THE CRISIS OF STANDARD FORM CONTRACTS

Today the legal system has also been computerized. In this computer age, the law of contract is also not averse to the present changes. Generally all the contracts which are perfected today not as for offer then acceptance them promise or agreement and then finally contract. Presently one person, in modern party conclude contract in a printed format the other party has no option except to put his signature there too, if he want to enter into contract, otherwise he is free to not to enter into contract. These kinds of contract are generally computerized & printed. Generally these kinds of contract are concluded with in minutes. First party has a readymade computerized draft of contract and the party has to put his signature only, hence the contract is concluded. Today entire banking system, multinational companies, all corporate & govt. contracts are generally carried out in this fashion. These contracts can be said to be computerized one sided contract i.e. Standard Form of Contract. The position at international level is also the same. A big Nation like USA, while contacting to poor or under developed countries try to carry out contacts in such a mode. It may be said that presently the law of Contact is hitching over such kind of contracts generally. The law of contract has had to face a problem which is assuming new and wide dimensions. The problem has arisen out of the modern practice of concluding contracts in standardized forms. The Life Insurance Corporation of India, for example, has to issue thousands of insurance covers every day and the railway administration has to make innumerable contracts of carriage. It would be difficult for such large organizations to draw out a separate contract with every individual. They have, therefore, printed forms of contract. Such standardized contracts contain a large number of terms and conditions in "fine print" which restrict and often exclude liability under the contract. The individual can hardly bargain with the massive organizations. His only function is to accept the offer whether he likes its terms or not. "He cannot alter those terms or even discuss them; they are there for him to take or leave. He therefore does not undertake the laborious and profitless task of discovering what the terms are." Lord DENNING MR pointed out in *Thornton* v *Shoe Lane Parking Ltd:* "No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat."

The courts have found it very difficult to come to the rescue of the weaker party particularly where he has signed the document. In such cases the courts have been constrained to hold that he will be bound by the document even if he never acquainted himself with its terms. This has come to be known as the rule in *L' Estrange* v *Graucob Ltd.*

At social level individual, at national level or international level the other party or weaker party therefore, deserves to be protected against the possibility of exploitation inherent in such contracts. The following modes of protection have been evolved by the courts to brush aside the problems created by such kind of contracts these kind of protections are as follows:-

1. Reasonable notice of terms

In the first place, it is the duty of the person delivering a document to give adequate notice to the offered of the printed terms and conditions. Where

this is not done, the acceptor will not be bound by the terms. This was laid down by the House of Lords in *Henderson v Stevenson.*

The House of Lords observed that the plaintiff could not be said to have accepted a term "which he has not seen, of which he knew nothing, and which is not in any way ostensibly connected with that, which is printed and written upon the face of the contract presented to him". The result would have been otherwise if words like 'For *conditions see back'* had been printed on the face of the ticket to draw the passengers' attention to the place where the conditions were printed. The house of Lord again elaborated that a notice will be regarded as sufficient only if it will "convey to the minds of people in general that the ticket contains conditions". This was clearly emphasized in the subsequent case of *Parker* v *Southeastern Kail* Co.

MELLISH LJ pointed out that if the plaintiff "knew there was writing on the ticket, but he did not know or believe that the writing contained conditions, nevertheless he would be bound", for there was reasonable notice that the writing contained conditions. The case was sent back for retrial.

Where a folded up ticket was handed over to a passenger and the conditions printed on it were also obliterated in part by a stamp in red ink and where, in another case, the words on a ticket, "For conditions see back", were obliterated by the date stamp, it was held in either case that no proper notice of the terms had been given.

A notice may be good even if it is in a foreign language. A Calcutta case illustrates this:

The plaintiff accepted a steamer ticket containing conditions printed in the French language. He claimed that he was not bound by them, being unable to read French.

