 2. The facts as indicated in the impugned order are that the complainant gave a sum of Rs.80,000/- to the petitioner and his father, who were arrayed as accused No.1 and 2 respectively. The said sum of Rs.80,000/- was allegedly paid by the complainant (respondent No.1) to the accused for the purposes of securing a job for the complainant's nephew in Haryana Police. In essence, this money was paid by way of illegal gratification for the purposes of arranging the said job through purported high profile political leaders. However, the complainant after having paid the said sum of Rs.80,000/- did not get the job for his nephew. Since the job was not made available to the complainant's nephew, the complainant requested the accused to return the amount of Rs.80,000/- to the complainant. The said sum was not easily forthcoming. After great persuasion and intervention of elders, the petitioner admitted liability on behalf of his father and promised to pay the sum of Rs.80,000/- to the complainant and in pursuance of this promise, issued a cheque of Rs.80,000/- on 30.03.2000 drawn on Punjab National Bank, Najafgarh, Delhi. The cheque on presentation was dishonoured by virtue of the memo dated 07.04.2000 with the remarks "no account". Thereafter, a statutory notice was served and since the payment was not forthcoming, the present complaint under Section 138 of the said Act was filed. The learned Metropolitan Magistrate, after conducting trial, found the petitioner to be guilty of the offence under Section 138 of the said Act and, as indicated above, the petitioner being aggrieved by that decision preferred an appeal before the learned Additional Sessions Judge, who concurred with the learned Metropolitan Magistrate and upheld the conviction and sentence. 3. The main contention raised by the learned Counsel for the petitioner before this Court is that in the background of the provisions of Section 23 of the Indian Contract Act, 1872, the payment of money that was made by the complainant to the accused was not lawful and, therefore, no binding contract resulted there from. He referred to the provisions of Section 138 of the said Act, which reads as under: 138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the

cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation:- For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability. 4. The submission made by the learned Counsel for the petitioner is that it was not enough for the cheque to have been issued and the same to have been dishonoured, it was also necessary to establish that the cheque was issued for the discharge, in whole or in part, of any debt or other liability. For this purpose, the Explanation to Section 138 of the said Act makes it clear that "debt or liability" had reference only to a legally enforceable debt or liability. He submitted that the payment made by the complainant to the accused did not result in a legally binding contract. As such, no legally enforceable debt or liability was created. Therefore, according to the learned Counsel, the cheque could not be regarded as being in discharge of any debt or other liability as contemplated under Section 138 of the said Act. 5. The learned Counsel for the petitioner placed reliance on the judgment of the High Court of Kerala in J. Daniel v. State of Kerala 2006(1) LRC 408 (Kerala). In the said decision, it is observed that the execution of the cheque is not sufficient to constitute an offence punishable under Section 138 of the Act, unless it is proved that the debt or other liability is a legally enforceable one. The Kerala High Court also held as under: 7. A reading of the above would show that any agreement opposed to law or forbidden by law is not enforceable. Every debt or liability upon which a cheque is issued is not enforceable. For example, if an officer of defense force receives a cheque for consideration on the basis of an agreement to pass on military secrets, such a cheque is not enforceable under Section 138 of the Act. It can be interpreted that any debt or liability arising out of a contract or promise, which is unlawful or not legally enforceable, would not constitute an offence under Section 138 of the Act. 8. In Words and Phrases Vol. 14A, the term "enforceable" is defined as "not invalid as contrary to public policy because bargaining contrary to the law as venue, word"enforceable" not necessarily implying actual force or coercion but meaning to be executed and to cause to take effect." Explanation to Section 138 clearly says that for the purpose of the section "debt or other liability" means a legally enforceable debt or other liability. Hence, only a claim arising

