"A Contract Shall Not Be Enforced If The Agreement Is Opposed To Public Policy"

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INTRODUCTION

***"Public Policy is an unruly horse, and when you get astride it you never know where it will carry you."*- Mr. Justice Burrough** [1]

Lawful object and lawful consideration are one of the essentials of a valid contract. Every agreement with unlawful object and consideration is declared void under Section 23 of Indian Contract Act[2]. This section enumerates of three issues, i.e. consideration for the agreement, the object the agreement and the agreement per se. Section 23 creates a limitation on the freedom of a person in relation to entering into contracts and subjects the rights of such person to the overriding considerations of public policy and the others enunciated under it.[3] Section 23 also finds its bearing in the other sections of the Act, namely section 264, 275, 286 and 307. Under which circumstances the court

[1] Mr. Justice Burrough noted "Public Policy is an unruly horse, and when you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail" Richardson v Mellish (1824) 2 Bing 228

[2] *Section 23 of the Indian Contract Act, 1872 - What considerations and objects are lawful and what not The consideration or object of an agreement is lawful, unless- It is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*

[3] *In Re: K.L. Gauba (23.04.1954 - BOMHC) [AIR 1954 Bom 478]. Para 11 : "...The freedom of the citizen, as indeed the freedom of the lawyer, to enter into a contract is always subject to the overriding considerations of public policy as enunciated in S. 23 of the Indian Contract Act. That freedom is also subject to the other considerations set out in S. 23."*

regard it as oppose to public policy. If court regards any agreement opposed to public policy than that agreement is unlawful. The term **Public Policy** holds a broad sense as sometimes the court will, on considerations of public policy, refuse to enforce a contract. The doctrine of public policy is based on the maxim "*ex turpi causa non oritur actio"* which means that an agreement which opposes public policy would be void and of no effect. Consideration of public interest may require the courts to retreat from their primary function and to refuse to enforce a contract i.e. to enforce a contract. Connotation of the concept of public policy is the function of the court and not of the executive. A State Amendment of the Registration Act, 1908 empowered the Registrar to refuse registration of a power of attorney authorizing the attorney to transfer specified immovable properties because the registration of such documents was opposed to public policy.[4]

Only the knowledge of the terms of the contract is not necessary but even the object should be reasonable. If the terms of the contract are unreasonable and opposed to public policy, they will not be enforced which is explained by a leading case *Central Inland Water Transport Corporation Ltd. v. Brojo Nath*[5].

Here in this case one of the clauses in a contract of employment gives that the employer can terminate the services of an employee who is permanent by giving him a notice or salary of 3 months. Here the service of the respondent Brojo Nath and others were terminated instantly by giving them the notice with cheque for 3 month's salary. The Supreme court held Rule 9 of service Discipline And Appeals of 1979 frames by the corporation empowering that such a clause in the service agreement between persons having gross inequality of bargaining power was wholly unreasonable and against public policy and was therefore void under section. 23 of the Indian Contracts Act.[6]

As public policy shows the fundamental presumption of the community so the content of the rules varies from country to country and from time to time. The matters of public policy should adopt a broader approach than to use of precedents.

The author Michael E. Kraft in his book "Public Policy" has beautifully described about public policy, its essentials effects and many more. The author Thomas R. Marshall in his book "Public Opinion, Public Policy, and Smoking" has described about the public opinion and public policy and

[4] Avatar Singh, Contract Act & Specific Relief, 12TH EDITION 2016, page no. 272
[5] 1986 SCR (2) 278
[6] https://www.lawctopus.com (last visited on 22 Nov 2017, 16:11)

also its outcome. The author John Keown in his book "Euthanasia, Ethics and Public Policy" has described about the morally justified principles and public policy.

The purpose of this research is to explain the different types of agreements which are opposed to public policy and also to find the effects of the enforcement of foreign award if opposed to the domestic public policy.