Rejecting this contention, GARTH CJ said: "Although he may not understand French, he was a man of business contracting with a French company, whose tickets he knew very well were written in the French language, He had ample time and means to get the tickets explained and translated to him before he went on board; and it very plainly disclosed upon the face of it that the conditions endorsed were those upon which the defendants agreed to carry him." "Similarly, it has been held that where reasonably sufficient notice of the existence of the terms is given, it would be no defense to say that the plaintiff was illiterate or otherwise unable to read."

The Supreme Court in the case of State of Maharashtra and Ors. Vs. A.P. Paper Mills Ltd. MANU/SC/1673/2006 held that once a tender was submitted then no changes could be made and consequently no tender could be withdrawn at later stage. It is made clear that while the tender was under consideration there is no question of its withdrawal. The party has to stick upon his stand.

Difference between contractual documents and receipts etc.

In the application of this principle the courts have had to distinguish contractual documents from mere receipts and vouchers. A document is said to be contractual if it embodies the contract, that is to say, if the persons to whom it is delivered should know that it is supposed to contain conditions. But where the paper is not supposed to express the conditions of the contract, it will be regarded as a mere voucher, etc. and extra care will have to be taken to communicate its terms than mere warning upon the face. "The document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions. Thus a cheque-book, a ticket for a deck-chair, a ticket handed to a person at a public bath house, and a parking-ticket issued by an automatic machine have been held to be cases where it would be quite reasonable that the party receiving it should assume that the writing contained no conditions and should be put in his pocket unread."A good illustration is *Chapelton* v *Barry Urban District Council.*

SLESSER LJ said: "In my opinion, this ticket is no more than a receipt, and is quite different from a railway ticket which contains upon it the terms upon which a railway company agrees to carry the passenger." The object of the ticket was that the person taking it might have evidence that he had paid the hire and the term printed on it was no part of the contract. In such cases, as Lord DENNING MR pictorially remarked in *Thornton* v *Shoe Lane Parking-Ltd:*[11] "In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it, or something equally startling." If this is not done, the condition would not form part of the contract.

Exhibited notices can become a part of the contract if they are displayed so prominently as to bring from home the fact to the other party before or at the time of contracting. Thus, where a receipt issued for a deposit showed that it was subject to the conditions exhibited on the premises and the notices were displayed in prominent places on the premises that were held to be a reasonably sufficient notice.

Contracts signed by acceptor

Even where a party has signed a contract he can be protected by the doctrine of fundamental breach or by a finding that the terms are unreasonable or that there was misrepresentation about them. The former two modes of protection will be noted subsequently, the effect of misrepresentation may be illustrated here. The leading authority is *Curtis* v *Chemical Cleaning & Dyeing* Co.

The plaintiff delivered a white satin wedding dress to the defendants for cleaning. On being asked to sign a receipt, she enquired why she was to sign it and was told that she was to take responsibility for any damage to beads and sequins. The plaintiff then signed the receipt without reading it. The receipt, in fact, contained a condition excluding liability for any damage howsoever caused. When the dress was returned there was a stain on it. To the plaintiff's action for damages, the cleaners pleaded the exemption clause.

But they were held liable. Lord DENNING MR said: "In those circumstances by failing to draw the attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to beads and sequins, and that it did not extend to the material of which the dress was made," and this was sufficient to disentitle them from relying on the exemption clause.

In a Canadian case, a vendor fraudulently misrepresented the capacity of a boiler. He was held liable in damages for the fraud, despite the presence of an exemption clause. "A party to a contract cannot rely on an exclusion clause to avoid liability for fraud."

Where a statement accompanies the delivery of a document, an oral assurance may prevail over what the document provides.

