Rudragowda Yeshvantgowda vs Gangowda Basagowda Patil on 29 June, 1937

Equivalent citations: (1937)39BOMLR1124, 173IND. CAS.553, AIR 1938 BOMBAY 54

JUDGMENT

Thakor, J.

1. This is an appeal against a decree of the learned First Class Subordinate Judge of Belgaurn, dated March 9, 1933, dismissing the plaintiffs' suit No. 353 of 1931. The suit was brought by the plaintiffs to recover Rs. 14,500 with future interest at ten per cent, from the defendant alleging, in substance, that he had committed breach of a contract dated November 10, 1925, by filing a written statement in suit No. 475 of 1925, and by deposing in contravention of the terms of the agreement of the aforesaid date. The cause of action was expressly based in the plaint on the dates, when the written statement was filed in June, 1927, and when the deposition was :given sometime at the beginning of the year 1929. The reliefs claimed were recovery of Rs. 8,000 paid at the time of the agreement and Rs. 6,500 in addition, which amounts, the plaintiffs alleged, they were entitled to recover from the defendant by reason of the alleged breaches. Plaintiff No. 1 has described himself as Rudragouda, genitive father Yeshvantgouda, adoptive father Pirgouda Patil of Anantpur. That description appears to have been so given by reason of the fact that plaintiff No. 1 was alleged to be the adopted son of one Pirangouda, but his adoption was held not proved in suit No. 475 of 1925 and an appeal was pending against that decision on the date of the present suit.

2. The defence of the defendant was principally that the agreement which he admitted to have executed was illegal and void and that the same was not executed by him voluntarily but was the effect of coercion brought to bear upon him by plaintiff No. 1's father who had launched a criminal complaint at the date of the agreement, presumably for forgery. He pleaded other defences also which are not material for the purposes of this appeal.

3. The learned Judge framed seven issues of which the material issues now would be issues Nos. 3, 4 and 5.

4. Issue No. 2 relating to coercion brought to bear upon the defendant was, found against the defendant and has net been discussed in the present appeal, the decree not having been sought to be supported on that ground.

5. Issue No. 3 was whether the agreement is bad in law as being against public policy?

6. Issue No. 4 was whether there was a breach of the agreement on the part of defendant?

7. Issue No. 5 was what damages are due to plaintiffs for the breach of the agreement?

8. The finding on issue No. 3 was in the affirmative. The finding on issue No. 4 also was in the affirmative. On issue No. 5 it was found unnecessary to find although the learned' Judge has expressed an opinion about the same, and has dealt with it. The conclusion reached on issue No. 3 is recorded by the learned Judge in the following terms :

> The adoption of plaintiff No. 1 as already held by me had never taken place and the agreement was fraudulent as against the real heir of Nilava. The agreement also involves injury to the property of another as laid down in this section (Section 23 of the Indian Contract Act). A prosecution of forgery which was a non-compoundable offence was stifled by this agreement. Whether the prosecution had been actually instituted or it was intended to be instituted, the agreement clearly stifled it. It was therefore opposed to public policy. The consideration; of such an agreement was unlawful and every agreement of which the object or consideration is unlawful was void. Section 24 of the Indian Contract Act lays down that 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. So the present agreement is void for various reasons.

9. The learned Judge also finds that the Hindu law does not recognize any adoption except that of a dattaka son as defined in the Dattaka Chandrika, and that an agreement like the one in suit would involve an injury to the: rights of the adopted son also.

10. On issue No. 4 the finding was given on the admission of the defendant (exhibit 34) that he filed his written statement. It also appears that he gave his deposition in that suit.

11. The final order was that the plaintiffs must fail on the ground that the agreement in suit was void.

12. The appellant's learned advocate apparently seems to have given up the only point, which, according to the judgment, was argued before the lower Court, but has relied mainly on Section 65 of the Indian Contract Act, and has contended that even on the finding of the learned Judge that the agreement was void, which finding he did not contest, he should be awarded the amount of Rs. 8,000 admittedly received by the defendant from the plaintiffs on the date of the agreement, and which amount the defendant has also admitted to have received in his deposition. His argument is that Section 65 is not confined in its operation to contracts, which are not ab initio void, but it equally applies to contracts which are void ab initio though they are determined to be so on a later date. Section 65 on which he relies is in these terms :

> 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.