During this paper the researcher will follow Doctrinal research methodology. This type of research is also known as pure. Also content analysis of available both primary and secondary data but mostly of secondary data.

Whether rules of public policy will only be the "Public Policy of India" where enforcement of a foreign award is sought in any Indian Court? And how Foreign and Domestic Arbitral Awards are enforced in India? What are the effects of the enforcement of foreign award if it is opposed to the domestic public policy?

OBSERVATIONS IN ENGLISH LAW ABOUT PUBLIC POLICY

The conditions in which a contract is likely to be cancelled as one opposed to public policy are well established in England. So a contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming wagering contract, or the assisting of the King's enemies, are all unlawful things on the ground of public policy. The normal working of a court is to be dependent on well- settled heads of public policy and to use them in various situations. If the contract in question fits into one or the other of these pigeon- holes, it may be declared void. The courts may, however, mould the well- settled categories of public policy to suit new conditions of a changing world.

According to Lord HALSBURY, the categories of public policy are closed. He said that court may invent a new head of public policy. From time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunal to roam unchecked in this field. Lord ATKIN says that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inference of a judicial minds.

INDIAN CASES ADOPTING ENGLISH VIEW ON PUBLIC POLICY

The circumstances of striking off a contract which is opposed to public policy is well established in England. So a contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract are all unlawful things on the ground of public policy.

The Indian scenario also includes the same view. In *Gherulal v. Mahadeodas Maiya*[7] which describes the present position of the doctrine of public policy in India.

Here in this case the plaintiff and defendant entered into Partnership agreement with the objective of entering into wagering transactions to share equal profit and loss of that partnership. Asking for reimbursement of money of loss of partnership, defendant alleged that the agreement made between them was illegal and unenforceable under Section 23 of Indian Contract Act.[8] The court held that void agreements cannot be equated with illegal agreements. The law may forbid the formation of an agreement or it may even deny to enforce an agreement. In the former case, it is illegal and in latter it is void, all illegal agreements are void but all void agreements are not illegal.

Section 30 of Indian Contract Act[9] is based on provisions of Gaming Act, 1845 in England which rendered both primary agreements of wagering and any substituted agreement for recovery of money alleged to be won on any wager as void but, secondary agreements in respect thereof enforceable. Therefore any wagering agreement though is void and unenforceable but is not forbidden by law, therefore the object of any collateral agreement upon wagering isn't unlawful within the ambit of Section 23 of Indian Contract Act, hence is valid and subsisting between the parties.[10]

In the case of Renusagar while the construction of the provisions of Section 7(1) (b) (ii) of the Foreign Awards Act[11], the Supreme Court held that enforcement of the award must involve something more than violation of Indian law in order to attract the bar of public policy, if such

[7] 1959 AIR 781
[8] Supra Note 2
[9] *ibid*
[10] Supra note 5
[11] Foreign Awards Act, 1961

foreign award is contrary to "the fundamental policy of Indian law or justice or morality" its enforcement would be refused on this ground. It was held that any violation of the Foreign Exchange Regulation Act, which was enacted for the national economic interest, would be contrary to the public policy of India. The enforceability of a foreign award could not be resisted as violating the public policy of India where an award, however directed payment of compound interest, or directed payment of compensatory damages or where the arbitral tribunal had awarded an amount higher than should have been awarded or where costs awarded by the arbitral tribunal were excessive.

In Supreme Court case of *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd*.,[12] the definition of "public policy" in Section 34 of Arbitration and Conciliation Act 1996[13] was controversially expanded such that anything which is against any Indian law is deemed to be opposed to Indian public policy. This means that any foreign awards that are subject to the application of Section 34 can be challenged under wider grounds than would usually be permitted under the New York Convention alone.