In *Tilden Rent-A-Car* v *Clendenning*[16] the plaintiff signed a motor car insurance document which carried a warning on the face that no liability would arise if the provisions were not observed. On the back there were terms in fine and faint print, one of which was that there would be no liability if the driver had taken any drink. The driver who made the accident testified that though he had consumed some alcohol, he was not intoxicated and was capable of controlling the vehicle. Holding the company to be liable, the court said that a signature could be relied on as manifesting assent to a document when it was reasonable for the party relying on the signed document to believe that the signer really did assent to its contents. Hence, the plaintiff was not bound by unusual and onerous printed terms which were not drawn to his attention.

The Supreme Court in the case of State Bank of India and Anr. Vs. Mula Sahkari Sakhar Karkhana Ltd. MANU/SC/3353/2006 held that a document, as is well known must primarily be construed on the basis of terms n conditions contained therein. It is also true that while construing a document the court shall not any word which the author there of did not use. In our opinion the present document is clear cut a contract of indemnity and not a guarantee because appellant was to indemnify the cooperative society against all losses claims n damages suffered by it. The document does not contain the usual words found in bank guarantee.

Notice of unusual terms

Another example is *Interphoto Picture Library* v *Stiletto Visual Performances* The defendants, an advertising agency, required photographs for a 1950's presentation. The plaintiffs dispatched 47 transparencies with a delivery note which stated that the transparencies were to be returned in 14 days and that a holding fee of £ 5 per day for each transparency would be charged if they were not so returned. The defendants did not use the transparencies, put them to one side and forgot about them for a further two weeks. To their utter and considerable consternation an invoice arrived for £ 3,783 holding fee. The court said that where a condition is particularly onerous or unusual, the party seeking to enforce it has to show that a clear, fair and reasonable effort was made to bring it to the attention of the other

party. The condition, in this case, was unreasonable and extortionate and had not been sufficiently brought to the defendants' attention, it did not form part of the contract. Where one party was sent two apparently similar documents for counter-signature, and one for return to the sender had additional clauses on the reverse side which were written in a foreign language and to which the party's attention had not been drawn in any way, that party was not bound by those terms after he signed and returned the document.[78]

These cases show the importance of the remarks of DENNING LJ in *Spruling* v *Bradshaw* to the effect that:

"The more unreasonable a clause is, the greater the notice which must be given of it. Some clauses would need to be printed in *red ink with a red hand* pointing to it before the notice could be held to be sufficient."

2. Notice should be contemporaneous with contract

Secondly, notice of the terms should be given before or at the time of the contract. A subsequent notification will indeed amount to a modification of the original contract and will not bind the other party unless he has assented thereto. A man and his wife hired a room at a hotel and paid a week's rent in advance. When they went up to occupy the room there was a notice on one of the walls to the effect that: "The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the managers for safe custody." Their property having been stolen owing to the negligence of the hotel staff, the defendants were held liable as the court held that the notice was not a part of the agreement.

Where tickets are issued by a machine, notice should be given beforehand, for the ticket comes too late. Explaining this in *Thornton* v *Shoe Lane Parking Ltd* Lord DENNING MR said:

Thus, it is the duty of the party relying on a clause to his benefit to make it clear to the other at the time of the contract that the same is a part of the contract.

A vehicle was offered for sale at an auction. The auction conditions were advertised in the auction room through posters. They excluded all rights of the buyer to return the vehicle or claim damages. The vehicle failed to reach the reserve price. The auction ended. The vehicle was subsequently bought by a person by private negotiation. The vehicle broke down almost immediately. The buyer returned it and stopped the cheque for the price. The seller sued him.

The court delivered judgment for the buyer. The article was not of merchantable quality. It was purchased at a private sale where the seller did not point out to the buyer that the auction conditions would be applicable.

3. Theory of fundamental breach

Another means of getting round the injustice of exemption clauses is by means of the doctrine of fundamental breach. It is a method of controlling the

unreasonable consequences of wide and sweeping exemption clauses. Even where adequate notice of the terms and conditions in a document has been given, the party imposing the conditions may not be able to rely on them if he has committed a breach of the contract which can be described as "fundamental". The rule has been thus stated by Lord DENNING LJ:

These exempting clauses are now-a-days all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so too he is disentitled from relying on an exempting clause.