It is followed by several illustrations, to which it is unnecessary to refer, having regard to the fact that not a single one of the illustrations comes anywhere near the facts of the present case.

13. Mr. Desai has contended that the words " agreement or contract" as used in Section 65 have to be read along with the definitions of these words in Section 2, particularly in Clauses (g) and (h) :

An agreement not enforceable by law is said to be void :

An agreement enforceable by law is a contract.

14. Section 23 of the Indian Contract Act says : "every agreement of which the object or consideration is unlawful is void. "Therefore says Mr. Desai that as the words used in Section 65 are " an agreement discovered to be void," the circumstance that that agreement was void ab initio and was not in the nature of a contract, which became void subsequently, will make no difference to the application of Section 65. The decisions which he has cited in support of his above contention are two. The first is the decision in Gulabchmd v. Fulbai (1909) I.L.R. 33 Bom. 411, s.c. 11 Bom. L.R. 649; and the second is the decision of the Privy Council in Harnath Kuar v. Indar Bahadur Singh (1922) L.R. 50 I.A. 69.

15. Mr. Desai was not prepared to say that the basis of the present decision should not be the findings arrived at in the reversioner's suit, namely, that the adoption of plaintiff No. 1 as well as of Babgouda or Rudragouda, the son of the defendant, did not take place in fact, as he, as I understood him, was prepared to admit that that decision was binding upon the parties. The first question, therefore, that arises is whether Section 65 applies to the facts of the present case, and whether the pleadings in the case justify the application of that section so as to entitle Mr. Desai to rely upon the same in appeal.

16. I may, in passing, mention that even in the memorandum of appeal presented to this Court, the only grounds apparently taken are that the agreement was not void or bad in1 law, and that the lower Court had taken an erroneous view of the agreement relied on by the plaintiff in so holding. Ground No. 6 no doubt does refer to the plaintiff's right to get back the amount of Rs. 8,000 which he had paid to the defendant with interest thereon. But there is no specific ground which would show that the appellants preferred their appeal on the basis of the applicability of Section 65.

17. Now taking the plaint, which has been now translated, it seems to me to be clear that the plaint is based on the agreement and its breach, and the whole amount of Rs. 14,500, including the amount of Rs. 8,000, which was paid to the defendant on the date of the agreement, has been claimed therein by reason of the breaches committed by the defendant by having filed a written statement and having given his deposition in the suit contrary to the terms of the agreement.

18. Paragraph 1 in the plaint expressly says after referring to the agreement "this suit has been based on the aforesaid deed of agreement.

Paragraph 6 says : "in the aforesaid deed of agreement defendant has stated that in case he contravenes the terms mentioned therein, then he (defendant) agrees to pay to plaintiff No. 1 and his father Yeshwantgouda Rs. 8,000 taken by him (defendant) and Rs. 12,000 twelve thousand by way of damages.

Paragraph 8 says: "in the aforesaid suit the aforesaid Rudragouda alias Baba-gouda's guardian ad litem was his father, that is the present defendant, and he in contravention of the agreement filed his objections. He also put in his written statement thereafter and the defendant's son also acted therein contrary to the agreement. The defendant too acted in the same way. Therefore this suit has been filed for recovery of amount as per the terms of the agreement. Cause of action arose at the time when the objections were put in, that is, in the month of June, 1927, or at the time when the statement was put in, that is at the beginning of the year 1929.

Paragraph 12 which refers to the suit No. 475 of 1925, says: "the adoption of plaintiff No. 1 has not been proved in the aforesaid original suit No. 475 of 1925. He has preferred an appeal as against that in the High Court at Bombay. The same is pending there. But this suit has nothing to do either with the proof or non-proof of his adoption in this suit.

