

## STUDY UNIT 7

### THE CONSEQUENCES OF ILLEGALITY:

Instance where contract is void with reference to :  
severability; redress, parties not equally guilty,  
relaxation of *in pari delictum* rule; application of *in*  
principle of simple justice.

Contract void - 1st consequence of illegality

① Severability - *in* courts have in certain cases allowed *in* illegal part of a contract to be severed from *in* rest of *in* contract where one part of *in* contract is illegal & *in* part can be severed from *in* rest. Some instances courts refused to do so even when severance is possible, because public policy requires *in* whole contract to be void.

② Redress OR RELIEF

When an agreement is void, restitution should be granted. Another rule of law prevents B from claiming *in* return of *in* purchase price i.e. *in pari delicto potior est conditio possidentis* (in effect, where 2 parties are equally guilty, *in* one who is in possession is in *in* stronger position).

this applies only to actions based on unjustified enrichment. B comes to court & says A ~~was~~ received R40 from me & did not deliver anything in *in* A was enriched @ my expense. I request *in* court to even *in* unequal position bet us. The court says since both of you

restitution  
pari delicto

unjustified  
enrichment

each  
eg

are guilty of this unlawful transaction, we not going to help you, we leave you in  $\perp$  position you are in in other words A is in stranger position.

$\perp$  par delictum rule is founded on considerations of public policy,  $\perp$  court will do everything in its power to discourage unlawful contracts

③ where  $\perp$  parties are not equally guilty

Underlying thought of par delictum rule - he who has acted disgracefully by making performance should not be allowed to recover such performance.

Where a party to an unlawful agreement has performed but performance by him was not disgraceful, he can recover from  $\perp$  other party  $\perp$  which he has performed.

Minister of Justice v Van Heerden - court held  $\perp$  state can recover  $\perp$  performance itself or, where this no longer exists,  $\perp$  value thereof, together with fruits & whatever has accrued to it with  $\perp$  *condictio ob turpem causam* ( $\perp$  enrichment action).

In all cases where  $\perp$  innocent party has performed can recover  $\perp$  value of  $\perp$  performance from  $\perp$  guilty party if  $\perp$  latter is unable to return  $\perp$  performance itself.

PAR delictum rule applies only to cases where 1 parties are equally guilty.

#### ④ Relaxation of 1 par delictum rule

Before 1939 courts applied 1 par delictum rule rigorously & made no exceptions. In 1939, 1 Appellate Division reconsidered 1 law & formulated new principle.

Jaybhay case 1 A.D argued 1 1 par delictum rule is founded on principles of public policy, but public policy also demands 1 justice shall be done; ∴ it cannot be in 1 public interest to enforce 1 par delictum rule where this will be unjust towards 1 plaintiff. 1 par delictum rule is ∴ to be applied as a general rule, to which an exception must be made whenever "simple justice bet a man & man" demands it. ? to be answered is WHAT IS MOST IN ACCORDANCE WITH PUBLIC POLICY?"

⑤ App of 1 principle of simple justice whether 1 court will be prepared to relax 1 par delictum rule in a case will depend entirely on 1 circumstances of each case.

# STUDY UNIT 18 / FORMAL REQ

Formalities prescribed by law: see w/s

Formalities stipulated by the parties:

a) Parties agree that their agreement must be in writing.

- parties agree  $\pm$  an oral contract entered into bet them must be reduced to writing & signed. In such case it may be  $\perp$  intention of  $\perp$  parties  $\perp$   $\perp$  agreement will acquire legal effect only when it has been reduced to writing & signed by  $\perp$  parties. Contract also becomes binding when this is done (Goldblatt case).

Parties cannot unilaterally depart from a clause  $\perp$   $\perp$  agreement will be effective only if it is reduced to writing: neither of them will  $\therefore$  be able to sue  $\perp$  other on  $\perp$  oral contract (Goldblatt case)

## Non-Variation Clause

Can parties depart bilaterally from a clause contained in a contract, either orally or in writing, stipulating  $\pm$   $\perp$  contract can be terminated or varied only in a particular way (non variation clause)

If  $\perp$  written contract contains a clause stipulating  $\perp$   $\perp$  contract can be terminated or varied only in writing i.e.  $\perp$  parties include a clause to  $\perp$  effect  $\perp$  any variation of  $\perp$  contract & of  $\perp$  clause must be in writing.  $\perp$  parties cannot later vary  $\perp$  clause or any other, orally.

In Shifren case A.D held ± such an agreement cannot be varied orally. A non-variation clause will only effectively protect a contract against oral variation if ± non-variation (entrenching) clause is itself entrenched against oral variation. ± decision in Shifren case can be explained as ± a policy decision which is based on ± preference of commercial certainty and avoidance of litigation above sanctity of contract.

May ± parties cancel ± whole contract orally where they have ± previously agreed ± dissolution will only take place in writing? In Impala Distributors v Taurus Chem Manuf. It was held in conformity with ± Shifren case, ± if ± contract contains a further provision entrenching ± restriction, oral dissolution will not be possible.

Would an oral waiver be valid?

A waiver by one party does not amount to an oral agreement to dissolve a contract

Van As v Du Preez