How Not to Win Friends and Influence People

Are "Backhanders" Immoral within Section 23 of the Indian Contract Act?

Two recent Indian decisions raise issues as to the meaning and extent of section 23 of the Indian Contract Act. [1] In *Gherulal Parakh* v. *Mahadeodas* [2] the argument that a wagering contract was illegal as being "immoral" was rejected on grounds that the concept of "immorality" was confined to cases of sexual immorality. [3] The phraseology of the provision "the Court regards it as immoral" indicated that it was based on common law, and at common law the concept of "immorality" had always been so construed. [4] Its juxtaposition with the term "public policy" raised a presumption of mutual exclusion, strengthening this conclusion.[5] In *Narayana Rao* v. *Ramachandra Rao*[6] A, a vendor of land had agreed to pay B a sum of Rs. 10,000 if he would exercise his influence so as to induce the managing director of a company to pay a net price of one lakh of rupees for the land which was worth only Rs. 72,000. B complied with this arrangement and the company duly agreed to a sale at the price of one lakh. In an action by B on the promissory note furnished by A as security

3. [1969] 2 All. E.R. 88; [1969] 2 W.L.R. 610.
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1. S.24 of the Contracts (Malay States) Ordinance, 1950, is in almost identical terms and provides: "The consideration or object of an agreement is lawful, unless — (a) it is forbidden by law; or (*b*) it is of such a nature that, if permitted, it would defeat the provisions of any law; or (*c*) it is fraudulent; or (*d*) it involves or implies injury to the person or property of another; or *(e)* the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."
2. A.I.R. 1959 S.C. 781 (an appeal from Calcutta).
3. Judgment of the court delivered by Subba Rao J. at pp. 787-8.
4. *ibid*., p. 798.
5. *ibid*., pp. 797-8.
6. A.I.R. 1959 Andhra Pradeah 370.

the learned subordinate judge found in favour of B. The illegality of the transaction was not pleaded and on appeal, both Krishna Rao and Umamaheswaram JJ. allowed the appeal on other grounds. Umamaheswaram J. also held that the agreement was *ex facie* illegal and void as being immoral.[7]

Two issues raised by these decisions are considered here. They are: (1) the extent of the term "immoral" in section 23; (2) the legality of arrangements for the exercise of influence.

It was, of course, doubly unnecessary for the court, in *Gherulal's* case to confine "morality" to sexual morality, firstly because it has many times been decided that wagering contracts although void are legal[8] and secondly because the class of wagering contracts could have been excluded without deciding on the propriety of including other non-sexual classes. Nevertheless, if the *dicta* of the Supreme Court in *Gherulal's* case are right, those in *Narayana Rao's* case are wrong, and *vice versa.*

There is, in fact, abundant authority in favour of the proposition that "immoral" as used in section 23 has always been regarded as applying only to cases of sexual immorality. Only one of the cases cited in the leading Indian text-books falls outside this category, *Manikka Mooppanar* v. *Peria Muniyandi,*[9] where the facts were very similar to those in *Narayana Rao's* case. An examination of the common law on which the "immoral" provision is allegedly based leads to similar results. The only instance where it seems to have been necessary judicially to define "immoral" arises under the Clergy Discipline Act, 1892, section 2. Even here, most of the cases concern sexual misbehaviour. *Fitzmaurice* v. *Hesketh,*[10] where a clergyman who went about as a collector of alms under false pretences was held to have committed an immoral act thereby, is exceptional. Even so, what is "immoral" for the purposes of the maintenance of standards of behaviour among clergymen need not inevitably appear so against the backcloth of the nasty big wide world outside. The term *"contra bonos mores"* may not be synonymous with "immoral" but shares with it the characteristic of being a criterion outside conformity to positive law. The editor of Chitty on *Contracts*[11] states that "The common law prohibits everything which is *contra bonos mores."* Of four cases cited in support of this proposition,[12] two[13] make no mention of morality, *boni mores* or anything similar. In *Holman* v. *Johnson* Lord Mansfield hints at the possibility of vitiation of mercantile contracts on grounds of immorality but states further that "An immoral contract it certainly is not for the revenue laws themselves, as well as the offences against them, are all *positivi juris."*[14] The only clear instance of non-sexual immorality which appears in the English cases seems to be in *Brown* v. *Brine.* There, Kelly C.B. expresses the view that it is a breach of moral duty to declare a man guilty of a crime unless upon a justifiable occasion. Hence, an agreement not to do such an act would be an agreement not to commit a breach of moral duty which, in the opinion of the learned Chief Baron could not be made the consideration for a promise.[15] No question of legal duty would have arisen