19. The final prayer is for the recovery of Rs. 14,500 made up of the two amounts of Rs. 8,000 and Rs. 6,500.

20. On reading the plaint one feels no doubt whatever that the plaint is expressly based on the agreement, and it prays for the recovery of the amount of Rs. 14,500 by reason of the breach, under the terms of the agreement. It appears from the plaint that this is a suit based on the agreement and to enforce the terms of the agreement. In the issues framed after the written statement was filed, which I have already referred to, issues have been framed specifically on the basis of the agreement, it being assumed that if the agreement was void or bad in law the plaintiff would not be entitled to any relief and that if the agreement was good and its breach was proved under issue No. 5 the amount claimed would be recoverable as damages. In his judgment also the learned Judge has dealt with the case on the same basis, giving grounds for the belief that the only point now raised in appeal was not the point urged before the trial Court. In paragraph 11 of the judgment the learned Judge says "the next question is, whether the agreement in suit is bad in law and unenforceable." After dealing with the agreement and the facts in paragraphs 11 and 12, the learned Judge in paragraph 13 sums up by saying that " the agreement amounted to nothing more than creation of false evidence mentioning false facts about plaintiff No. 1's adoption and for compromising a non-compoundable offence." In paragraph 16 also he deals with the authorities on the basis that the agreement was void.

21. The question then arises as to whether on these pleadings, the plaint having been expressly based on the agreement, the plaintiff should not fail, it being conceded in appeal that the agreement was void and that a void agreement cannot be enforced, and that no suit can lie on such an agreement.

22. There may be cases, and there have been many cases, in which by reason of the complexity of facts or the ignorance or the bona fides of the parties this Court is inclined to take a lenient view of the pleadings, and to discuss cases in appeal on grounds which are not apparent on the pleadings or which even were not urged before the lower Court or embodied in the issues. Speaking for myself, to me the plaintiff, who is patil of a certain place, who set about entering into an agreement on the basis of facts relating to an adoption, which never existed, and who on the arguments now conceded set about defeating the rights of the real reversksner by setting up an adoption, which must be assumed not to have taken place at all and therefore not held proved, is not entitled to any of the reliefs now asked for. Therefore on this ground alone it will be sufficient to dismiss the present appeal without going into the other questions argued by the learned advocate for the appellant. However, as the point has been argued I would deal with the same also.

23. I have already read Section 65 of the Indian Contract Act, and I am not inclined to disagree with the contention that Section 65 may, in conceivable cases, cover cases of agreements which are ab initio void. But what Mr. Desai asks us or the effect of what he argues is to almost eliminate the expression "is discovered to be void," his contention being that the words "is discovered to be void " must be read as being almost identical with the words " is void." With that contention I am unable to agree in the absence of any authority cited for the same. In the case of Dayabkai Tribhovandas V. Lakhmichand Panachand (1885) I.L.R. 9 Bom. 358 which related to an alleged wagering transaction, the applicability of Section 65 was considered and1 at p. 362 Mr. Justice Birdwood expresses himself thus :

> If the Plaintiff really sought to avoid the contract on the ground of a mistake as to a matter of fact, common to himself and the defendant, but if, nevertheless, the agreement between them was really a wager, then, indeed, Section 65 of the Contract Act would, apparently, have had no application to the case; for if the agreement was one merely to pay differences, its nature must necessarily have been known to the plaintiff and defendant at the time when they entered into it, and they must be presumed to have known also that it was void. To such an agreement, so known to be void, Section 65 does not, in terms, apply.
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> Then he proceeds to deal with an alternative argument, the result of which and the facts in the case rightly entitled Mr. Desai to say that the previous observations quoted above were more in the nature of an obiter. The decision in, the case of Gulabchand v. Fulbai (1902) I.L.R. 33 Bom. 411, s.c. 11 Bom. L.R. 649 which I have already referred to and which Mr. Desai cited, is not based on Section 65 as Mr. Desai first seemed to argue, for Mr. Justice Batchelor at p. 417 after referring to and discussing; Section 65 says this:
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> But, apart from the observations in Dayabhai v. Lakhmichand which scarcely seem to have been necessary to the decision arrived at, the use of the word 'discovered' introduces certain difficulties in the application of the section to an agreement which is void under Section 23 by reason of an unlawful consideration or object; and we are therefore of opinion that this appeal should be decided on a somewhat different

ground.