What constitutes fundamental breach? "Every contract contains a 'core' or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him." This may be illustrated by *Davies* v *Collins?*

The plaintiff entrusted to a dyer and cleaner a uniform for cleaning. On the docket given to him when he handed over the uniform was a clause which exempted the cleaner from liability for damage arising from necessary handling and limited his liability to ten times the cost of cleaning. The defendant sent the uniform to be cleaned by a sub-contractor and it was never returned. The plaintiff claimed the full value of the uniform.

It was held that the mere fact of the particular limitation clause in the contract was sufficient to exclude any right to sub-contract the performance of the substance of the contract. Limitation clauses of this kind do not apply where the goods are lost not within the four corners of the contract but while something was being done which was outside the terms of the contract altogether, or when loss takes place in the course of some operation which was never contemplated by the contract at all. In *Alderslade* v *Hendon Laundry Ltd,* on the other hand, the plaintiff's handkerchiefs were lost in the laundry itself and, therefore, the exemption clause effectively limited the defendant's liability to twenty times the charge made for laundering.

Another illustration is *Alexander v Railway Executive.*

On depositing his luggage at the parcel office of a railway station, paying ordinary rates, the plaintiff received a ticket containing conditions one of which exempted the defendants from liability for misdelivery or loss of any article exceeding £ 5 in value unless a special charge for the same was paid. The defendants allowed the plaintiffs friend to take away the luggage and in an action by the plaintiff relied on the above exemption clause.

But it was held that "an essential part of the executive's duty was to take care of the deposited goods; that they had committed a fundamental breach of the contract in allowing an unauthorized person to have access to the goods and to take them away and, therefore, they could not rely on the exemption clause to shield them from liability."

In *Giband* v *Great Eastern Railway.* A cycle deposited at a station of the defendant railway company was not in fact taken to the cloakroom, but was left in the booking hall itself and from there it was stolen, the company was held to be protected by the clause in the ticket which exempted the company from liability. The Court of Appeal could find no fundamental breach as it was no part of the contract that the cycle should be necessarily stored in the cloakroom. In *Hollins* v *J Davey Ltd* the plaintiffs car was garaged at the defendant's garage. One of the conditions of the contract exempted the defendant from loss or misdelivery. One of the plaintiffs former servants called at the garage and successfully persuaded the attendant to deliver the car to him telling him that he had been authorized by the plaintiff. The defendants were held not liable. The attendant made the innocent mistake in believing in the holding out by the servant. But if the attendant had delivered the car to a complete stranger, there would have been fundamental breach.

In *Suisse Atlantique Societe D'Armement Maritime, S A v N V Rotterdamsche Kolen Centrale:*

The defendants chartered the plaintiffs ship for carriage of coal from the United States to Europe for two years. The contract set out the rates of loading and also provided that in case of any delay in loading the defendants would have to pay demurrage at the rate of one thousand dollars a day. The defendants caused delays for which the plaintiffs claimed that the contract was repudiated but nevertheless, without prejudice to their rights, allowed the defendants to use the ship. At the end of the term they claimed damages for the delays in excess of the demurrage clause.

The House of Lords held that there was no fundamental breach. The defendants were guilty of conduct which entitled the plaintiffs to repudiate the contract, but they, in fact, affirmed it. The contract remained in force including the demurrage clause. Moreover, the demurrage clause was not an exception or limiting clause; it only stipulated liability for breach of contract and, therefore, the principle of fundamental breach was not applicable. But even so their Lordships explained *(obiter)* the meaning of fundamental breach or a breach going to the root of the contract.

"These expressions", observed Lord WILBERFORCE, "are used in the cases to denote two quite different things, namely: (*') a performance totally different from that which the contract contemplates, *(ii)* a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance of the contract."

