In view of the ratio of the decision in 2008 S.A.R.(Civil) S.C. P.286 *Tiruvangada Pillai v. Navaneetthammal and another* (supra), it is respectfully submitted comparison of the disputed handwriting/finger impression with the admitted one without the assistance of the expert is hazardous and risky and the Courts should not take the risks of a hazardous role of an expert.

In 2004 ALD Digest Part March @ 156 Kerala

It is held "It is not advisable for a Judge should take up on himself the task of comparing the admitted writing and the disputed one find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.

It is respectfully submitted a Court of Law, cannot exercise it's a discretion *de hors* the statutory law, its discretion must be exercised in terms of the existing statute, and it is therefore submitted for reconsideration of the decisions covered by 2006 (3) ALD 673, 2007 (3) ALD 145 and 2004 (5) ALD 700 as it appears the various views of the Supreme Court (supra) are not brought to the knowledge of the Honourable High Court which however appear to have been impliedly over ruled by 2008 SAR (Civil) 286 of the Supreme Court.

WHETHER THE MAXIMS, EX TURPI CAUSA NON ORITUR ACTIO' AND EX DOLO MALO NON ORITUR ACTIO' DO NOT APPLY TO CASE WHERE THE PLAINTIFF PLEADS IGNORANCE OF A STATUTORY PROHIBITION ?

By

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1. The meaning of the age old legal maxim *Ex turpi' causa, non oritur actio*' is 'no cause of action would arise out of an act of turpitude'; and the meaning of the maxim '*Ex dolo malo non oritur actio*' is 'No Court will lend its aid to a man, who founds his cause of action upon an immoral or an illegal act.'

2. While implementing the said maxims, the Courts used to uphold that a party to an illegal contract cannot invoke the aid of a Court to have such a contract carried into effect, as law will no tolerate any part to violate any moral or legal duties; and that, if from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* on the transgression of a positive law of the country, the Court says he has no right to be assisted and it is upon that ground the Court goes, not for the sake of the defendant, but because, it will not lend its aid to such a plaintiff.

3. In *Immani Appa Rao v. G. Ramalinga Moorthy*, AIR 1962 SC 370, The Apex Court adopted the rule enunciated by Lord *Mansfield*, CJ., in *Holman v. Johnson*, (1775) 1 Cowp. 341, as the true principle which should govern the decision in such cases founded on *ex turpi causa.*

Mansfield C.J. said thus :

> "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake,

however, that the objection is ever allowed but it is founded on general principles of policy, which the defendant has he advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio*, No Court will lend its aid to a man, who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* on the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but, because they will not lend their aid to such a plaintiff"

The facts in the said Supreme Court's case relate to a transfer of property in breach of the creditors of the transferor and the transferor retained possession. So the transferee for possession laid the suit. The Suit failed. The leaned Judges observed that out of the two confederates in breach, one wanted a decree to be passed in his favour and that meant, he wanted the active assistance of the Court in reaching the properties, possession of which has been withheld from him by the other. The defence of breach was set up. It was observed that, if the defence was shut out, the party to the breach would be entitled to a decree and that meant assisting a party to the breach and the Court would be used as an instrument of breach, which is clearly and patently inconsistent with public interest. It was observed that there was no question of estoppel in such a case. The learned judges concluded at Page 376 thus :—

"Therefore, we are inclined to hold that the paramount consideration of public interest requires that the plea of breach should be allowed to be raised and tried and if it is upheld, the estate should be allowed to remain where it rests. The adoption of this course, we think is less injurious to public interest than the alternative course of giving effect to a fraudulent transfer."

4. A Division Bench of A.P. High Court, following the above referred decision of Supreme Court AIR 1962 AP 209 (DB), held that none of the parties to an illegal partnership can lay an action *inter se* for recovery of moneys invested thereunder. The facts in that case are : Two persons entered into a partnership to run a motor transport under the name and style of Sri Venkateswara Motor Transport, Rajahmundry, which was illegal and *void ab initio*, as contravening the provisions of Section 59(1) of the Madras Motor Vehicles Act. One of the partners filed a suit for dissolution and rendition of accounts of partnership or alternatively, for recovery of the share capital advanced by the plaintiff. The lower Court dismissed the suit for accounts on the finding that the partnership was illegal and *void ab initio*, as contravening the provisions of Section 59(1) of the Madras Motor Vehicles Act but granted the relief prayed for in the alternative by decreeing the suit for Rs.40,000/- with subsequent interest; on appeal to A.P. High Court, the short question that fell for consideration of the High Court was "*Whether the moneys advanced by way of capital for an illegal partnership could be recovered*." The said Division Bench referred to an earlier Division Bench AIR 1959 AP 647, where the same view was expressed with regard to the enforceability of obligations by either party to an illegal contract. The legal position has been stated in the said judgment at page 649 as follows :

"On this premise, the contract entered into between the first defendant and the plaintiff for making purchase of tobacco is illegal, being prohibited by the relevant sections of the Act. The true legal position has to be appreciated. It is now well settled that a party to an illegal contract cannot invoke the aid of a Court to have such a contract carried into effect, as law

> will not tolerate any party to violate any moral or legal duties. As a corollary from this principle, if money is advanced, for a purpose which is either opposed to morals or law or in furtherance of an illegal transaction, such advance is not recoverable having regard to the maxim *ex turpi causa non oritur* action. But, this is subject to an exception. The law allows local penitential. So, before breach, if an illegal purpose is carried out, the money may be recovered from the person to whom it was advanced. But, the Court will not render any assistance in the recovery of money, if there is even a part-performance of the illegal contract."

