K.Nagamalleshwara Rao And Ors vs State Of Andhra Pradesh on 14 March, 1991

Equivalent citations: 1991 AIR 1075, 1991 SCR (1) 875, AIR 1991 SUPREME COURT 1075, 1991 (2) SCC 532, 1991 AIR SCW 924, 1991 CRIAPPR(SC) 165, 1991 SCC(CRI) 564, 1991 APLJ(CRI) 209, (1991) 1 APLJ 82, 1991 CRILR(SC MAH GUJ) 303, (1991) 1 JT 652 (SC), (1991) IJR 178 (SC), 1991 (1) JT 652, (1991) 1 SCR 875 (SC), 1991 (2) UJ (SC) 109, (1991) SC CR R 561, 1991 CHANDLR(CIV&CRI) 640, (1991) 1 GUJ LH 291, (1991) MADLW(CRI) 241, (1991) MAD LJ(CRI) 512, (1991) 2 RECCRIR 1, (1991) 2 CRILC 653, (1991) 28 ALLCRIC 208, (1992) 1 CHANDCRIC 52, (1991) 1 CRIMES 812, (1991) 2 CURLJ(CCR) 32

Bench: A.M. Ahmadi, M. Fathima Beevi

PETITIONER:
K.NAGAMALLESHWARA RAO AND ORS.

Vs.

RESPONDENT:
STATE OF ANDHRA PRADESH

DATE OF JUDGMENT14/03/1991

BENCH:
RAMASWAMI, V. (J) II
BENCH:
RAMASWAMI, V. (J) II
AHMADI, A.M. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1991 AIR 1075 1991 SCR (1) 875
1991 SCC (2) 532 JT 1991 (1) 652
1991 SCALE (1)460

ACT:
Criminal Law: Indian Penal Code, 1980-Section 302 and 34-Deceased attacked by several persons -no specific overt act attributed to the accused and instead bald statements that 15 persons caused injuries to deceased make in the F.I.R. and Dying Declaration which was later treated as statement under section 157 Cr. P.C. -Conviction of the accused under section 302 and section 302 read with section 34 I.P.C. cannot be sustained.

Sections 302 and 149-When 15 persons were specifically charged of forming unlawful assembly and committing murder in prosecution of the common object of the assembly but 11 of them were acquitted, the remaining 4 cannot be convicted under section 302/149 as being members of the unlawful assembly.

HEADNOTE:

The 4 appellants along with 11 others were tried for murder and for causing injuries. The learned sessions judge while acquitting all others of all the charges, convicted A-1, A-2, A-5 and A-1 on different counts. The sentences awarded to them under various charges including the sentence of life imprisonment under section 302 IPC were ordered to run concurrently. The convicted accused preferred appeal to the High Court against their conviction and sentences and the State appealed against the acquittal of the rest of the accused. The High Court altered the convection of A-1 and A-2 under section 302 I.P.C. and 302 read with section 34 respectively into one under section 302 read with section 149 I.P.C. and confirmed the sentence for imprisonment for life. Except for this modification the convictions and sentences in respect of all the four accused were confirmed. The state appeal against acquittal of all other accused was dismissed.

In this appeal preferred by the four convicted accused namely, A-1, A-2, A-5 and A-11 their counsel confined his arguments against their convictions and sentences under section 302 read with section 149 I.P.C. only as the appellants had either already served or had almost finished serving to their sentences awarded to them under other charges.

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The argument was that in the absence of a specific finding to the effect that apart from the 4 appellants the prosecution has proved the involvement of other persons, section 149 I.P.C. cannot be invoked for convicting them under section 302I.P.C. Confirming the convictions and sentences of the appellants under other charges but allowing their appeal against their conviction and sentence under section 302 I.P.C. read with section 149 I.P.C. this Court,

HELD: Since the accused who are convicted were only four in number and the prosecution has not proved the involvement of other persons and the court below have acquitted the other accused of all the offences, section 149 cannot be invoked for convicting the four appellants herein. The learned judges were not correct in stating that A1, A2, A5 and A11 can be held to be the members of an unlawful assembly along with some other unidentified persons on the facts and circumstances of this case.The charge was not that accused 1,2,5 and 11 "and others" or "and other unidentified

persons" formed into an unlawful assembly but it is that "you accused 1 to 15" formed into an unlawful assembly. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object. [882A-D]

Amar Singh v. State of Punjab, [1987] 1SCC 679 and Maina Singh v. State of Punjab, [1976]3SCR 651, followed.