> The learned Judge accordingly proceeds to decide the appeal on a ground which particular ground, as I have understood the argument, has not been, urged in this appeal. But the observations make it clear that although Mr. Justice Batchelor did discuss Section 65 and was perhaps of the opinion that it would apply to an agreement ab initio void, in view of the decision in Dayabhai v. Lakhmichand, as well as apart from it, he was not prepared to base the decision of the case itself on that ground. The decision must therefore be read as a decision based on the only alternative ground on which it is-expressly stated to have been based. The decision in Gulabchand v. Fulbai therefore cannot help the appellants in contending that Section 65 applies to this case. I say it cannot help the appellants because to me the facts of this case seem to be of the clearest character in enabling me to attribute the lowest kind of moral turpitude to the plaintiff when he entered into the agreement.

24. The facts which led to the passing of the agreement have been shortly stated in the lower Court's judgment. For convenience I repeat them in this judgment. The defendant was the uncle of one Nilava, the widow of Pirangouda, whose father apparently was dead and who was living with the defendant-respondent in or about the year 1925. The agreement itself recites that Nilava was ill in or about the month of July or August, 1925. I have no-indication, on the present materials or arguments, as to what exactly the position of the present plaintiff or his father was in so far as the relationship to Nilava was concerned; but he appears from the appellant's advocate's statement and the previous judgment to be an. agnate of Nilava's husband. While Nilava was living with the defendant, no adoption set up could succeed unless the defendant helped the person setting up the adoption and passively or actively supported him in the same. Nilava died on August 6, 1925. The agreement in suit was entered into on November 10, 1925. It recites in its first paragraph that it is passed by the defendant for himself and as guardian of his minor son. It refers to some previous talk or negotiation by Yeshavantgouda, the father of plaintiff No. 1, through the defendant for giving Yeshavantgouda's son in adoption and to the intended payment of Rs. 8,000 to Nilava for the purpose, so that she might maintain herself with those Rs. 8,000 relinquishing her entire right of maintenance over the estate of her husband. After this recital it states that as those Rs. 8,000 could not be paid, the adoption never came about. Then it proceeds:

> But in the month of July-August, she was laid up with fever. Then you thinking that it was not good to put off, you, that is Yeshavantgouda, brought Rudragouda from Dharwar by sending wire, and gave him in adoption to Nilawa in our house, on the date the 3rd of the month of August, 1925 A.D. At that time you gave a promise to bring and give Nilawa Rs. 8,000, in words eight thousand rupees, as agreed before, by the evening of that day, from Anantpur. Relying on that promise we consented to the adoption. But neither that day nor even on the next day the amount was received from you as promised. Therefore, on the date the 4th of the month of August, 1925, A.D. Nilawa passed a deed of adoption in favour of my son Rudragouda alias Babagouda, on the stamp paper brought for passing a deed of adoption and she seated the boy on her lap (i.e. took him in adoption). But as Nilawa had a strong

> desire to make an adoption before that, it was decided that if you failed to give your son in adoption about the date of Nagapanchami (corresponding to the 27th of July, 1925) I should give my son by name Rudragouda in adoption to her. Therefore Nilawa got it mentioned in the deed of adoption that (the defendant's son's) adoption took place on Nagapanchami day.
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> The agreement proceeds to refer to a suit and a reference, and then says:
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> If you had paid the said amount of Rs. 8,000 in words eight thousand rupees to Nilawa, she should have given the same to us. And relying upon the words (promise) I looked after her for 5 to 6 years. For this reason you paid me the said amount of Rs. 8,000 in words eight thousand rupees under the amicable settlement, and I have received the same. The said deed of adoption arid deed of reference have been delivered to you. And I make an agreement with you as follows :I and my son Rudragouda shall never contend that your adoption did not take place, or that the same is illegal, or that my son Rudragouda is the legal adopted son of Nilawa. Nor shall I ever make a statement that your adoption did not take place. If I or my son shall act contrary to this agreement I shall pay Rs. 8,000 in words eight thousand rupees taken from you and Rs. 12,000 in words twelve thousand rupees by way of damages in all rupees 20,000 in words twenty thousand rupees. This agreement is binding upon the executors," etc.