7. *ibid.*, pp. 376-7.
8. For Malayan examples, where the law is the same, see *Seong Sam* v. *Goon Food On* [1933-34] F.M.S.L.R. 169; *Kader Batcha,* v. *P.P.* [1935] F.M.S.L.R. 18; *Benjamin* v. *Esmailjee* [1935] F.M.S.L.R. 219; *D'Almeida* v. *D'Menzies, 4* Ky. 126. In the case under consideration the Supreme Court considered the question of the legality of wagering contracts at length and concluded in favour of their legality but did not, apparently, regard this as conclusive of the question of morality which, however, was of legal consequence only in this connection.
9. A.I.R. 1936 Mad. 541.
10. [1904] A.C. 266 (P.C.).
11. 21st ed., vol. 1, p. 475.
12. *Fletcher* v. *Harcot* (1623) *Hutton* 55; *Allen* v. *Rescous* (1677) 2 Lev. 174; *Holman* v. *Johnson* (1775) Cowp. 341; *Brown* v. *Brine* (1875) L.R. 1 Ex. Div. 5.
13. *Fletcher* v. *Harcot* and *Allen* v. *Rescous.*
14. At p. 343.
15. At pp. 6, 7.

provided the publication had been slanderous as opposed to libellous. There is, finally, the almost unanimous opinion of the text-writers, as relied upon by the Court in *Gherulal's* case that one cannot be immoral without being licentious.

It seems, thus far, that the court was near to the truth in voicing the restricted definition of "immoral." A single Indian and a doubtful English decision oppose such a view. However, two matters remain to be mentioned. The first of these is that the concept of morality is not fixed for all time[16] and hence is more than a matter of mere precedent. This is strengthened by the analogy of public policy. The second is illustration *(j)* of section 23: "A, who is B's mukhtar, promises to exercise his influence, as such, with B, in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void because it is immoral."

Short of a mid-Victorian-novellette interpretation of "favour" or the recognition of a hitherto unknown perversion it is impossible to regard this illustration as being of a sexual nature. It does not conflict with the express provisions of the substantive part of the section — immoral can reasonably bear a meaning other than "sexually immoral."

Illustration *(j)* was the mainspring of Umamaheswaram J.'s categorisation of the agreement in *Narayana, Rao's* case as immoral. It was, he said,[17] "not necessary that the section should be confined only to cases where the influence is exercised by the mukhtar on his client...the section has a wider and general application. What has to be decided is whether the agreement is opposed to morals." It may be that "the bane of modern society is the faith in the efficacy of recommendation or influence on public officers or persons occupying high positions for the purpose of achieving their own ends to the detriment loss or injustice to others who are not in a position to command such influence," but it must be remembered that the mere exercise of influence is regarded in some quarters at any rate as being societally invigorating rather than enervating. Ought teachers never to be paid? Is a sales agent never entitled to commission?

The purchase of influence is already forbidden in some cases. As regards matters of public concern, one may discern two types of objectionable transaction. The first is the straightforward interest/duty conflict which arises where a public officer is paid to exercise his discretion in a certain manner.[18] The second is what might be described as the "canvassing" situation where, for example, influence is brought to bear on a public officer via the paid agency of a third party. A promises to pay B to influence C. B obtains the benefit, C discharges the duty.[19] There is no conflict of interest and duty but nevertheless, the public interest is apparently such that such an agreement between A and B must be struck down. These situations have their parallels as regards private matters. A promise to pay for the exercise of discretion may result in a conflict between interest and duty, as for example, duty of trustee or of agent. [20] The situation which arose in *Narayana Rao's* case was not of this type whilst illustration *(j),* of course, is. The situation in *Narayana Rao's* case was of the second type where the interest is once removed. It is one thing to

16. This is well illustrated by Lampleigh v. Brathwait (1615) Hob. 105. The Court went to some lengths to uphold the type of agreement struck down in Narayana Rao's case, except that the influence was brought to bear on the Crown!