JUDGMENT:

CRIMINAL APPEALLATE JURISDICTION:Criminal Appeal No. 680 of 1987.

From the Judgement and Order dated 16.8.1984 of the Andhra Pradesh High Court in Crl. A. No. 604 of 1982.

N. Santosh Hegde, A.D.N. Rao and A, Subha Rao for the Appellants.

G. Prabhakar for the Respondent.

The Judgement of the Court was delivered by V.RAMASWAMI, J. The appellants along 11 others were tried for causing the murder of on Appikatla Tataiah, and for causing injuries on Jarugu Rama Koteshwararao (PW2) on 24th June, 1981 near `Manchineeti Cheruyu'(fresh water tank) at or about 8.00 P.M. in Machavaram Village.

The learned Sessions Judge, Krishna Division Machilipatnam by his Judgment dated 16.7.1982 acquitted A-3, A-4, A-6 to A-10, A-12 and A-15 of all the charges. He convicted Kurakula Nagamelleswarao (A-1), Jarugu Kotaiah (A-

2), Appikatla Krishnamurthy (A-5) and Appikatla Nagulu (A-

11) under section 148, Indian Penal Code and sentenced each of them to undergo two years rigorous imprisonment. A-1 was further convicted under section 302, IPC and sentenced to imprisonment for life. A-2 was convicted under section 302 read with section 34, IPC and sentenced to imprisonment for life. A-5 and A-11 were convicted under section 302 read with section 149, IPC and each of them were sentenced to undergo imprisonment of life. Regarding the attack on PW-2 jarugu Rama Koteshwararao the learned Sessions Judge convicted A-1 and A-2 under section 326, IPC read with section 149 and sentenced each of them to undergo rigorous imprisonment for four years. The

learned Judge further convicted A-5 and A-11 under section 324, IPC for causing simple hurt to PW-2 and sentenced each one of them to undergo rigorous imprisonment for two years. A-1 and A-2 were also convicted under section 324 read with section 149, IPC and each of them were sentenced to two years rigorous imprisonment. The sentences awarded against each accused under various ground were ordered to run concurrently.

The convicted accused preferred Criminal Appeal No. 604 of 1982 and the State appealed against the acquittal of the rest of the accused in Criminal Appeal No. 630 of 1983. At the time of admission of appeal, however, the State appeal was dismissed as against A-9, A-10, A-12, A-13, A-14, and A- 15 and it was admitted only as against acquittal of A-3, A-4 and A-6 to A-8. The High Court confirmed the conviction and sentence of A-1, A-2, A-5 and A-11 under section 148, IPC. However, it alterted the conviction of A-1 and A-2 under section 302, IPC and Section 302 read with section 34 respectively into one under section 148 and section 302 read with section 149 and the sentence awarded thereunder were also confirmed. The High Court also confirmed the conviction and sentences on the accused under sections 326 and 324 read with section 149 and sections 324 read with section 149, IPC. The sentences were directed to run concurrently. the lerned Judges of the High Court dismissed the appeal preferred by the State in respect of acquittal of the other accused.

In this appeal Sh. Santosh Hedge, Senior Advocate appearing for the accused appellants did not canvass the conviction of the four appellants, namely, A-1, A-2, A-5 and A-11 under section 324 and 326, IPC and section 324 read with section 149, IPC and section 326 read with section 149, IPC in relation to the attack on PW-2 but without prejudice to his contention that on the facts section 149, IPC could not have been invoked in relation to the offence under section 302,IPC. This stand was taken on the basis that the appellants had already served or had almost finished serving the four year terms which was awarded for those offences. The conviction and sentence under section 148 was also not canvassed for the same reason without prejudice the above said contention. He confined his arguments against the convictions and sentences of A-1, A-2, A-5 and A-11 under section 302 read with section 149, IPC. The argument of the learned counsel for the appellant was that in the absence of specific finding to the effect and apart from the four appellants the prosecution has proved the involvement of other persons, section 149 IPC cannot be used for convicting for four appellants under section 302. In this connection, he also relied on the decisions of this Court in Amar Singh V. State of Punjab, [1987] 1SCC 679 and Maina Singh V. State of Punjab, [1976]3SCR651.