25. Now on the facts found by the trial Court in the reversioner's suit it was clear that during the illness of Nilava the two parties to the suit thought of setting up adoptions. The adoptions have been found never to have taken place, and in spite of no adoptions having taken place both the parties by their agreement in effect conspiredI use the expression as my ownto defeat the claims of the reversioners, the plaintiff's father by setting up the adoption of his son and the defendant by agreeing passively or actively to support that fictitious adoption and undertaking not to set up his own son's adoption. It is true that the findings of the trial Court have to a certain extent been modified in appeal, the learned Judge having expressed himself more moderately. But the effect of the judgment, as admitted in the course of the argument, is that the present suit must be decided on the basis that neither of those adoptions in fact took place. If that is the basis on which the present suit has to be decided, it follows that there being no adoption at the date of the agreement in November, 1925, both the parties were aware that there was no adoption by Nilava of either of them, and they created evidence of this agreement in order to enable the plaintiff to succeed in setting up his adoption. In fact, it appears that the plaintiff at the date of the suit of the reversioner had got possession of the properties left by Nilava, and was also relying upon the agreement in suit in that previous suit. No attempt having been made to prove the adoption now, it follows that the agreement was known to be void and was intended not only to defeat the claims of the reversioners but to defeat them either by perjured evidence or by deliberate and intentional suppression of the truth. It has been conceded that such an agreement is void under Sections 23 and 24 of the Indian Contract Act. I go further and say that such an agreement is a fraudulent agreement. It is an attempt to defeat the rights of persons legitimately entitled to property by dishonest means, including perhaps perjury.

26. It is material to note as have already stated, that the plaintiff could not have succeeded in setting up the adoption without the defendant's aid, and the Rs. 8,000 paid to the defendant therefore were to bribe the defendant with whom Nilava was living, so that the plaintiff's work of setting up the fictitious adoption may by case. The learned advocate for the appellants has cited no case in which the principle of Section 65 has been applied so as to entitle the party, who is a party to such a fraudulent agreement, to seek the assistance of the Court in recovering back the amount paid, and unless I felt my hands forced by authority, my own inclination is not to apply the provisions of Section 65 or the principle underlying it to facts such as the present.

27. The only other case which Mr. Desai referred to, namely, the decision in Harnath Kuar v. Iridar Bahadur Singh (1922) L.R. 50 I.A. 69 has no bearing on the present point, because I have not disputed the proposition that Section 65 may, in conceivable cases, apply to agreements which are ab initio void. It is not an authority for the proposition that agreements which were not only known to be void but were initially bad and fraudulent as against others and intended to defeat the administration of justice the fraud being necessarily known to both the parties to the agreement would be covered by Section 65. In Harnath's case their Lordships said as follows (p. 76):

> The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.
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> Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think 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 the private rights of Indar Singh in. the villages which he purported to sell by the instrument of January 2, 1880, 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, and that was well within the period of limitation.
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> While I concede, therefore, that Section 65 may apply to agreements void ab initio, when there has been some misapprehension, I do not regard this ruling as an authority for the1 proposition that it must also apply to agreements not only void ab initio but known to be so from the beginning and a fortiori to agreements of a fraudulent nature involving moral turpitude on the part of the parties to it. I must say in passing that Mr. Desai also relied upon this decision to entitle him to argue the applicability of Section 65 in spite of the suit being in terms based on the contract itself to enforce the agreement. As I have already said, the facts of this case are entirely different, and because on the facts of that case their Lordships took a lenient view of the pleading, it does not follow that I should regard this as an authority to compel me to take a lenient view of the pleadings in the present case also.