17. At p. 377.

18. As, for example, in Montefiore v. Menday, 34 T.L.R. 463.

19. As in Karuppiah Pillai v. Pannuchanu Pillai, A.I.R. 1933 Mad. 768. A diverting application is seen in cases of agreements with Brahmins to arrange the benevolent influence of deities. As regards such influence on the administration of justice, it is apparently to be feared — Bhagwan Dat Shastri v. Raja Ram, A.I.R. 1927 All. 406; in cases of appointment to public office, it can apparently only operate in a just manner, its effect being confined to the prevention of injustice — Bapuji v. G. C. Natrangan, A.I.R. 1935 Nag. 119.

20. See, for a recent example, Gulabehand Gambhirmal v. Kudilal Govindram. A.I.R. 1959 Madhya Pradesh 151.

say, as does Umamaheswaram, J, that illustration (*j*) is not confined to mukhtar and client, but extends to analogous situations. It is another thing, however, to ask, as does the learned judge, "Is not an agreement on the part of any individual to exert or exercise influence on another occupying a fiduciary position such as a Managing Director of a Company, and to receive excessive[21] consideration immoral ?" In the former case, the person charged with the duty is the beneficiary of the transaction; in the latter, he is not. There is ample reason for viewing third party influence in public matters with apprehension, for in many spheres already, public interest is regarded as overriding. So far as private matters are concerned, however, we are already accustomed to allow "trade puff" or *simplex commendatio.* We already condone the perpetration of frauds in fact under the rubric of *caveat emptor.*

It seems that Umamaheswaram J. lacked the warrant he claimed for striking down the agreement as immoral within section 28. Might it, even if not "immoral," have been struck down as contrary to public policy? The learned judge expressly disclaimed such a ground, considering that the heads of public policy were all fairly well defined and implying that the agreement in question fell under none. There is surely just as much warrant for extending the concept of public policy as for extending that of morality. It may not, however, be necessary to extend "public policy." In one similar Indian case, at least, where A agreed to pay B, a vakil's clerk, for ensuring that special attention was given to A's business, the agreement was struck down.[22]

In considering what finally should be the place of agreements to pay for influence, a penultimate distinction may be noted. It may be one thing for A to promise to pay B to influence C who is acting on his own account, and another thing for A to agree to pay B to influence C who is acting for D, as where C is trustee and D beneficiary. Lastly, there is influence and influence. Where the influence is to take the form of apparently disinterested advice, there may be a stronger case for striking down an agreement even by A to pay B to influence C acting on his own account, if, indeed such an agreement is not void as being an agreement to commit the tort of deceit. The American attitude as expressed by Williston[23] is that "Probably any bargain for reward to influence by apparently disinterested advice the conduct of a third person is...obnoxious to public policy, even when neither party at the time bears a fiduciary relation to the person to be influenced, except perhaps, in order to effect a compromise where the rights of the parties are in doubt and it reasonably appears that the third party is not put at a disadvantage." Such apparently disinterested advice is to be distinguished from mere influence not used in an "underhand or improper manner."[24] Here, there may be a case for protecting the *cestui que trust,* the lunatic or the ward. A company, however, in the type of transaction involved in *Narayana Rao's* case, is none of these. It would be anomalous in the extreme if the principal could shelter behind his agent's credulity.

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21. If the use of this word is really intended to indicate that an agreement the consideration for which is inexcessive is not immoral, many further complications enter into the matter.

22. *Tenjerla. Suryanarayana* v. *Probhala Subbayya,* A.I.R. 1918 Mad. 504.

28. Williston on *Contracts,* revised ed., p. 4906.

24. *Shiv Saran* v. *Kesho Prasad.* A.I.R. 1917 Pat. 92.

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