So far this part of the case is concerned in the present case the High Court observed:

> "The lower court has convicted A-1 under section 302 of the Indian Panal Code for attacking the deceased. A-2, was convicted under sections 149, 302 r.w. section 34, 324 r.w. section 149 and 326 I.P.C. for attacking the deceased. A-5 and A-11 were convicted under sections 148, 302 r.w. section 149, 324 and 326 r.w. section 149 IPC. As already observed the facts and circumstances undoubtedly show that there was an unlawful assembly consisting of more than five persons and the common object of the unlawful assembly was to attack and kill the deceased and attack PW 2. As already observed only such of accused whose presence and participation is established can

> safely be held to be the members of the unlawful assembly. To arrive at such a conclusion we have indicated that the evidence of PW 2 to extent consisting with the earlier versions of Ex. P-2 can safely be accepted to be the basis and if corroboration is necessary the same can be found in the evidence of PWs 1, 3 and 4P. Ws. 2's evidence is subjected to scrutiny in the light of the contents in Ex. P-2. The consistent version regarding the presence and participation by A-1,A- 2, A-5 and A-11 can safely be accepted and they can be held to be the members of the unlawful assembly along with some others unidentified persons. The common object of the unlawful assembly along with some others unidentified persons. The common object of the unlawful assembly was to commit murder of the deceased. All of them can be conviction under section 302 read with section 149 IPC in as much as there can be no doubt whatsoever that the object of such an unlawful assembly of which A-1, A-2, A-5 and A-11 are members is to attack the deceased and PW-2. In this context it must also be remembered that PW 2 who received the serious injuries, would be the last person to leave out the real assailants and implicate the innocent persons.".

(Emphasis supplied) We are of the view that there is some confusion in the statement of the High Court. The charges under section 324 and section 326 read with section 149 and section 326 and section 324 read with section 149 are in relation to the injuries inflicted on PW 2. So far as injuries inflicted on PW 2 is concerned as already stated the conviction and sentence in regard to the same are not canvassed in this appeal. So far as the attack on the deceased is concerned P 1 the statement of PW 1 given to the village Munsif on 24.6.1981 immediately after the occurence stated that:

> "...surrounded my husband and my elder brother armed with axes, curved knives, and spears. Then Kurakula Nagamalleswararao hacked my elder brother with curved knife (Yerukala Kathi) on the left shoulder. Jargugu Kotiah hacked my elder brother with an axe on the left shoulder. Appikatla Nagulu beat my elder brother on the head with stick portion of the spear. I raised hue and cry loudly that they are killing my husband and my elder brother. On hearing my cries Ummadisetti Pooraniah and my sister-in law Srikrishna came there. the above fifteen persons caused injuries to my husband by beating and hacking with axes, spears and curved knives (Yerukala Kathi)which were in their hand. My husband succumbed to the knife injuries."

It may be seen from this report that there is a bald statement that fifteen persons caused injuries to her husband (deceased) by beating and hacking with axes, spears and curved knives (Yerukala Kathi) which were in their hands and her husband succumbed to the knife injuries. It did not attribute any overt act to A-1, A-2, A-5 and A-11, who are the appellants in this case. The PW2 gave the statement Ex. P 2 dated 25.6.1981 recorded by the Munsiff Magistrate, Avamigadda as a dying declaration which was later taken as a statement under section 157 Code of Criminal Procedure. In this so far as the injuries inflicted on the deceased are concerned he had merely stated:

> "The aforesaid four persons and the other eleven persons, beat and hacked my younger sisters' husband Appikatla Tataiah and felled him down."

The charges framed against the accused appellants also stated:

> "That you, accused Np. 1 to 15, on the night of 24th day of June, 1981, at about 8.P.M. near the Manchineeti Cheruvu' in Machavaram Village, Divi taluk, were members of an unlawful assembly and did, in prosecution of the common object of which viz. in killing Appikatla Tataiah, S/o Chittonna alias Chinna Ammanna an d Jarugu Rama Koteswara Rao, S/o Mangaiah of Machavaram village...."

Thus the specific prosecution case was that accused 1 to 15 attacked the deceased and no specific overt act was attributed to any of the accused. It is true that PW 1 in her evidence stated that A-1 hacked the deceased on the left side of neck with Yerukala Kathi and the evidence of doctor PW 8 showed that this is injury No. 2 which proves fatal by itself. But in the light of the first information report P-1 and the dying declaration Ex. P-2 dated 25.6.1981 of P.W. 2 recorded by the Munsiff Magistrate which was later on treated as statement under section 57 of the Criminal Procedure Code which did not attribute any specific overt act to any of the appellant accused in this case, this case was not accepted by the High Court. It is because of this reason the High Court did not accept the conviction of the appellants 1 and 2, namely, accused 1 and 2 under section 302 and section 302 and section 302 read with section 34, accused 1 and 2 under section 302 and section 302 read with section 34, IPC and altered the conviction into one under section 302 read with the section 149, IPC.

