

Module IV

Limitations on Freedom of Contract

Nilima Bhadbhade, PhD (Law)

nilima.bhadbhade@gmail.com

<http://obiterdicta.in>

Unlawfulness

- Complex law

Unlawfulness

- Presumption of legality
- Courts should not interfere lightly with freedom
- Consideration and object
- Consideration
 - Pay bribe to obtain employment
- Object
 - purpose, design
 - Agreement to drop prosecution for robbery in return of promise to return articles
 - Lending black money without object of evading iltax – not unlawful.

Forbidden by law

- Violates prohibitory provision of
 - Act or Rules, or orders of competent authority having force of law, or rules of personal law
 - Statute forbids
 - Statute prohibits expressly: benami
 - Transaction needs permission
 - Prohibitions on transfer in statutory licences
 - Prohibition on contracting out
 - Lawful on face, but purpose unlawful
 - Lawful terms, but performance in unlawful manner
- Is the purpose of the law to prohibit the transaction?

Defeat provisions of law

- Circumvent provisions of law
- Example
 - Two agreements for saving property tax

Other factors

- Fraudulent
 - Composition deed favouring one creditor
 - Instrument includes fictitious property to enable registration at remote place
- Involves injury to another's person or property
 - Bidders combine to keep down price

Immoral or against public policy

- Immorality – narrow concept
- Public policy
 - To bribe persons occupying positions
 - Indemnity to person giving bail bond
 - Withdraw prosecution
 - Maintenance and champerty
 - Unconscionable or unfair
- Transactions permitted are not against public policy

Effect

- Void ab initio
- Seriousness, turpitude vary
- Reliefs granted
- Innocent party can sue
 - Unlawful purpose is not carried out
 - Put party to terms
 - Unless prohibited altogether
- Severability : Enforce legal part

Void agreements

- Unenforceable
- Collateral agreements not affected

Void agreements and voidable contracts

- Void = not enforceable
- Void under ICA or other law
- Voidable = valid until avoided
- Gives choice to promisee: to avoid
- Right to avoid stated under ICA
 - Coercion, undue influence, misrepresentation, fraud
 - On breach
 - Refusal (§ 39)
 - Prevention (§ 53)
 - Failure, time being of essence (§ 55)
- Communicate rescission

Agreement without consideration

- Void
 - Can be performed
 - Cannot be enforced
- Agreement on account of natural love and affection
 - Between near relations
 - Writing and registered
- Promise to compensate for past voluntary acts
 - Compensate for past services
- Promise to pay time barred debt
 - Acknowledgment of debt v/s promise to pay
 - Writing, signed by promisor
 - Fresh promise, fresh limitation

Agreement in restraint of trade

- One or both parties limit their freedom to work or carry on profession or business
 - Not to compete in a locality
- Restraint during contract not void
- Performance in India
- “to that extent void”

Particular restraints

- Trade combinations
- Exclusive dealing agreements
 - Valid during contract
 - Void post-contract
- Restraints on employees
 - Restraint during employment valid
 - Post employment restraint is void
 - Injunction restraining disclosing secrets

Exceptions

- Sale of goodwill of business
 - Similar business
 - Specified local limits that are reasonable
 - So long as the buyer or his successor does business
- Partnership
 - Partner agrees that he shall not carry on business similar to that of the firm
 - While he is partner
 - When he ceases to be partner
 - After dissolution

Agreements in restraint of legal proceedings

- **Absolute restraint**
 - Enforcing contractual rights in usual legal proceedings
 - Limits time within which he can enforce rights
- **On expiry of a specified period**
 - Extinguishes rights or Discharges liability
- **“to that extent void”**
- **Selecting jurisdiction of a court**
- **Exceptions**
 - Refer to arbitration, and amount awarded will be recoverable
 - Refer to arbitration any dispute
 - Bank guarantee, specified period ≥ 1 year

Uncertain and ambiguous agreements

- Void if
 - Meaning uncertain
 - Meaning cannot be made certain
- Evidence to remove uncertainty
- Interpretation
 - Literal rule
 - Context
 - Ambiguity
 - Surrounding circumstances
 - Contra proferentem

* * *