NOTES OF CASES

ILLEGALITY AS A DEFENCE

Palaniappa Chettiar v. *Arunasalam Chettiar*
Chai Sau Yin v. *Liew Kwee Sam*

Two recent Malayan cases on illegality of contract have gone up to the Privy Council. The strict application by the courts of the principle of *ex turpi causa non oritur actio,* is clearly illustrated in these cases. The sternness of the application of this principle seems to have been envisaged as far back as 1940.[1] Yet the strict application of this principle can at times lead to injustice being done, especially when the cases are looked at in the light of the maxim *in pari delicto.* This can be seen when one examines these two Malayan cases, which are: *Palaniappa Chettiar* v. *Arunasalam Chettiar*,[2] and *Chai Sau Yin* v. *Liew Kwee Sam.* [3]

In *Palaniappa Chettiar's* case the facts were fairly straightforward: — In 1934, the plaintiff (the respondent in the Privy Council) bought 40 acres of rubber land. He was already in possession of 99 acres of rubber land so that, with the new purchase, his total holding of rubber land exceeded 100 acres. By virtue of the Rubber Regulation [4] a person holding more than 100 acres of such land was to be assessed by the Assessment Committee, whilst a person holding below 100 acres was to be assessed by the local District Officer.

In order to remain within the jurisdiction of the local District Officer the respondent, in 1935, transferred 40 acres of his rubber land to his son, the defendant (the appellant in the Privy Council). In the memorandum of transfer the respondent acknowledged having received $7,000 in consideration of the transfer of the land. It was, however, found, as a fact, by the trial judge, that no money was paid by the appellant. The transfer was duly registered and the certificate of title, showing the appellant as the proprietor of the 40 acres, remained in the possession of the respondent all the time. The respondent also received the income of this property and paid the salaries and the taxes on the 40 acres of land. In 1950, the appellant refused to give the respondent a power of attorney for the sale of the property. As a result of this, the respondent brought an action for a declaration that the appellant held the property in trust for the respondent and also for an order that the property be transferred back to him. Smith J., referred

1. "These general formulae are found in experience often to distract the court's mind from the actual exigencies of the case and to induce the court to quote them as ready made solutions." — *per* Lord Wright, *Lissenden* v. *C.A. & Bosch Limited* [1940] A.C. 412 at 435.

2. (1962) 28 M.L.J. 143.

3. (1962) 28 M.L.J. 152.

4. No. 17 of 1934.

to the decision of the Court of Appeal in *Sajan Singh* v. *Sardara Ali.*[5] He said that[6]:

> In view, however, of the Court of Appeal decision in *Sajan Singh's Case,* it appears that the plaintiff's possible turpitude is no reason for denying him the order which he seeks.

Sajan Singh's case is, therefore, of importance in the discussion of the present case. The facts in *Sajan Singh's* case were as follows: — By Regulations made by the Commissioner for Road Transport of Malaya,[7] no person was allowed to use a motor-vehicle for the carriage of goods without a haulage permit. In 1948, the defendant bought six second-hand vehicles from the British Military Disposals Board. Plaintiff paid part of the price of this purchase on the understanding that one of the vehicles should become his property. Although the lorry was owned and operated by the plaintiff for the carriage of goods on his own account, the defendant registered the lorry in his own name. In this way he obtained a haulage permit, authorising the use of the lorry by himself or his employees. Had the authorities known the true facts they would have refused to issue the licence for the lorry. The policy of the authorities was to grant haulage permits only to those who had one before the War. The defendant was eligible for the licence whereas the plaintiff was not. By acting in this manner, the plaintiff and the defendant deceived the public administration. In 1955, the defendant removed the lorry from the plaintiff's possession without his consent and refused to return it. The plaintiff brought an action against the defendant for the return of the lorry or its value.

Although no illegality was pleaded in *Sajan Singh's* case, the trial judge (who was also the trial judge in *Palaniappa Chettiar's* case), took into consideration the illegality of the transaction and applied the maxim *ex turpi causa non oritur actio.* The Court of Appeal reversed this decision[8] and stated that the action was not one based on the contract. Hence the maxim *ex turpi causa non oritur actio* was inapplicable. This decision of the Court of Appeal was affirmed by the Privy Council,[9] where it was held that the action was either an action in trespass to goods or in detinue.