The learned counsel for the appellant also contended that the evidence of PW 1 apart from the fact it was not accepted by the High Court in so far as it related to the specific overt acts of A-1, 2, 5 and 11 are concerned are also not acceptable as they are full of infirmities and improbabilities and also by reason of the possibility of improving the case. He had pointed out that though PW 2 and deceased were said to have gone to the Manchineeti Cheruyu (fresh water tank) to verify whether the paddy bags kept by them for soaking were in tact, paddy bags were not found the investigating officer or anybody and they were not recovered. the learned counsel also pointed out, the story that PWs 1 and 3 and had gone that side for calls of nature are also not believable as the place were ladies ease was on the opposite direction and not in the direction of the fresh water. The houses of the deceased and PW 2 and that of Pw 4 were about 150 yards away from the scene of occurence and the occurrence is stated to have taken place at 8.00 P.M. These ladies ran to the scene of occurrence on hearing the cries of the deceased and PW 2. It was also pointed out that though they stated that when they (ladies) went to answer the calls of nature they had taken along with them chambus or lotas with water, and those chambus or lotas were not recovered. In her evidence PW 1 stated that when she found her husband lying dead with number of injuries and blood everywhere she fell over her husband and wept but none of her blood stained clothes were recovered. Though they had stated that when she found her husband PW 2 injured she carried him but her blood stained clothes were also not recovered. Though they had stated before going to the village Munsiff for giving the complaint and after taking PW2 to the house they have changed the clothing their evidence clearly throw a doubt as to the presence at the time of occurrence. It should be kept in mind that PW1 is the wife of the deceased PW3. And thus they are all closely related and the possibility of an exaggeration or of improving in their evidence cannot be ruled out. It may also be pointed out that these witnesses stated that there was electric lamp post and there was no question of any electric light being on. There is ample evidence of rivalry between the parties also. In these circumstances their

presence at the time of occurrence is doubtful and it is also not possible to believe the evidence of PWs 1,2,3 and 4 in respect overt acts attributed to the four appellants herein. In fact, as already stated the High Court was not willing to accept their evidence in this regard and that is why the conviction was made under section 302 read with section 149, IPC.

However, the learned Judges over-looked that since the accused who are are convicted were only four in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, section 149 cannot be invoked for convicting the four appellants herein. The learned Judges were not correct in stating that A1, A2, A5 and A11 "can be held to be the members of the unlawful assembly along with some others unidentified persons' on the facts and circumstances of this case. The charge was not that accused 1, 2, 5 and 11 "and others' or "and other unidentified persons" formed into an unlawful assembly but it is that "you accused 1 to 15" who formed into an unlawful assembly. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permisible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object.

In Maina Singh's case (supra) the appellant in that case and four others were charged with offences under sections 302/149, IPC, the appellant with having shot at the deceased and the other accused with giving blows to the deceased with a sharp-edged weapon. The Trail Court acquitted the four accused and convicted the appellant under section 302 read with section 34. IPC. The High Court dismissed the appeal for the State against the acquittal as also the appellants appeal against the conviction. In the appeal before the Supreme Court it was contended for the appellant that it was not permissible to take the view that a criminal act was done by the appellant in furtherance of the common intention of other co-accused when those accused who had been named had all been acquitted and that all that was permissible for the High Court was to convict the appellant of an offence which he might have committed in his individual capacity. The head note in the report brings the ratio of the judgement correctly and that may be quoted:

> "In a given case even if the charge disclosed only the named persons as co-accused and the prosecution witness confined their testimony to them, it would be permissible to conclude that others, named or unnamed, acted cojointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise.
>
> The charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with four named co-accused, and with no other person. The trial in fact went on the basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused had been given the benefit of doubt and acquitted, it would not be permissible to take the view

> that there must have been some other person alongwith with the appellant in causing injuries to the deceased. the appellant would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others.".