CONTRACTS ILLEGAL AT COMMON LAW ON GROUNDS OF PUBLIC POLICY

Certain sorts of contracts are prohibited in common law. The primary fundamental to an understanding of this head of the law, which has been darken by much dilemma of thought, is to find if conceivable the principle upon which the stigma of illegality is based. The conviction of judges of prior period was that they would not endure any agreement that in their view was injurious to society. It can be concluded from such conviction's that the judges were resolved to build up and maintain an idea or concept of public policy. This conflict has its own particular inconvenience as it is uncertain. Modern judges have in fact taken more practical perspective of this piece of the law and have concluded that the illegal contracts fall into two separate gatherings as per the level of mischief that they include. A few agreements are so clearly detrimental to the interest of the general public that they outrage any idea of public policy; others violate no fundamental sentiments of morality, however run counter just to social or economic advantage. The consequence of their separation into two classes lies in various results that they include.

[12] 2003 (5) SCC 705

[13] Section 34 of Arbitration and Conciliation Act 1996 "specifies the conditions under which the award can be set aside"

"No polluted hand shall touch the pure fountains of justice."[14]

The following agreements have been held to be opposed to public policy:-

1. Trading with Enemies

All trade with enemies is against public policy. Thus it is unlawful and is void. However, if a contract is made during peace times and later on war breaks out, one of the two things may result, Either the contract is suspended or it stands dissolved depending upon the intention of the parties to contract.[15]

2. Agreement tending to injure the public service

Agreements went into for utilizing corrupt influence in securing Government jobs, titles or honors are unlawful and along these lines are not enforceable. This is on account of, if such agreements are valid, corruption will increase and lead to inability in public services. In the case *N.V.P. Pandian v. M.M. Roy*[16] the respondent paid an amount of ₹15,000 to the appellant and the appellant promised him to use his impact with the committee who was selecting for getting the admission of respondent son in the Madras Medical College. Here the appellant failed of getting the seat for the respondent's son so the respondent filed a suit against the appellant claiming back the sum of ₹15,000 paid by her. It was held that the agreement tended to injure public service and was against public policy and hence the same was void. So, she was not held entitled to claim the refund of ₹15,000.

3. Stifling Prosecution

An agreement in which one party agrees to abdicate criminal proceedings pending in a court in consideration of some amount of money, is unlawful. Therefore, such type of agreement cannot be enforced except where crime is compoundable. However, if a compromise agreement is made before any complaint is filed, it would not amount to stifling prosecution even if it is implemented after the filing of a complaint which is then withdrawn. In *P. Shivaram v. T.A. John* the owner 'A' of a store found that one of his employees after embezzlement of certain goods from his store and had sold them to another person 'B'. Here 'A' could bring criminal or civil proceedings against B for the recovery of the value of goods stolen. Even this was done before where B voluntarily accomplished a pronote in favour of A, for the money value of the articles purchased. The suit which was brought on

[14] *Per Wilmot, C.J., in Collins v. Blantern, (1867) 1 Smith LC 369*
[15] https://accountlearning.com (last visited on 22 Nov 2017, 19:28)
[16] AIR 1979 Madras 42

the pronote, there it was held that nothing was illegal or opposed to public policy in A's accepting the pronote was to curb a prosecution. It was been observed at that time that a distinction should be drawn motive and consideration of an agreement. Here in this case, the motive for the pronote may have been to avoid a legal proceeding, but that was the consideration for the pronote.[17]

4. Maintenance and Champerty

Agreements of maintenance and champerty are against public policy and hence they are declared as void. Maintenance agreements are those agreements whereby a man guarantees or promises to keep up a suit in which he has no intrigue or interest. Champerty agreements is one whereby a man consents to share the aftereffects of litigation.

Differences of maintenance and champerty lies in their object. Encouraging the protest of upkeep agreement is to energize or incite case, while the same in Champerty understanding is sharing the returns of the prosecution.

Both maintenance and champerty agreements are illegal and unenforceable in England. Be that as it may, in India, just those agreements which have all the earmarks of being made for purposes for gambling in litigation and for injuring or persecuting others, by empowering unholy suit, won't be maintenance and champerty agreements.