5. Under the wake of the above stated proposition of law laid down by the Supreme Court way back in 1966, a learned Single Judge of A.P. High Court, relying on AIR 1974 SC 1892, held, in a decision reported in 2007 (5) ALD 285, that "Courts are justified both in law and equity in ordering refund of money paid as sale consideration of an assigned land, which transfer was prohibited by A.P. Assigned Lands (Prohibition of Transfer) Act 1977 (Act No.9 of 1977), while holding, that specific performance of agreement of sale of assigned lands cannot be granted".

The facts in this case are : The plaintiff filed the suit praying for the relief of specific performance of possessory-sale-agreement executed by defendants in favour of the plaintiff in respect of the plaint schedule land or in the alternative for a decree directing the defendants to repay the sale consideration of Rs.20,000/- paid by the plaintiff to them with interest. The trial Court as well as the first appellate Court arrived at a conclusion that, inasmuch as the lands in question are assigned lands and non-alienable lands by virtue of the statutory prohibition imposed by the Act A.P. Assigned Lands (Prohibition of Alienation) Act 1977 (Act No.9 of 1977) the contract cannot be enforced; but, both the Courts decreed for the refund of the sale amount with interest to the plaintiff. In the second appeal before A.P. High Court, the learned Single Judge, relying upon a decision of the Supreme Court reported in *Kuju Collieries v. Jharkand Mines*, AIR 1974 SC 1892 and also referring to Section 65 of the Indian Contract Act, 1872, held as follows : This Court is thoroughly satisfied that both in law and equity, a just order had been made, while ordering the refund with reasonable interest and hence this Court does not see any reason to disturb such concurrent findings, which had been recorded by both the Courts below and accordingly the said findings are hereby confirmed. (The trial Court granted the alternative decree for refund of the sale consideration of Rs.20,000/- with interest at the rate of 12% from the date of suit till date of payment and created a charge for the said amount over the plaint schedule property and for a permanent injunction and certain other ancillary reliefs.

6. At page 292 column No.2, the relevant portion of the Supreme Court's judgment reported in AIR 1974 SC 1892, was extracted by the learned judge, which is as follows :

> "Section 65 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 Section 65 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 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 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 it was lawful (Sic, unlawful) and, therefore, void there was no 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."

At this juncture, it is apt and necessary to know what is contained in Section 65 of the Indian Contract Act, 1872, which is extracted hereunder.

"*Section 65 of the Indian Contract Act* :—

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 contact is bound to restore it or to make compensation for it, to the person from whom he received it." To understand fully the provisions of Section 65 of the Contract Act, the following illustrations may be visualized :

(a) A, Hindu intends to marry B a Hindu. Out of love and affection A settles a property and also gives possession of the same to B. Thus, there is an agreement between A and B, which can be lawfully enforced and hence the said agreement is a contract.

(b) In the above illustration, A intends to marry B and settles upon B a property X and gives possession of the said property to B; but, before A marries B, A comes to know that B is already married to C who is alive and that the said marriage between B and C is still subsisting. So, A resiles from the said marriage proposal with B and asks B for restitution of the property X to him. A is entitled to such restitution under first part of Section 65 of the Contract Act, 1872, inasmuch as the stage is only at that of an agreement and that agreement cannot be enforced, as B is already married to C, who is alive and as such, the intended marriage of B with A is prohibited under law and hence the said agreement was void. This void nature of the agreement was discovered at a later stage, after the agreement was entered into.

(c) In the same illustration, suppose A in consideration of B marrying him, settles a property X in favour of B Suppose, after such agreement, which is lawful and enforceable, B is abducted by C and C marries B. Then, A cannot marry B and demands B for restitution of the property X. A is entitled for such restitution from B and B is bound to restore the said property X to A. Here, the agreement between A and B, which is lawful and enforceable at its inception, became void due to subsequent happening, to wit, B, being married to C, whether voluntarily or involuntarily. This circumstance comes within the second part of the Section 65 of India Contract Act, 1872. The Supreme Court decision reported in AIR 1974 SC 1892, does not say that, where, at the time when the agreement is entered into between the parties, both parties know, that such an agreement was unlawful and, therefore, unenforceable and hence void, the party, who had 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.