out of an enforceable debt or other liability will constitute an offence under Section 138 of the Act. Accordingly, the learned Counsel for the petitioner, placing reliance on the aforesaid decision, submitted that the conviction of the petitioner would be bad in law inasmuch as the vital ingredient of the cheque being in discharge of "a debt or other liability", was not made out. 6. The learned Counsel for the respondent, however, submitted, on the basis of the decision of the Supreme Court in the case of Mohd. Salimuddin v. Misri Lal and Anr. that the doctrine of pari delicto is not applicable inasmuch as merely because an illegal gratification was provided, would not entitle the petitioner to wriggle out of his commitment. The learned Counsel for the respondent also referred to the decision of the Supreme Court in the case of Sita Ram v. Radha Bai and he referred to the following paragraph of the said judgment to show that it is not as if the present amount of Rs.80,000/- was not legally enforceable. 11. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari delicto portior est conditio defendantis. But as stated in Anson's principles of the English Law of Contracts, 22nd Edn., p. 343: there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered- cases to which the maxim does not apply. They fall into three Classes (a)where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out this claim. The learned Counsel for the respondent submitted that the transaction was not opposed to public policy and, therefore, the doctrine of pari delicto was not applicable in the facts and circumstances of the present case. According to him, the debt or other liability was legally enforceable and, therefore, fell within the meaning ascribed to debt or other liability under Section 138 of the said Act. 7. The question which requires to be answered is: Whether the cheque for Rs.80,000/- issued by the petitioner in favor of the respondent No.1 (complainant) was for the discharge of any debt or other liability? Now, the explanation in Section 138 of the said Act makes it clear that the expression "debt or other liability" has reference only to a legally enforceable debt or liability. Conversely, if a cheque is issued in respect of a debt or liability which is not legally enforceable then, Section 138 of the said Act would not apply. Section 23 of the Indian Contract Act, 1872, inter alia, stipulates that every agreement of which the object or consideration is unlawful is void. The said Section 23 reads as under: 23. 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. An agreement which is void is not enforceable by law [see: Sections 2(g) and 10 of the Indian Contract Act, 1872]. The question, therefore, is -

Was the agreement between the petitioner and the complainant for securing a job for the complainant's nephew in the Haryana Police, legally enforceable? Fortunately, the answer is provided straightaway by illustration (f) to Section 23 of the Indian Contract Act, 1872. The said illustration (f) reads as under: (f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful. Clearly, the facts of the present case fit into this illustration. Therefore, it can be safely stated that the agreement between the petitioner and the complainant was void as the consideration of Rs.80,000/- was in the nature of an illegal gratification and was unlawful. The next question, taking illustration (f) further, is - B having paid A the promised sum of 1,000 rupees but, A not fulfillling his promise of obtaining for B an employment in public service, does B have a remedy in law to seek restitution and return of the 1000 rupees that he has paid to A? What is the obligation of a person who has received an advantage under a void agreement? Is A bound to return the sum of 1,000/- rupees to B? 8. Apparently, these questions are answered by Section 65 of the Indian Contract Act, 1872 which reads as under: 65. When an agreement is discovered 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. But, the provision applies to (1) an agreement which is "discovered to be void" or (2) a contract which "becomes void". The expressions "agreement" and "contract" have distinct meanings under the Contract Act. As mentioned earlier, an "agreement" becomes a "contract" only if it is enforceable in law. Thus, the phrase "a contract becomes void" appearing in the said Section 65 would not have any application in the case where an agreement is void ab initio. It has already been indicated above that the agreement in the present case was void from the very beginning. Therefore, the agreement in question as also the agreement of the type mentioned in illustration (f) to the said Section 23 cannot fall within the phrase "a contract becomes void". This leaves us with agreements which are "discovered to be void". This has reference to those agreements which, the contracting parties or one of them did not know, at the time of entering into the agreement, that the same was not enforceable in law but, it was later "discovered" by them or one of them as being void. Where the parties are aware and have knowledge that the agreement is unlawful and despite this knowledge they go ahead with the agreement, they would not be able to take recourse to the provisions of the said Section 65 because there would be no "discovery" of the invalidity of the agreement. That the agreement was unlawful and, therefore, void, was known to them all along. This aspect and the provisions of the said Section 65 were discussed in detail and analysed by the Supreme Court in Kuju Collieries Ltd v. Jharkhand Mines Ltd. in the following manner: 6. We are of the view that Section 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65 reads as follows: 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. The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that if was not lawful and, therefore, void, there was not contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply. In Kuju Collieries Ltd (supra) a sum of Rs.80,000/- (coincidentally) had been paid by one party as salami for a mining lease. The stipulation for payment of salami was illegal and the lease on the basis of that was also illegal. The question of the return of the said sum of Rs.80,000/- arose in the context of the provisions of the said Section 65. The Supreme Court held that since the parties were aware of the illegality of the agreement at the time it was entered into, it was not a case of an agreement which was "discovered to be void" subsequent to its execution. Consequently, Section 65 was found not to be applicable and the return of the sum of Rs.80,000/- could not be enforced. The Supreme Court observed as under: 12. The further question is whether it could be said that this contract was either discovered to be void or became void. The facts enumerated above would show that the contract was void at its inception and this is not a case where it became void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into. As pointed out by the trial Court 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. Clearly, therefore, this is not a case to which Section 65 of the Contract Act applies. Nor is it a case to which Section 70 or Section 72 of the Contract Act applies. The payment of the money was not made lawfully, nor was it done under a mistake or under coercion. 13. We agree with the trial Court that the plaintiff should have been aware of the illegality of the agreement even when it entered into it and therefore Section 65 of the Contract Act cannot help it. 9. In Tarsem Singh v. Sukhminder Singh , the Supreme Court distinguished cases falling under Section 20 and those falling under Sections 23 and 24 of the Indian Contract Act, 1872. It