His Lordship then explained that if fundamental or total breach means a departure from the contract, the question will arise how great a departure and if it means supply of a different thing, the question will be how different? and added: "No formula will solve this type of question, and one must look individually at the nature of the contract, the character of the breach and its effect on future performance and expectation and make judicial estimation of the final result." In *Harbutt's "Plasticine" Ltd* v *Wayne Tank and Pump Co Ltd.*

The defendants agreed with the plaintiff to design and install equipment for storing and dispensing stearine in a molten state at their factory. The defendants specified durapipe, a form of plastic pipe. In fact this was wholly unsuitable for the purpose. It burst at the very first testing leading to a fire which destroyed the factory. The defendants had limited their liability under the contract for any accident, etc. to £ 2,330. The plaintiff's loss was much greater.

The Court of Appeal held that the defendants were guilty of fundamental breach and, therefore, they could not avail of the limitation clause and were liable for the cost of reinstating the factory. The court pointed out that one must look not merely at the quality of a breach but also at its results. If the result of breach is the total destruction of the subject-matter of the contract, (factory in this case) then the contract is automatically at an end with all its exception clauses.

That these two decisions were not contradictory, but are reconcilable, appears from the judgment of DONALDSON J in *Kenyon, Son & Craven Ltd* v *Baxter Hoare & Co Ltd.*

The plaintiff stored in the defendant's warehouse 250 tons of round nuts packed in bags. The warehouse was suitable for the purpose and was otherwise also structurally sound. The defendants had excluded their liability for any loss or damage unless it was due to the willful neglect or default of the company or its own servants. The warehouse was not, however, rat proof and the groundnuts were badly damaged by rats.

DONALDSON J referred to three categories of cases in which the rule of fundamental breach has been applied as stated by Lord WILBERFORCE in the *Suisse Atlantique*-case. They are: *(i)* supply of a different article; *(ii)* hire-purchase cases; and (in) marine cases relating to deviation. The learned judge then stated that the Court of Appeal considered the *Harbutt's "Plasticine"* case as one of deviation from the main purpose of the contract. "The breach found consisted of the design, supply and the creation of a system or installation that was wholly unsuitable for its purpose." "Had the defendants stored these nuts in the open or in an area which was prohibited by the contract or had they even stored them in a warehouse which was structurally or by reason of its other contents so unsuited to such storage as to destroy the whole contractual sub-stratum of the contract, then none of the defendant's conditions would have applied. That was not, however, the position. The warehouse itself, although not perfect and therefore requiring special vigilance against infiltration by rats, was not unsuitable and the other goods stored there caused no damage to the nuts."

It has been laid down by the Court of Appeal that where the goods are lost from the custody of a bailee (a carpet cleaner in this case) fundamental breach would be presumed unless he accounts for the loss. The bailee must show that the loss had not occurred in consequence of a fundamental breach on his part since he is in a better position than the bailer to know what had happened to the goods while they were in his possession. Since the cleaner

could not account for the loss, he was not permitted to rely upon a clause by which he had limited his liability to a negligible figure. Lord DENNING went to the extent of saying that limitation clauses should not be given effect to in contracts in standard forms where there is inequality of bargaining power.

In a contract of carriage entered into on standard conditions of the forwarding trade, the parties orally agreed that the goods would be carried under the deck of the ship and not on the deck. The goods were by mistake put on the deck and lost. The cargo owner was allowed to recover his loss notwithstanding the exemption clause in the standard form limiting the carrier's liability, because the oral promise was to be treated as overriding the printed conditions. A contract for hire-purchase of a motor cycle stated that the motor cycle was subject to no conditions or warranties whatsoever express or implied. The machine was defective. It was returned for remedying the faults. It was delivered again to the buyer but all the faults were not rectified. Ultimately there was breakdown of the chain damaging also some other parts. The buyer finally rejected the machine and sought refund of the hire installments he had already paid. He succeeded. The supply of a defective machine was a fundamental breach. This cancelled out the exemption clause. Fundamental breach was also inferred where the plaintiff's factory was burnt down by a security guard who had been provided by the defendants to protect the factory against fire. The defendant was held liable despite a number of exemption clauses. The limit of £ 25,000 as stated in the contract was held to be not applicable.