In *Executive Officer for Navaneetha Krishnaswami Devasthanam v. Rakmani & Co.* the financer not only undertook to finance the litigation but also looked after the same including engaging lawyers and securing records, etc. In return, the financiers beyond sharing the fruits of the decree were to get a bonus of five lakhs of rupees. The financiers actually spent about 8 lakhs of rupees. It was held that under these circumstances, payment of bonus of 5 lakhs of rupees could not be considered to be unconscionable or extortionate.[18]

5. Marriage Brokerage Agreements

Here in this agreement, one or other parties to it or third parties, receive a certain amount of money, in consideration of marriage. Such agreements being opposed to public policy are said to be void.

[17] Dr. R.K. Bangia, Contract- 1, page no. 216

[18] *ibid*

Similarly, an agreement to pay money to the parent/guardian of a minor in consideration of his or her acceptance to give the minor in marriage is void, as it is opposed to public policy.

In **Herman** *v.* **Charlesworth,** Charlesworth promised a young man to get him introduced to Miss Hermann and she was to pay £52 in return as advance and £250 on the day of marriage. Efforts were made by him to secure the marriage but he was unsuccessful. Action was brought by Miss Herman who paid the advance against Charlesworth for the recovery of money and she was successful. If, however, the marriage has been solemnized, the money already paid cannot be recovered back.[19]

6. Agreements Creating Interest Against Duty

The agreement is void on the ground of public policy which is entered by person who is bound to do something which is against the public policy. For e.g., an agreement by an agent to get secret profits shall be void as it is opposed to public policy. Similarly, an agreement by a Government servant for the purchase of land situated within his circle is illegal as opposed to public policy.

7. Agreements in Restraint of Legal Proceedings

Two kinds of agreements are dealt with under this head. They are-

i. Agreements Restricting Enforcement of Rights

These are the agreements which prohibits wholly or partly any party to the agreement to enforce his rights in respect of any contract is void to that extent.

ii. Agreements Curtailing Period of Limitation

If an agreement curtails the period of limitation which is prescribed by the law of limitation is void. This is so because, its object is to defeat the provisions of law.

8. A contract prejudicial to the administration of justice

It is admitted that any contract or engagement having a tendency to affect the administration of justice, is illegal and void. There are many examples of this rule, as for instance an agreement neither

[19] *ibid*

to appear at the public examination of a bankrupt nor to oppose his discharge, an agreement not to plead the Gaming Acts as a defense to an action on a cheque given for lost bets, and an agreement to withdraw divorce proceedings, or an agreement by a witness not to give evidence or only to give evidence for one side. Any agreement which obstructs the ordinary process of justice is void. An agreement to delay the execution of a decree, and a promise to give money to induce a person to give false evidence, have been held void.

It is therefore well established that the courts will neither enforce nor recognize any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution for a public offence.[20]

Section 23 says that the consideration or object of the agreement is unlawful if it "is fraudulent".[21] But subject to such and similar exceptions, contracts which are not illegal and do not originate in fraud, must in all respects be observed*: pacta conventa quae neque contra leges neque dolo mall inita sunt omnimodo observanda sunt* (contracts which are not illegal, and do not originate in fraud, must in all respects be observed).

Domestic Awards:

As per Section 2(7) of the Arbitration and Conciliation Act, 1996[22] an arbitral award made under Part I of the Act is called a 'domestic award'. An arbitral award shall be deemed to be final and binding upon the parties (and persons claiming under them) to the arbitration. Further, an arbitral award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court where the time for challenging an award has passed (90 days).

It is important to note that while before the 2015 Amendment, a challenge to an arbitral award usually meant an automatic stay on the enforcement of the award. However, the Act now specifically states that where an application challenging the award has been filed, the filing of such an application will not by itself render that award unenforceable, unless the Court grants an order of stay of the operation on a separate application made for that purpose.

[20] Supra Note 6

[21] *Relevant Illustrations to Section 23: (e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful. (g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.*

[22] Section 2(7) in THE ARBITRATION AND CONCILIATION ACT, 1996 defines "an arbitral award made under this Part shall be considered as a domestic award".