In *Palaniappa Chettiar's* case the trial judge held himself bound by the decision of the Judicial Committee in *Sajan Singh's* case. It is felt that that case was not an authority on the question of illegality of contracts. In spite of the fact that *Sajan Singh's* case arose as a result of an illegal transaction the *ratio decidendi* of the case seems to be based on trespass to goods rather than on illegality of contract. In *Palaniappa Chettiar's* case[10] Smith J., was, therefore, at liberty to determine the question of illegality without having to follow *Sajan Singh's* case.

The Court of Appeal affirmed the decision of the trial judge in *Palaniappa Chettiar's* case. It was held that the son (appellant) held the property as a trustee of the father (respondent). The court disagreed with the trial judge's interpretation of *Sajan Singh's* case. It was also held that the appellant could not raise the question of illegality, *i.e.* the fraudulent purpose of the father, for the first time, in the Court of Appeal. The court relied on the words of James L.J., in *Haigh* v. *Kaye*:[11]

5. (1957) 22 M.L.J. 165.
6. These words were quoted by the Judicial Committee.
7. Pursuant to powers conferred on him by the Road Transport Proclamation of October 6, 1945.
8. Unreported.
9. (1960) 26 M.L.J. 52.
10. (1962) 28 M.L.J. 143.
11. (1872) L.R. 7 Ch. App. 469 at 473.

> If a defendant means to say that he claims to hold the property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it.

To this the Court of Appeal added:

> Here, of course, the defendant has said nothing of the sort.

The Privy Council[12] reversed the decision of the Court of Appeal and gave judgment for the appellant. Their Lordships held that, since the respondent had arranged for the transfer for an illegal or fraudulent purpose, and as this purpose had in fact been carried out, the respondent was precluded from obtaining the aid of the court. They pointed out that the Court of Appeal, in basing its decision on the words of James L.J., overlooked a very essential difference between the present case and *Haigh* v. *Kaye*. In *Haigh* v. *Kaye* it was the defendant, and not the plaintiff, who sought to drag the illegality in without pleading it distinctly. In the present case, the plaintiff (the father) had, of necessity, to disclose the illegality in his statement of claim in order to rebut the presumption of advancement.

Looking at this case from the point of view of the principle of *in pari delicto,*[13] it is only fair to say that justice has been done. It is clear from the facts that the father was far more guilty than the son. It was the father who had initiated and benefited from the illegal transaction. Hence it is respectfully submitted that the decision of the Privy Council in the present is unexceptionable. The father, who was the more guilty of the two parties, was not given the relief which he sought. The other Malayan case which went up to the Privy Council, discussed in this note,[14] on the other hand, seems to involve a certain amount of injustice done to the respondent, when the decision is looked at in the light of the principle of *in pari delicto.*

In this second case, *i.e.* in the case of *Chai Sau Yin* v. *Liew Kwee Sam,*[15] the facts were as follows: —The respondent was a rubber grower and sold rubber to a partnership, of which the appellant Chai was a member. Only one of the members had a licence as required by section 5(1) of the Rubber Supervision Enactment which reads as follows:

> . . . . . no person shall purchase, treat or store rubber or pack rubber for export unless he shall have been duly licensed in that behalf under this enactment.

In an action by the respondent against the partnership for the balance of the price of the rubber sold, judgment was given against two of the partners, including the licence holder. The action was continued between the appellant and the respondent. The appellant contended that the licence was issued only to the holder of it, one Yap, and not being assignable, did not cover the partnership. He pleaded that any purchase by him (the appellant) was prohibited by the enactment and therefore illegal and unenforceable. The learned trial judge did not attach much weight to this contention of illegality. He held that the enactment was merely for the protection of the revenue and not for prohibiting any acts in respect of which the penalty was imposed. He decided that, therefore, the action was maintainable. He found support for this in the words of Lord Tenterden C.J., in *Brown* v. *Duncan,*[16]

12. (1962) 28 M.L.J. 143.

13. Explained, *infra.*

14. *Chai Sau Yin* v. *Liew Kwee Sam* (1962) 28 M.L.J. 152.

15. (1962) 28 M.L.J. 152.