28. I have so far dealt with the cases referred to by Mr. Desai.

29. The learned advocate for the respondent has referred to the decision in Ledu Coachman v. Hiralal Bose (1915) I.L.R. 43 Cal. 115 which dealt with a suit to enforce a contract for the return of money paid to a Nazir to secure an appointment as a District Court peon for the plaintiff's son, and held that such a suit was not maintainable. The judgment deals with numerous authorities and at p. 120 concludes as follows:

> It is plain, therefore, that the contract, which is the foundation of this suit, is based on an unlawful consideration, is opposed to public policy and is void. It follows that, under such circumstances, when the illegality of the contract has been made to appear, the law wit not extend its aid to either of the parties who will be left to abide the consequences of their own act. We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to perform his part of the agreement. 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.
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> I admit that the facts on which the present remarks are based are slightly different. But on the view of the facts, as I have been constrained to take, of the present agreement between the parties, I prefer to apply these observations to the present facts than observations to be found in other cases relating to transactions of a more innocent nature.

30. In the course of the arguments of the learned advocate for the respondent a decision of the Madras High Court in Thmgammal Aiyyar v. Krishrtan (1929) I.L.R. 53 Mad. 309 was noticed, and Mr. Desai for the appellants in the course of his reply also relied on certain observations to be found at p. 316 therein. The case dealt principally with Sections 28 to 30 of the Legal Practitioners Act and the learned Judges following the previous authorities of that Court on Section 28 came to the conclusion that although an agreement between a pleader and client may be void by reason of its being a verbal one, still monies could be recovered for services rendered by the pleader under the agreement. It is enough to say that the facts in that case stood on an entirely different footing from the facts in the present case, and in the absence of any authority of our own High Court, that monies paid on a fraudulent agreement like the present one, could as of right be recovered with the assistance of the Court, I should be unwilling to extend the principle of this Madras decision to the present facts.

31. I may note in passing that although no other decisions have been referred to on Section 65 at the bar, even in cases apparently, assisting Mr. Desai's contention, for instance the decision in Srinivasa v. Sesha (1917) I.L.R. 41 Mad. 197 Section 65 has been held not to apply to agreements which are not discovered to be void. My conclusion, therefore, is that the present agreement being, as I have tried

to indicate, of a fraudulent nature, known to be illegal involving moral turpitude on the part of the plaintiff and, as stated by the learned Judge being an agreement amounting to nothing more than creation of false evidence mentioning false facts about plaintiff No. 1's adoption and for compounding a non-compound-able case, Section 65 would not apply to such an agreement.

32. Mr. Desai has not cited any authority for the proposition that if Section 65 had applied, the Court would have been obliged to direct restitution, and even if I had held that Section 65, which enunciates the principle of equity, had applied, I should have considered the further question as to whether the Court was bound in this particular case to direct restitution of the amount of Rs. 8,000, with or without interest.

33. The appellants' learned advocate's alternative argument is that, as in this case the agreement has not been carried into effect, on general principles of a or equity, his client should be held entitled to restitution, particularly as the defendant is in no better position than his clients. I agree that the defendant apparently is in no better position, and the learned Judge has himself found that both the parties to the agreement are equally guilty. But it is the plaintiff who seeks the assistance of this Court in recovering the amount, and before the Court could be asked to apply equitable considerations to him, he should demonstrate to the Court that there is some equity in his favour. As I have already stated, in the present case the suit was based on the agreement and its breach. It was framed as a suit td enforce the agreement. The defences, which might have been raised, if the position had been clearly stated in the plaint that the plaintiff was relying upon equitable considerations, might have been raised, and issues would have been framed, and evidence led on the point to show that the plaintiff's present case, viz., that the agreement was never carried into effect, was not correct or true. It will not be quite fair; in my opinion, therefore, to the respondent to allow the appellant to succeed on this new ground which is not even indicated in the grounds of appeal. But even on the materials presented to the lower Court and on the evidence in the case, I am. not prepared to concede that the plaintiff has shown that the agreement has not been carried into effect wholly or in part, that is either partially or wholly.