The facts in the Amar Singh's case (supra) in short were that seven accused were charged for murder under section 302 read with section 149 IPC. Two out of the seven accused were acquitted by the Trial Court and on appeal the High Court acquitted one more accused. However, the High Court convicted four of the accused under section 302 read with section 149 IPC and sentenced them for life imprisonment. The four convicted accused appealed to this Court and it was contended on their behalf that after the acquittal for three accused persons out of seven, the appellants who were remaining four cannot be held to have formed an unlawful assembly within the meaning of Section 141, IPC and accordingly the charge under section 149 was not maintainable. Accepting this contention this Court observed:

> "As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under section 148 or section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an `unlawful assembly' is that such assembly must be of five or more persons, as required under section 141 IPC. In our opinion, the convictions of the appellants under sections 148 and 149 IPC cannot be sustained."

The ratio of these judgements are also applicable to the facts and circumstnces of this case.

In the result the appeal of the appellants against the conviction and sentence under section 302 read with section 149, IPC is allowed and the same is set aside. We, however, confirm the conviction and sentence of the appellants under the other charges.

R.N.J. Appeal allowed.

GURMUKH SINGH
V
AMAR SINGH MARCH 15, 1991
[N.M.KASLIWAL AND K. RAMASWAMY, JJ.]

Indian Contract Act, 1872: Section 23 - Contract opposed to public policy-What is-Agreement to purchase property in public auction and thereafter convey half the property-Specific performance of -Whether enforceable.

The respondent field a suit for specific performance of an agreement of sale of land or refund of the money paid to him contending that he and the appellant had contracted that the appellant would participate, on their behalf in public aution to purchase the evacuee property and the appellant

would convey half the property purchased thereat and in furtherance of that he had contributed his share, but the appellant who became the highest bidder and got a sale certificate issued by the custodian of the evacuee property had not performed his part of the contract.

The appellant resisted the suit, and denied the execution of the agreement. He also pleaded that the contract was illegal and void, being opposed to public policy, and that the relief of specific performance being discretionary could not be granted in favour of the respondent.

The trial court decreed the suit. On appeal by the appellant, both the first appellate court and the High Court confirmed the decree. Hence the appeal, by special leave.

On behalf of the appellant it was contended that the agreement was opposed to public policy since it was to knock out the public property on a minimum price and, therefore, void under s. 23 of the contract Act, 1872.

Dismissing the appeal, this Court., HELD: 1.1 Section 23 of the Contract Act adumbrates that 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 provision of any law; or is fraudulent; or involved or implied injury to the persons 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 unlawful. Thus, every agreement of the consideration or object of which is unlawful is void. [888F-G] 1.2 The word "object" would mean the purpose and design which is the object of the contracts; it is opposed to public policy if it tends to defeat any provision of law or purpose of law, and it becomes unlawful and void under s. 23 of the Contract Act. Section 23 is concerned with only the object or consideration of the transaction and not the reasons or motive which prompted it. Public policy imposes certain limitation upon freedom of contract. Certain objects of contract are forbidden or discouraged by law; though all other requisites for the formation of a contract are complied with, yet if these objects are in contemplation of the parties when they entered into the agreement, the law will not permit them to enforce any rights under it. Most cases of illegality are of this sort; the illegality lie in the purpose which one or both parties have in mind. But in some instances the law strikes at the agreement itself, and the contract is then by its very nature illegal. [888G- H,889A-B] 1.3 The public policy is not static. It is variable with the changing times and the needs for the society. The march of law must match with the fact situation. A contract tending to injure public interest or public welfare or fraudulent to defeat the right of the third parties is void under s. 23 of the Contract Act. [892F] 1.4 The object of conducting public sale is to secure as much price or revenue as possible to redeem the debt of the debtor or to secure maximum price to the exchequer for use of public purpose. If such a contract to form a ring among the bidders was to peg down the price and to have the property knocked out a low price it would defeat the above economic interest of the debtor or public welfare. Thereby the agreement becomes fraudulent and opposed to public policy and is void under s. 23. [890E-F] In the instant case, the facts demonstrate that the agreement between the appellant and the respondent was only a combination to participate at an auction of the evacuee property. There is no intention either to peg down the price or to defraud the Government to knock out the sale at a lower price. Thus, the object of the agreement is not opposed to public policy, and therefore, it is not void under s. 23 of the Contract Act. Therefore the agreement between the appellant and the respondent

is lawful contract. The courts below committed no error of law warranting interference.[892H,893A-B] Rattan Chand Hira Chand v. Askar Nawaj Jung, J.T. 1991 1SC 433 and Cheerulal Prakash v. Mabadeodas Maiyua & Ors., [1959] (Suppl.) 2 SCR 406, referred to.

Scott v. Brown. Deorning Mc Nab & Co., [1892] 2 K.B. 724 and Mohamed Meerta v. S.V. Raghunadha Gopalar, 27 Indian Appeals 17, referred to.

Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. & Ors.,[1974] 3 SRC 678; Central Inland Water Transport Corpn. Ltd. & Anr v. Brojo Nath Ganguli & Anr., {1986] 2 SCR 278 and Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Ors., A.I.R. 1991 SC 190, inapplicable.

Chandra Sreenivasa Rao v. Korrapati Raja Rama Mohana Rao and Anr., A.I.R. 1952 Madras 579; Ram Lal Misra v. Rajendra Nath Sanyal, A.I.R. (1933) Oudh P. 124 at 127; Nand Singh @ Ghuddha v. Emperor, A.I.R. (30) 1943 Lahore 101; Hutchegowda v. H.M. Basaviah, A.I.R. 1954 Mysore 29; Ratanchand Hirachand v. Askar Nawaz Jung & Ors., A.I.R. 1976 A.P. 112; Mo. Issac V. Sreeramula, A.I.R. Mad. 289= [1946] 1 Madras Law journal, 187; Ramalingiah v. Subbarami Reddi A.I.R. 1951 Mad. 390; Mohafazul Rahim v. Babulal, A.I.R. 1949 Nagpur 113 and Lachhman Das & Ors v Hakim Sita Ram & Ors. A.I.R. 1975 Delhi 159, referred to.

Chitty's contract, 26th Edn., Vol. I Paragraph 1134, P. 686 and Halsbury's Laws of England. Fourth Edition, Vol. 9 Paragraph 392 at p. 266 and paragraph 746 at 383, referred to.

& CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1335 of 1977.

From the Judgement and Order dated 7.3.1977 of the Punjab & Haryana High Court in R.S.A. No. 1162 of 1966.

J.M. Khanna and Mr. I.B. Gaur for the Appellant. Dhruv Mehta, Aman Vachhar, S.K. Mehta, Arvind Verma and Romesh Chand for the Respondent.

The Judgement of the Court was delivered by K. RAMASWAMY, J. The unsuccessful defendant/appellant resisted the suit of the respondent for specific performance of the agreement of sale of 27 Bhigas and 2 Biswas of the land situated in Chakkar Karman Village. According to the respondent he and the appellant contracted that the appellant would participate on their behalf in a public auction to purchase the evacuee property. he contributed his share. The appellant agreed to convey half the property purchased at the auction. The appellant became the highest bidder for a sum of Rs. 5,000 and he contributed his share and the sale was confirmed on March 11, 1964 and a sale certificate was issued by the custodian of he evacuee property but the appellant had not performed his part of the contract. Accordingly he laid the suit for specific performance or refund the amount advanced by him. The suit was resisted by the appellant denying the execution of the agreement and also pleaded that the contract is illegal and void being opposed to public policy. The relief of specific performance being discretionary cannot be granted in favour of the respondent. The Trial Court decreed the suit; on appeal and on further second appeal the District Court and the High Court confirmed the same. Thus this appeal on social leave under Art. 136 of the Constitution.

The contention neatly argued by Shri Khanna, the learned counsel for the appellant, is that the agreement is opposed to public policy and, therefore, it is void under s. 23 of the Contract Act, 1872. According to him the agreement was to knock out the public property on a minimum price and that, therefore, the object of the agreement is opposed to public policy and is hit by s. 23. We found no force in the contention . Section 23 of the Contract Act adumbrates that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such of nature that, if permitted, it would defeat the provision of any law; or is fraudulent; or involved or implied injury to the persons or property of another; or the court regard it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is a said to be unlawful. Every agreement of which the object or consideration is unlawful is void. The word object would mean the purpose and design which is the object of the contract, if is opposed to public policy which tends to defeat any provision of law or purpose of law, it becomes unlawful and thereby it is void under s. 23 of the Contract Act. Section 23 is concerned with only the object or consideration of the transaction and not the reasons or motive which prompted it. Public policy imposes certain limitations upon free-

dom of contract. Certain objects of contract are forbidden or discouraged by law; though all other requisites for the formation of a contract are complied with, year if these objects are in contemplation of the parties when they entered into the agreement, the law will not permit them to enforce any rights under it. Most cases of illegality are of this sort: the illegality lies in the purpose which one or both parties have in mind. But in some instances the law strikes at the agreement itself, and the contract is then by its very nature illegal. Whenever a plea of illegality or against public policy is raised as a defence to a contractual claim, the test to be applied is: Does public policy require that this claimant, in the circumstances which have occurred, should be refused relief of which he would otherwise have been entitled with respect to all or part of his claim . In addition, once the court finds that the contract is illegal and unenfocreable, a second question should be posed which would also lead to greater clarity:

> do the facts justify the granting of some consequential relief (other than enforcement of the contract) to either of the parties to the contract.
>
> In Chandra Sreenivasa Rao v. Korrapati Raja Rama Mohan Rao and Anr., A.I.R. 1952 Madras 579, Subba Rao J., as he then was, while considering the word "object" in s. 23 of the Contract Act in the context of enforceability of the debt secured to celebrate the marriage of the minor which was prohibited by the Child Marriage Restraint Act, held that the word "object" in s. 23 meant "purpose" or "design" of the contract. The purpose of borrowing was unlawful as it was opposed to the public policy of celebrating the marriage of a minor in violation of the statutory provisions, and therefore, the promissory note was held to be unenforcable. An agreement between A & B to purchase property at an auction sale jointly and not to bid against each other at the auction is perfectly lawful, though the object may be to avoid competition between the two. But if there is an agreement between all the competing bidders at the auction sale, be it of the court sale or revenue sale, or sale by the government of its property or privilege and formed a ring to peg down the price and to purchase the property at knock out price, the purpose or design of the agreement is to defraud the

third party, namely , the debtor or Govt. whose property is sold out at the court auction or revenue sale, or public welfare. The object or consideration of the contract, oral or written, to share such property is unlawful. There is also implied "injury to the debtor"

within the meaning of s. 23. Thereby the contract was fraudulent. The contract thus is also opposed to public policy and is void. Take for instance four persons participated at an aution sale; pursuant to their previous agreement, they made pretext of partici pation in the auction; bid upto an agreed price though the real value of the property is much more than what they had offered for. Here the design or object of their forming a ring is to knock out the property for a song to defraud the debtor or public. What is the object of the public policy in this regard ? The scope of public policy was classified into five groups in paragraph 1134 at p. 686 of Chitty's on Contract , 26th Edn., Vol. I, thus:

"Objects which on ground of public policy invalidate contracts may, for convenience, be generally classified into five groups; first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality and fifthly, objects economically against the public interest."

In Halsbury's Laws of England , Fourth Edition, Vol. 9, in paragraph 392 at p. 266 it is stated that an agreement which tends to be injurious to the public or against the public good is invalidated on the ground of public policy.

"The question whether a particular agreement is contrary to public policy is a question of law, to be determined like any other by the proper application of prior decisions" The object of conducting public sale is to secure as much price or revenue as possible to redeem the debt of the debtor or to secure maximum price to the exchequer for use of public purpose. If such a contract to form a ring among the bidders was to peg down the price and to have the property knocked out at a low price would defeat the above economic interest of the debtor or public welfare. Thereby the agreement becomes fraudulent and opposed to public policy and is void under s. 23 . In Ram Lal Misra v. Rajendra Nath Sanyal, A.I.R. (1933) Oudh p. 124 at 127 the finding was that the agreement was not merely of an honest combination between two bidders to purchase the property at an advantageous price but goes further by resorting to secret artifice for the purpose of defrauding a third person, namely, the rival decreeholder. Accordingly, it was held that the agreement was fraudulent and that, therefore, void under s. 23 of the contract Act; Same is the view expressed by the Lahore High Court in Nand Singh @ Ghudda v. Emperor, A.I.R. 30 1943 Lahore 101 and in Hutchegowda v. H.M. Basaviah, A.I.R. (1954)Mysore 29. In Rattan Chand Hira Chand v. Askar Nawaj Jung,J.T. 1991 1 SC 433 this Court held that an agreement to influence authorities to obtain favourable verdict was held to be

opposed to public policy and void under s. 23 and approved the decision of the A.P. High Court in Ratanchand Hirachand v. Askar Nawaz Jung & Ors. A.I.R. 1976 A.P. 112.

An agreement to rig the market for share has been held to be fraudulent and unenforceable in Scott v. Drown, Deorning McNab & Co. [1872]2K.B. 724.