The Supreme Court in the case of K.C.Skaria Vs. The Govt. Of State of Kerela and Anr. MANU/SC/0175/2006 the court held that in case of reach of contract for a particular work to be done then suit for rendition of account is not maintainable for work done. It can only be maintained if a person suing as a right to receive an account from the defendant.

Statutory definition of fundamental breach

The theory of fundamental breach has now become merged in the provisions of the (English) Unfair Contract Terms Act, 1977. The Act says that a party who commits breach of his contract cannot take the advantage of any clause in the contract which either excludes or limits his liability. Further, if there is any provision in the contract to the effect that "no performance" or "substantially different performance" will be taken as equivalent to performance, that will be of no avail. Thus the term "breach" will include no performance or a performance which is substantially different from that contemplated by the contract.

The effect of the provision is that it is no longer necessary for the courts to resort to "fundamental breach". The same result can be attained by resorting to the test of reasonableness under Section 11 of the Unfair Contract Terms Act. This approach was in evidence in the decision of the House of Lords in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd:*

The plaintiffs, who were farmers, ordered a quantity of seeds from seed merchants. It was known to the sellers that the seed should be for winter

white cabbage fit for human consumption. The supply was on standard terms which limited liability in case of defective goods to replacement or refund of price. The seeds grew into unusable weeds and not anything fit for human consumption. The defendants were not allowed to claim the protection of the exemption clause and were held liable for the plaintiffs' loss. The plaintiffs had based their claim on fundamental breach and requirement of reasonableness, but their Lordships rejected the common law ground of fundamental breach, and founded themselves exclusively on the statutory ground.

This was followed in *Phillips Products Ltd* v *Hylands.* A plant hire company delivered an excavator to the plaintiff along with its driver for use in building work consisting of an extension in the plaintiff's factory. A condition was that the driver would be regarded for all purposes the servant of the plaintiff who alone would be liable for his operations. The driver's negligence caused an accident resulting in considerable damage to the factory. Holding the company liable, the court said that the exclusion of the common law duty of care and responsibility for negligence was no longer allowed by the Act.

It is not necessary for the plaintiff to repudiate the contract. He may stay in it and also recover compensation for the deficiency in goods and services.

An electrical equipment was supplied under a contract which excluded all liability except for repair. Its poor functioning was set right by the supplier after two and a half months. He was held liable for the loss caused during the period of deficient functioning.

A term in a sale of potato seeds excluding all liability unless the buyer gave notice of any defects within three days of delivery, has been regarded as unreasonable. In such cases the defect is likely to be discovered only when the seed has been planted and it comes out. The other term which restricted the seller's liability to the contract price was found to be reasonable because it was there with the approval and as a common practice of the whole trade.

The Supreme Court in the case of Food Corporation of India Vs. Laxmi Cattle Feed Industries MANU/SC/8041/2006 it held that in case of breach of contract if suit is filed the plaintiff is required to prove the fundamental of the breach of the contract and proper evidence should be given for that. If the proper evidence is not given then suit cannot be degreed.

4. Strict construction

Exemption clauses are construed strictly, particularly where a clause is so widely expressed as to be highly unreasonable. Any ambiguity in the mode of expressing at exemption clause is resolved in favour of the weaker party. An illustration of this principle is afforded by *Lee (John) & Sons (Grantham) Ltd* v *Railway Executive.*

Goods stored in a railway warehouse let to a tenant were damaged by fin and the tenant brought an action against the railway executive alleging that the accident was due to their negligence because a spark ejected from their railway engine had caused the fire. The defendants set up a clause in the

tenancy agreement which exempted them for loss of or damage to property, however, cause (whether by act or neglect of the company or their servants or agents or no] which 'but for the tenancy hereby created would not have arisen'. The company was nevertheless held liable. The court was of opinion that the words "but for the tenancy hereby created" were confined to liabilities which arose by reason of the relationship of landlord and tenant.