34. Mr. Desai was good enough to point out the written statement of his client in the previous suit wherein he admitted that he was in possession of the properties of Nilava. The defendant has gone into the witness-box in the present case and has also made a statement that Yeshwantagouda began to officiate as patil on behalf of plaintiff No. 1 and that he took possession of all the lands and houses of Nilava. The possession of the properties at the date of the reversioner's suit is admitted to be with the present plaintiff No. l's father. He relied upon the agreement of adoption. It would be difficult to say under these circumstances that he was able to recover possession of Nilava's properties without the passive acquiescence or support of the defendant. The plaintiff would have continued further to be in possession, and did continue to be in possession until the reversioner's suit was decided. It is difficult therefore to say that the present agreement was not partially carried into effect by the defendant before he committed the breach of it by filing his written statement in the suit. The agreement itself further refers to some proceedings by way of prosecution of the defendant, which proceedings were apparently dropped. It would be difficult therefore to say in the absence of fuller materials and pleadings that that part of the agreement also was not carried into effect. The offence, if any, on the part of the defendant would be, by reason of the ante-dating of his son's adoption in

the adoption deed, something like forgery which would be a non-compoundable offence. Therefore I am not prepared to say, or accede to Mr. Desai's argument, and assume that the agreement was not at all carried into effect. The question therefore of the application of the principle, which he relies upon, namely, that where the intended fraud has not been carried out, and the contemplated harm has not been done and where both the parties are equally guilty, restitution should be ordered as a matter of equity, need not further be considered. The respondent's learned advocate has also objected to his new point being taken in the absence of materials and, on the facts I have stated, I am not prepared to rule out that objection.

35. I have dealt with all the points which the appellants have taken in the appeal, and in my view the appeal must be dismissed with costs.

36. I may add that the decision might have been different if we were dealing with an agreement of a different nature; but on the present agreement the view of the learned Judge that the plaintiff's suit should be dismissed, must prevail.

Wassoodew, J.

37. I agree that the consideration for this agreement is tainted with illegality and therefore the essential basis of the suit to recover damages for its breach fails. On the claim made for the first time in appeal for restitutio in integrum it seems to me that, although there is no distinction as to the effect of illegality on the validity of an agreement, a distinction must be observed between the character or degree of turpitude creating illegality in the application of the provisions of Section 65 of the Indian Contract Act upon which the claim for restitution is founded. A contract might be invalidated by reason of a matter of substance, or by the provisions of a statute such as a statute prohibiting members of a local authority from being interested directly or indirectly in contracts of the local authority, or by reason of the failure to conform to the forms required by statute, or by the destruction of the subject-matter as in a lease of premises (See Dhuramsey v. Ahmedbhai (1898) I.L.R. 23 Bom. 15) or by the performance being made impossible by reason of the prohibition of export of goods (Boggicma & Co. v. The Arab Steamers Co., Ltd (1915) I.L.R. 40 Bom. 529 s.c. 18 Bom. L.R. 126); or, there might be failure to give possession by the interposition of circumstances beyond the control of the contracting parties (Mahabir Prasad Pande v. Gctnga Dikal Rai (1919) I.L.R. 42 All. 7); or, a contract of lease or sale might become impossible of performance by reason of compulsory acquisition of the premises by Government (Muhammad Hashim V. Misti (1921) I.L.R. 44 All. 229). In all such cases it is possible to suppose that the contract becomes void notwithstanding the willingness of the parties to perform their part, and Courts have ordered the restoration of the advantage which one party has gained over the other.

38. But the question arises whether the provisions of Section 65 could apply if in its origin an agreement was induced by fraud or the contracting parties were animated by fraudulent object or purpose and it was known to both parties to be illegal or immoral at the time of the agreement. It is difficult having regard to the decision in Harrktth Kuar v. Indar Bahadur Singh (1922) L.R. 50 I.A. 69 to suggest now that a contract ab initio void cannot be brought within the operation of Section 65 of the Indian Contract Act. Their Lordships of the Judicial Committee were not however dealing in

that case with an agreement whose consideration was opposed to public policy or whose illegality was expressed in the promise or found in its purpose and object. They were dealing with a case where there was a misapprehension as to the private rights in property which was alienated by one by the instrument. There although the sale was from its inception void, nevertheless, upon discovery of the true nature of those rights Court was prepared to grant restitution under the provisions of Section 65. That section deals with agreements discovered to be void. As observed in Gulabchand v. Fulbai (1909) I.L.R. 33 Bom. 411, s.c. 11 Bom. L.R. 649 there is no " express reference to the cause or origin of the void character" and the " use of the word ' discovered' introduces certain difficulties in the application of the section to an agreement which is void under Section 23 by reason of an unlawful consideration or object." There the Court was dealing with a marriage brokerage contract and it refused to apply the provisions of Section 65.