held: 37. We may point out that there are many facets of this question, as for example (and there are many more examples) the agreement being void for any of the reasons set out in Section 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, we are dealing only with a matter in which one party had received an advantage under an agreement which was "discovered to be void" on account of Section 20 of the Act. It is to this limited extent that we say that, on the principle contained in Section 65 of the Act, the petitioner having received Rs 77,000 as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent. A decree for refund of this amount was, therefore, rightly passed by the lower appellate court. Clearly, a review of the legal position with regard to the scope and ambit of the said Section 65 indicates that it would not apply to cases falling under Section 23. In other words, agreements which are void ab initio and their illegality is known to the parties at the time of execution would not fall within the purview of Section 65. An agreement of the kind mentioned in illustration (f) to Section 23 and the one at hand being void ab initio and to the knowledge of the parties would also not benefit from the equitable principle of restitution embedded in Section 65. So, neither the sum of 1,000 rupees mentioned in the said illustration (f) nor the sum of Rs.80,000/- paid in the present case is recoverable in law. 10. In view of the clear position based on statutory provisions it is not open to set up the position in English law as crystallised in the maxim in pari delicto portior est conditio possidentis (defendantis) and then to urge that the present case falls in the category of exceptions to that rule and therefore the money illegally paid can be recovered under law. But, as the learned Counsel for the respondent laid stress on this submission and placed reliance on two decisions of the Supreme Court in Sita Ram v. Radha Bai (supra) and Mohd. Salimuddin v. Misri Lal (supra), a discussion on these aspects is necessary. 11. The doctrine or rule of pari delicto is the embodiment of the principle that the courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud. As per Blacks' law dictionary (fifth edition), the maxim - pari delicto portior est conditio possidentis (defendantis)- means: In a case of equal or mutual fault [between two parties] the condition of the party in possession [or defending] is the better one. Where each party is equally in fault, the law favors him who is actually in possession. Where the fault is mutual, the law will leave the case as it finds it. In Herbert Broom's "A Selection of Legal Maxims" (10th edition) the maxim is explained as follows: The maxim, in pari delicto portior est conditio possidentis, is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; 'for the Courts will not assist an illegal transaction in any respect'. The maxim is therefore, intimately connected with the more comprehensive rule of our law, ex turpi causa non oritur actio, on account of which no court will "allow itself to be made the instrument of