Another illustration of strict interpretation is *Akerib* v *Booth.*

By a written agreement the defendants let to the plaintiffs a few rooms on the second and third floor of their premises for office and store purposes. They retained in their possession a water closet on the fourth floor. The agreement provided that the plaintiffs shall exclusively employ the defendants in making up and packing all the goods brought by them for business on the premises and that the defendants shall not in any circumstances be responsible for damage caused by water, insects, vermin or fungi to any goods. Owing to the negligence of the defendants or their servants water escaped from the closet and caused damage to the plaintiffs' goods.

It was held that the exception clause must be limited to the purpose of the contract. The purpose was to exempt the defendants from liability to goods that came to their possession for packing or making up, etc. The exemption clause must be confined to this and was not to apply to any other goods and accordingly, the defendants were liable.

Where the words are capable of bearing a wider as well as a narrower construction, the narrower construction would be preferred and against the party who has inserted the exemption clause "*'contra proj-erentem"'. Hollier* v *Rambler Motors A M C Ltd* is an illustration in point.

The Court of Appeal said that three or four dealings during the preceding five years were not sufficient to create such a course of dealing between the parties as to amount to notice of terms and distinguished the case from the decision of the House of Lords in *Henry Kendall & Sons v William Lillico & Sons Ltd* because in that case there were four dealings every month during the past three years and the terms printed on earlier sold notes were held to have become a part of the contract which resulted in the case, although on this occasion no such notes were issued. The court relied upon the decision of the House of Lords in *McCutcheon* v *David Mac Brayne Ltd* in which a car was shipped from an island to the mainland and although the sender had on previous four occasions shipped cars and signed a "risk" note which excluded liability for negligence, on this occasion he was not required to sign any and the car was lost by negligence, it was held that there was not such a course of dealing by which the terms of earlier contracts could be imported into the present and that the defendants were liable. The court further pointed out that even if the particular term had become a part of the contract, the defendants would have been liable because the term excluded liability for fire and not for fire by negligence.

Provision for review or variation of terms

A contract may contain a provision for escalation or review of prices. Such a contract does not become void for uncertainty and cannot be repudiated when prices are either reviewed or escalated provided that the review is reasonable and not arbitrary and escalation is on the basis of solid facts and according to the original price base and prescribed percentage.

The Supreme Court in the case of Ramchandra Murarilal Bhattad and Ors. Vs. State of Maharashtra and Ors. MANU/SC/8766/2006 observed that if the authorities are rejecting the bid in a auction then the power of rejection of Bid should be exercised by the authorities in cancelling tenders so as to enable it to have a relook over entire project. Again the Supreme Court in the case of Jagdish Mandal Vs. State of Orissa and Ors. MANU/SC/0090/2007 clearly directed that in case of tenders and its acceptance opportunity of hearing must be given before tender is granted. It was further held that the concerned authority should apply its mind judiciously before the rejection or grant of tender. The order should not be arbitrary or irrational.

5. Liability in tort

Even where an exemption clause is exhaustive enough to exclude all kinds of liability under the contract, it may not exclude liability in tort. In *White* v *John Warwick & Co Ltd.*

The plaintiff hired a cycle from the defendants. The defendants agreed to maintain the cycle in working order and a clause in the agreement provided: "nothing in this agreement shall render the owners liable for any personal injuries ...." While the plaintiff was riding the cycle the saddle tilted forward and he was thrown and injured.

It was held that although the clause exempted the defendants (even if they were negligent) from their liability in contract, it did not exempt them from liability in negligence.