39. The argument of the learned advocate for the appellant is that there is no distinction whatsoever between malum prohibitum and malum in se in the consideration of the effect of illegality on the claim to restitution. Although there is no direct authority of this Court on the point, upon general principles it seems to me that an action for restitution of the benefit under an agreement which is founded on fraud cannot be maintained; ex turpi causa non oritur actio. The effect of the judgment in the prior suit has been discussed very fully by my learned brother, and, it is legitimate to infer upon the findings in that suit that the parties were aware that they were setting up a fraudulent adoption supported by false evidence to defeat the succession of the real owner to the property. There are other circumstances referred to by my learned brother, of which the parties were conscious, betraying a similar fraudulent design. In the language of Section 23 of the Indian Contract Act the consideration or object of an agreement is lawful, unless it is fraudulent; or involves or implies injury to the persons or property of another. Inasmuch as the defendant undertook not to expose the fraud but connive at it, it was immoral and opposed to public policy. Fraud not only means an active fraudulent participation in supporting a false claim but also the active concealment of a fact by one having knowledge or belief of the same. When, therefore, the parties were aware that they were entering into an agreement of that kind, there can be no question of discovery of fraud which avoided their act. Sufficient emphasis has been laid in Gulabchand v. Fulbai on the word "discovered" in Section 65 of the Indian Contract Act to suggest that it is an essential condition precedent to the granting of relief under that section that the illegality should be discovered at a later stage of the agreement. It might be said that the same thing can be predicated in a marriage brokerage contract. That contract, in my opinion, stands on a different footing and has been treated so having regard to the notions of the community in this country. But where, as here, the action is indefensible, it will lead to the gravest possible injustice if a claim of this nature could be sustained in a Court of Justice. With respect I agree with the observations in Ledu Coachman v. Hiralal Bose (1915) I.L.R. 43 Cal. 115 as to the effect of countenancing a claim to restitution of an advantage gained under an immoral agreement. Wilmot L.C.J., in the leading case of Collins v. Blmtern (1765) 2 Wils. K.B. 314 when dealing with an immoral agreement, made the following observations :"It is a contract to tempt a man to transgress the law, to do that which is injurious to the community : it is void by the common law; and the reason why the common law says such contracts are void, is for the public good!. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. "That was a case in which it was proved that the bond had been given to the obligee as an indemnity for a note entered

into by him for the purpose of inducing the prosecutor on an indictment for perjury to withhold his evidence. It seems to me, therefore, that the words " discovered to be void " govern the application of the provisions of Section 65 and they cannot be extended to all agreements which are void under Section 24 of the Indian Contract Act by reason of unlawful consideration or object. The illegality here is both in the matter of consideration and the promise itself as expressed in the agreement and also in its purpose. Consequently no relief can be granted under the provisions of Section 65 of the Indian Contract Act.

40. With regard to the broader equitable claim to relief urged in this case, a complete answer has been given by my learned brother that having regard to the fact that fraud has partly succeeded, at least in temporarily keeping the rightful owner out of possession of the property, and also out of the watan, that relief cannot properly be claimed or granted. Cases have been referred to in which Courts have refused to grant relief on the ground that fraud has partially succeeded(See Kama Row v. Nukamma (1908) I.L.R. 31 Mad. 485 and Govinda Kuar v. Lala Kishtm Prosad) (1900) I.L.R. 28 Cal. 370. When a claim to equitable relief is made, the party making it must establish that he comes with clean hands. That cleanliness is entirely lacking in this case.

41. I, therefore, agree with the order proposed that the appeal should be dismissed with costs.