enforcing obligations alleged to arise out of a contract or transaction which is illegal"; and the maxim may be said to be a branch of that comprehensive rule: for the well-established test, for determining whether the money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction: if he "requires aid from the illegal transaction to establish his case," the Court will not entertain his claim. 12. So, if the maxim in pari delicto etc., were to apply, the complainant/respondent No.1 could not have a claim for recovering the Rs.80,000/- paid by way of illegal gratification for securing a job for his nephew in the Haryana Police. It is here that the learned Counsel for the respondent No.1 pressed into service the observations of the Supreme Court in paragraph 11 of the decision of Sita Ram v. Radha Bai (supra), to submit that there are three exceptional circumstances to which the maxim does not apply and that the present case falls in one of those. The three classes of cases being: (a) Where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) Where the plaintiff is not in pari delicto with the defendant ; (c) Where the plaintiff does not have to rely on the illegality to make out his claim. If the facts of the present case are examined, it would be immediately clear that it does not fall in any of these three classes of cases. The first class of cases deals with situations or agreements where the object is unlawful. In the present case - securing a job in the Haryana Police for the nephew - is not an unlawful object. What is unlawful is the consideration paid for it. The consideration having already been paid, the illegality stood completed on the part of the respondent No.1. And, since the respondent No.1 would have to rely upon this illegality to make out his claim or enforce the same, this case does not also fall within the third class of cases mentioned above. This leaves us with the second class of cases where the parties are not in pari delicto. In Sita Ram v. Radha Bai (supra) the Supreme Court was dealing with a case where the parties were not "in pari delicto" or, to put it differently, "in equal fault". And, in that backdrop, the Supreme Court observed that it is settled law that where the parties are not in pari delicto , the less guilty party may be able to recover money paid or property transferred, under the contract. It was further held that such a possibility could arise in three situations: (1) The contract may be of kind which has been made illegal by statute in the interest of a particular class of persons of whom the plaintiff is one; (2) The plaintiff must have been induced to enter into the contract by fraud by strong pressure; (3) The defendant is under a fiduciary duty to the plaintiff and it is in connection with this fiduciary relationship that moneys have come into his hands as proceeds of a transaction albeit illegal. None of these three situations arise in the present case. In any event, the parties in the present were pari delicto so, no investigation into whether the any of these three situations arise is called for. The Supreme Court decision in Sita Ram v. Radha Bai (supra) is on a different footing. There the parties were not in pari delicto and the case fell under the third situation of the fiduciary relationship referred to above. 13.

In Mohd. Salimuddin (supra), also, the parties were not in pari delicto. This would be clear from the following observation of the Supreme Court: 4. The view taken by the High Court is unsustainable inasmuch as the High Court has lost sight of the fact that the parties to the contract were unequal. The tenant was acting under compulsion of circumstances and was obliged to succumb to the will of the landlord, who was in a dominating position. If the tenant had not agreed to advance the loan he would not have been able to secure the tenancy. It was the landlord who was in the position of an oppressor who wanted to exploit the situation obtaining in the context of the acute housing shortage which prevailed. The tenant had either to yield to the unlawful demand of the landlord or to without a roof, for, otherwise, the landlord would not have granted the lease. The relevant provision prohibiting the payment of rent in advance embodied in the Rent Act was enacted precisely to protect the tenant from such exploitation. Obviously, he had to succumb to such exploitation, the protective law notwithstanding, as he would have been obliged to remain roofless. The law extended the protection but did not guarantee the roof. To deny access justice to a tenant who is obliged to yield to the unlawful demands of the landlord in this scenario by invoking the doctrine of pari delicto is to add insult to injury, and to negate the very purpose of the provision designed for his protection. The doctrine of pari delicto is not designed to reward the "wrongdoer" or to penalize the "wronged", by denying to the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Such being the position the said doctrine embodying the rule that a party to a transaction prohibited by law cannot enforce his claim in a court of law is not attracted in a situation like the present. In the present case neither party is a victim of exploitation. Both had voluntarily and by their free will joined hands to flout the law. Therefore, in terms of the Supreme Court decisions in Sita Ram v. Radha Bai (supra) and Mohd. Salimuddin (supra) themselves, the parties being in pari delicto, the doctrine would apply and the sum of Rs.80,000/- could not be recovered in a court of law. Meaning thereby that there did not exist any legally enforceable debt or liability for the discharge of which it could be said that the cheque in question was issued. Consequently, Section 138 of the said Act would not be attracted. This legal position was not appreciated by the courts below and it is for this reason that they fell into error. That being the case, the conviction of the petitioner is set aside. It is, however, made clear by the learned Counsel for the petitioner that the sum of Rs.1 lac, which had been deposited pursuant to the orders by the court below, has already been withdrawn by the respondent No.1 and that he would not be pressing for its return. The learned Counsel for the petitioner also submits that to maintain his bona fides, he would be paying a further sum of Rs.20,000/- within two months to the complainant/respondent No.1. He submits that the said sum will be deposited in the trial court, which the complainant/respondent No.1 may withdraw immediately thereafter. 14. With these observations, the revision petition is allowed. The petitioner is acquitted. However, the petitioner has

already paid a sum of Rs. 1 lac to the complainant/respondent No.1 and has undertaken to pay a further sum of Rs.20,000/- to the complainant/respondent No.1 within two months by depositing the same in the trial court, which the complainant/respondent No.1 may withdraw thereafter.