In Halsbury's Laws of England Fourth Edition, Vol. 2, paragraph 746 at p. 383, it was stated that where good were purchased at an auction by a person who had entered into an agreement with another or others that the other or the others, or some of them, shall abstain from bidding for the goods, and he or the other party, or one of the other parties, to the agreement is a dealer, the seller may avoid the contract under which the goods are purchased. Where a contract is avoided by virtue of this provision, then if the purchaser has obtained possession of the goods and restitution thereof is not made, the persons who were parties to the agreement are jointly or severally liable to make good to the vendor any loss he sustained by reason of the operation of the agreement. In Md. Issac v. Sreeramulu, A.I.R.1946 Mad. 289=(1946) 1 Madras Lw Journal, 187 the Madras High court held that an agreement between two bidders not to bid against each other at an auction is not illegal and is not opposed to public policy. The same was followed in Ramalingiah v. Subbartami Reddi, A.I.R. 1951 Mad 390. In Mohafazul Robim v. Babulal, A.I.R. 1949 Nagpur 113 the Nagpur High Court also held that persons agreeing not to bid against each other is not opposed to public policy.

The Division Bench of Delhi High Court in Lachman Das & Ors. v. Hakim Sita Ram & Ors. A.I.R. 1975 Delhi 159 had to consider that an agreement entered into by the parties not to bid at the auction against each other is not opposed to public policy, and therefore, it is not avoid. While upholding the agreement it was also held that where agreements are likely to prevent the property put up for sale in not realising its fair value and to dump the sale would certainly be against public good and, therefore, is void being opposed to public policy. In Cheerulal Prakash v Madadeodas maiyua & Ors., [1959] (suppl.) 2 SCR 406 this court held that though a wagering contract was void and unenforceable under s. 30 of the ContractAct, it was not forbidden by law and agreement collateral to such a contract was not unlawful within the meaning of s. 23 of the Contract Act. A partnership with the object of carrying on wagering transaction was not therefore, hit by s. 23. In Mohomed Meerta v. S.V. Raghunadha Gopalar, 27 Indian Appeals, 17 the sale was impugned, on one of the grounds that the agreement was made for the benefit of the Papanand Zamidar and the appellant, intended to sell the property back to the former when he should be in a position to repurchase it and both of them had combined to dissuade persons from bidding, and did in fact dissuade them. Thereby they purchased the property for lesser price than the real value. The execution was set aside. On appeal, the High Court did not agree with the finding that the appellant and the Jainilabdin and the Papanand Zamindar did combine to dissuade the persons from bidding but fount that the appellant played fraud on the court by suppressing the contract as being a decree holder obtained leave of the count and bid in the auction. Therefore, the sale was void on that ground. On further appeal the judicial committee found that the ground on which the High Court set aside the sale was not pleaded, nor an opportunity given to the appellant. Therefore, for the first time that ground cannot be taken before the High Court and having disagree with the executing court that there was an agreement to dissuade third party to participate in the bid, the sale cannot

be set aside on the new ground. The Privy Council confirmed the sale. On those facts the ratio is of no assistance to the appellant since there is no agreement between the appellant and the respondent to dissuade third party to participate in the bid.

The ratio in Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. & Ors. [1974] 3 SCR 678 is of no assistance to the appellant. Therein the executing court, on the previous occasion, with a view to secure better price did not confirm the sale, the conduct of the second sale, therefore, was held not to be vitiated by any material irregularity. The general principles of public policy discussed by this Court in Central Inland Water Transport Corpn. Ltd. & Anr. v. Brojo Nath Ganguli & Anr., [1986] 2SCR 278 and one of us (K.R.S., J.) in Delhi Transport Corporation v. D.T.C. Mazdoor Congerss & Ors. A.I.R. 1991 SC 190 are of no assistance on the facts in this case. The public policy is not static. It is variable with the changing times and the needs of the society. The March of law must match with the fact situation. A contract tending to injure public interest or public welfare or fraudulent to defeat the rights of the third parties are void under s. 23 of the Contract Act.

From the record it is clear that there were as many as six bidders who participated in the auction, the upset price was fixed at Rs. 1,000. The auction was started with the bid at Rs. 1,000 and ultimately at 20th knock the highest bid of the respondent was at Rs. 5,000. Thus, the facts demonstrate that the agreement between the appellant and the respondent was only a combination to participate at an auction of the evacuee property. There is no intention either to peg down the price or to defraud the Government to knock out the sale at a lower price. Thus, the object of the agreement is not opposed to public policy, and therefore, it is not void under s. 23 of the Contract Act.

Thus, on the facts of this case we have no hesitation to conclude that the impugned agreement between the appellant and the respondent is lawful Contract. The Courts below committed no error of law warranting interference. The appeal is accordingly dismissed, but in the circumstances without costs as we did not call upon the respondent to argue the case.

N.P.V. Appeal dismissed.