Foreign Awards

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) as well the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). "Foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India

(a) in pursuance of an agreement in writing for arbitration to which the New York or the Geneva Convention applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Till recently, the Central Government had notified 48 countries as 'reciprocating countries'.

The party applying for the enforcement of a foreign has to produce the following to a court:

(a) the original award

(b) the original agreement for arbitration or a duly certified copy thereof

(c) Such evidence as may be necessary to prove that the award is a foreign award.

Section 48[23] of the Act deals with instances where the enforcement of the award may be refused, which includes an invalid agreement, improper notice being given to party, situation where the enforcement of the award would be contrary to the public policy of India etc. Where the Court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that Court and enforced accordingly.

[23] Section 48 in THE ARBITRATION AND CONCILIATION ACT, 1996 defines the Conditions for enforcement of foreign awards

Enforcement of any foreign award if opposed to public policy- International Public Policy vis-à-vis Domestic Public Policy

The pre- dominant view taken by international jurists is that Article V (2) of the New York Convention refers to the concept of international public policy, the scope of which is narrower than domestic public policy. In other words, what is considered as public policy in domestic matters, is different from public policy in international matters. In the context of enforcement of arbitral award, international public policy is increasingly referred to in legislations and court judgements. However, what constitutes international public policy is a matter to be decided by a national judge.

While the definition of international or transnational public policy is not necessarily the same as domestic public policy, the purpose of making such a distinction is always to narrow down the scope of the public policy which must be considered for assessing whether the enforcement of a foreign award is compatible or not.

The principal surrounding the violation of public policy have been differently expressed by courts depending on whether they are in civil law or common law jurisdictions. In the former, the definitions of public policy generally refer to the basic principles or values upon which the foundation of society rests, without precisely naming them. In common law jurisdictions, on the other hand, the definition often refers to more precisely identified, yet very broad, values, such as justice, fairness or morality.

In India, public policy has been given a much broader interpretation, and the enforcement of a foreign award may be refused by an Indian court on the ground of public policy if such enforcement would be contrary to:

(a) Fundamental policy of Indian law; or

(b) The interests of India; or

(c) Justice or morality

Domestic public policy consists of principles of morality and justice that are reflected in the constitution or other legal sources of a country. On the other hand, international public policy is a reflection of the justice seeking sentiment of a society and is a collection of values of a country and

their violation cannot be tolerated by the society even in international public policy in relation to enforcement cases. Usually, the fundamental or basic principles constituting public policy are those as existing in the country where enforcement is sought. This is explicitly stated in Article V (2) (b) of the New York Convention which refers to a situation where the recognition or enforcement of the award would be contrary to the public policy of "that country". Countries like France and Switzerland, differentiate between international and domestic public policy and consider international arbitral awards as part of international public policy.

CONCLUSION

It is quite clear that an agreement becomes void under Section 23 of Indian Contract Act, 1872 if the consideration or its object of consideration is opposed to public policy in the opinion of court. The freedom of citizen, as indeed the freedom of the lawyer, to enter into a contract is always subject to the overriding considerations of public policy as enunciated under section 23. In other words we can say that a contract will be void if it is opposed to public policy and its decision or conclusion cannot be challenged on the grounds that it involves invasion of citizen's freedom to enter in any type of contract which he likes.

The Bombay High Court said that the term Public Policy is somewhat indistinct or vague and the courts should not be shrewd to make new grounds of public policy. But on the other side, the making of the clause "opposed to public policy" in the circumstances of administration of justice not show any difficulty. Therefore, it gets concluded that "public policy" does not have any specific definition and all the agreements that obstruct the effect of administration of justice and which are opposed to public policy will be held void under Section 23 of Indian Contract Act, 1872.[24]

So "**a contract shall not be enforced if the agreement is opposed to public policy".**

[24] *ibid*

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