16. (1829) 10 B. & C. 91.

where the learned Chief Justice distinguished between breaches of revenue enactments, where there had been no fraud on the revenue, and breaches of the provisions of Acts of Parliament which have for their object the protection of the public. The learned trial judge, in giving judgment for the respondent, gave also an alternative ground for his decision. He said that where money is paid for an illegal purpose it may be recovered.

The Court of Appeal[17] affirmed the decision of the trial judge but on different grounds. The court held that a principal and agent relationship existed between the appellant and the respondent, by virtue of the partnership. It was decided that, since such a partnership existed, the sale of rubber to one of the partners made him an agent for the others, and thereby arose the obligation to pay. The Court of Appeal rejected the reliance of the trial judge on the case of *Brown* v. *Duncan.* [18] They accepted that the Rubber Regulations were not merely a revenue enactment but were also intended to protect one of the essential industries of the country.

The appellant, who was not satisfied with this judgment, appealed to the Privy Council,[19] where judgment was entered in his favour. Their Lordships found it difficult to accept the liability created on the principles of agency. They felt that there was not sufficient evidence for such a finding. Lord Hodson, who delivered the opinion of the Privy Council, said that there was no escape from the conclusion that the appellant was entitled to rely on his illegality in respect of the purchase of the rubber from the respondent in view of the prohibition imposed by section 5(1) of the enactment. He agreed with the Court of Appeal that the Rubber Enactments were not merely revenue legislation. As far as this part of the decision is concerned the Privy Council seems to differ from the opinion of Holt C.J. In *Bartlett* v. *Vinor*[20] this great judge said:

> It may be safely laid down, notwithstanding some dicta to the contrary, that if the contract be rendered illegal it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is whether the statute means to prohibit the contract.

Lord Hodson seems to be more in agreement with other decisions[21] when he distinguishes between revenue and prohibitive enactments. His Lordship seems to agree that a contract is only illegal in so far as it contravenes a prohibition enactment.

It is felt that this limitation to the doctrine of illegality of contracts is most welcome. It is true that courts of law should not be too willing to assist persons who give their hand to illegal transactions. Yet, one should bear in mind that by refusing to intervene in favour of one party to an illegal contract the courts, indirectly, assist another, not less guilty, party. Moreover, not only does this second guilty party go unharmed despite his participation in an illegal transaction, but the court's reluctance would in addition assist him in retaining some ill-gotten gains.

It is that reasoning which led to the establishment of another maxim connected with illegality of contracts, namely, *in pari delicto.* The courts will, often, intervene

17. (1960) 26 M.L.J. 122.

18. (1829) 10 B. & C. 91.

19. (1962) 28 M.L.J. 152.

20. (1688) Carth. 251.

21. See *Holman* v. *Johnson* (1775) 1 Cowp. 341; *Pellecat* v. *Angell* (1835) 2 Cr. M. & R. 311 *cf. Ralli Bros.* v. *Compania Naviera Sota y Aznar* [1920] 2 K.B. 287 at p. 300; *Foster* v. *Driscol* [1929] 1 K.B. 470, 518; *Regazzoni* v. *K.C. Sethia Ltd.* [1958] A.C. 301 at p. 330.

in favour of a party to an illegal contract if that party is the lesser to blame. This attitude of the courts was described by Knight-Bruce L.J. in *Reynell* v. *Sprye* [22] as follows:

> Where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him.[23]

With the greatest respect to their Lordship's opinion it is submitted that the respondent has been left without any relief at all, even though from the point of view of the principle of *in pari delicto* the respondent in *Chai's* case was to a lesser extent guilty than the appellant. One should note that the purchase of rubber without a licence was prohibited: no restrictions were imposed on the sale of rubber. And this is hardly surprising. It would be asking too much of any person in the commercial world to take the trouble to enquire whether the person to whom he is selling goods is legally entitled to purchase them. It can lead to a lot of hardship if a person who sells goods in ignorance of the fact that the purchaser is prohibited by statute from purchasing them ultimately discovers that the court will not aid him to get the price of the goods sold. It is felt that a better decision would have been given if the principle of *in pari delicto* had been applied by the courts.

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22. (1852) 1 De G.M. & G. 660 at p. 679.

23. See also *Kettlewell* v. *Refuge Assurance Co.* [1908] 1 K.B. 545 applied [1909] A.C. 243; *Hughes* v. *Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482.