7. If parties enter into an agreement in the teeth of a statutory prohibition, none of them should be allowed to be heard, if he says that he does not know the said statute and hence he entered into such agreement or contract and so, if the said transaction could not take place as being prohibited under the said statute he is entitled for restoration of the property and the other party is bound to restore the advantage which he obtained under such void agreement or contract. If such a plea is allowed by Courts and order for restitution on equitable grounds, then every law-breaker can take the rescue of the Court and obtain restoration from Courts, in which process the Courts would become instrumentalities for giving assistance to a law breaker, which is against the maxim '*Ex dolo malo non oritur actio*'.

8. The learned Judge delivering judgment in 2007 (5) ALD 285, did not actually peruse the last two sentences stated in the Supreme Court decision referred to by the learned Judge at Para 22 Page 293, which are as follow :

> "22……..But, where even at the time when the agreement is entered into both parties knew that it was lawful (sic. Unlawful) and, therefore, void, there was no 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, 1872 does not apply."

So, from the clear and unequivocal statement of the Apex Court, it is laid down that Section 65 of Indian Contract Act 1872 has no application, where both parties to the agreement know that it is unlawful for them to enter into such an agreement.

9. Now the point for consideration is, can a person be heard to say the he does not know the A.P. Assigned Lands (Prohibition of Alienation) Act, 1977 (Act No.9 of 1977) at the time when he entered into an agreement of sale for such prohibited lands ? It is the law of the land that no person, whether literate or illiterate, should be allowed to say that he does not know what the law of the land is "*Ignorentia juris non excusat*." It is no excuse for a citizen of a country to say that he does not know the law of the land, as ignorance of law is no excuse.

10. So, in the said decision, having held that the plaintiff therein cannot be granted any relief of specific performance of a contract for sale of assigned lands of the Government as being statutorily prohibited under Section 3 of Act No.9 of 1977, the learned Judge ought not have been satisfied, that relief of refund of the so called sale price of Rs.20,000/- with interest as decreed by lower Courts on equitable grounds is in accordance with law and equity, as it is the basic and fundamental jurisdictional point for a Court to hold that equitable relief cannot over come the statutory prohibition and equity has no place where law is clear and specific.

11. So, I am of the honest view that the decision reported in 2007 (5) ALD 285, is not in accordance with the earlier Supreme Court and Division Bench decision of A.P. High Court reported in AIR 1959 AP 647 and another Division Bench decision of A.P. High Court reported in AIR 1966 AP 209 (DB), which are binding on the learned Judge, who delivered the said judgment and as said earlier binding decisions are not placed before the learned Judge, while delivering judgment reported in 2007 (5) ALD 285, the learned Judge had held that, under Section 65 of the Contract Act, 1872, the defendants therein are bound to refund the advantage, which the defendants received from the plaintiff with interest, even though the defendants therein are not entitled for specific performance of the agreement for sale of assigned lands of the Government, whose alienation is prohibited under Section 3 of

Act No.9 of 1977 and hence, in my honest opinion, the said judgment of the A.P. High Court reported in 2007 (5) ALD 285, is *per incurriam* and not a binding authority for the law declared in the said judgment to wit, that the purchaser of assigned land, the sale of which is prohibited under Section 3 of A.P. Assigned Lands (Prohibition of Transfer) Act, 1979 (A.P. Act No.9 of 1979), is entitled for the refund of sale price with interest, even though he is not entitled for specific performance of getting a registered sale deed executed in his favour by the defendant and in case, the defendant refuses to so register, get the same executed and registered by Court.

CHILD LABOUR
Welcome measures, half-hearted actions

Child welfare, elimination of child labour and right to education: International commitment and Constitutional mandate; Supreme Court directions and Legislative measures; Failure of legislative measures: A critical study

By

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Publishers : ANDHRA LEGAL DECISIONS
21-1-985, Opp. High Court Bldgs., Hyderabad - 02
Ph: 66710278, 6671029, 24578310

Edition 2008 Price Rs. 425/-

a. BANNING OF EMPLOYMENT OF CHILDREN AS DOMESTIC LABOUR OR SHOP HANDS

It is heartening to note that the government is determined to eliminate child labour, which has been considered one of the worst forms of child exploitation and abuse, and which has been playing havoc with the lives of lakhs of children and spoiling their future. By addition of employment of children as domestic workers and/or servants/as shop hands in dhabas (road-side eateries), restaurants, hotels, motels, tea-shops, resort, spas or other recreational centers, as entries 14 and 15 respectively in Part A of the Schedule to the Child Labour (Prohibition and Regulation) Act 1986 under the heading "Occupation", the Government has banned employment of children who have not completed their 14th year, as domestic labour or shop hands. A notification providing for three months notice was issued under Section 4 of the Act on July 10, 2006 to add the specified occupations in the Schedule to the Act [Notification No. S.O. 1029(E), dated July 10, 2006, published in the Gazette of India, (Extra.), Part II Section 3(ii), dated 10th July, 2006, p.2, No.711] and on expiry of the notice period, the amendment to the Act was enforced by issue of a fresh notification by the labour ministry on October 10, 2005 [Notification No.S.O. 1742(E), dated October 10, 2005 published in the Gazette of India, (Extra.), Part II, Section 3(ii), dated October 10, 2005]. With the enforcement of ban, engaging child as domestic help has