It is; however, open to the parties to exclude liability even for negligence by express words or necessary implication. For example in *Rutter* v *Palmer,* a car was given to the defendants for sale under a contract which provided that while on trial the car would be driven at the customer's risk. An accident took place while the car was on a trial run. The defendants were held not liable, for they had by express words shifted the risk to the customers.

The results of such cases should now be different. The [English] Unfair Contract Terms Act, 1977, expressly provides that any clause in a contract which excludes or restricts liability for death or personal injury resulting from negligence shall be absolutely void. The expression "negligence" is defined in the Act to mean the breach of any common law or contractual duty.

Presently competition act 2003 in India has given much more protection against all such kind of standard form of contract. Earlier MRTP Act has given insufficient protection to the weaker section or other party but now, the enforcement of new competition law 2003 has improved the position of weaker section against much more kind of civil & tortuous liabilities.

6. Unreasonable or unfair terms

Another mode of protection is to exclude unreasonable terms from the contract. A term is unreasonable if it would defeat the very purpose of the contract or if it is repugnant to public policy. Pointing this out in the *Suisse Atlantique case,* Lord WILBERFORCE said:

One may safely say that the parties cannot, in a contract, have contemplated that a clause shall have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.

An example of an unreasonable term is to be found in *Lilly White* v *Mannu-swami.* A laundry receipt contained a condition that the customer would be entitled to claim only fifteen per cent of the market price or value of the article in case of loss. The plaintiffs new *sari* was lost. The term would place a premium upon dishonesty inasmuch as it would enable the cleaner to purchase new garments at 15% of their price, and that would not be in public interest.

Explaining the justification for not enforcing unreasonable terms in *Lee (John) & Sons (Grantham) Ltd* v *Railway Executive,* Lord DENNING LJ remarked:

There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused.

The importance of this vigilance was amply demonstrated by his Lordship in *Levison* v *Patent Steam Carpet Cleaning* Co.

A carpet was delivered to a cleaning company under the signature of the carpet owner. Immediately above the space for signature the form stated that the undersigned agreed to the terms and conditions set out above. One of the clauses fixed the value of the carpet at £ 40 and another stated that the goods had been accepted at the owner's risk and the customers should insure their goods. The carpet was never returned and the cleaners informed the customer that it had been stolen. The customer recovered the full value of the carpet from his insurer and the latter claimed £ 900 from the cleaners.

The clause which fixed the liability at £ 40 was regarded as unreasonable and, therefore, the cleaners were required to pay the full value of the carpet. Not to have returned the carpet, also amounted to a fundamental breach.

It is not reasonable to exclude liability for breach of a term which is fundamental to the contract.

A photocopying machine was taken on lease. The machine was supposed to contain a particular feature. The machine which was actually supplied did

not have that feature. The lease excluded liability for representations, if any, made about the machine.

It was held that the exclusion clause was unreasonable. It became overridden by the representations made by the copier salesman.

A local authority entered in a contract with a supplier for purchase of computer software designed to administer the collection of community charge according to population. The software contained an error which led to wrong count and, therefore, loss of revenue. The supplier company had limited its liability under the standard terms to £ 100,000. The court allowed the authority to recover its whole loss of revenue and not merely the amount under the limitation clause, which was held to be unreasonable. The supplier was a substantial company with ample resources to meet any liability and was insured under a worldwide policy for £ 50 million. There were a very few companies which could meet the authority's requirements, the supplier was in a very strong bargaining position. The supplier company failed to adduce any evidence as to why the limit of £ 100,000 was justified. It was irrelevant to the defendant company's liability that the authority had made up its loss by increasing the community charge the following year.

The Supreme Court in the case of India financial Assn., Seventh Day Adventists Vs. M.A. Unneerikutty and Anr. MANU/SC/3291/2006 the court described that in any part of single consideration for one or more objects or any one or any part of anyone of several considerations for a single object was unlawful then the agreement is void and such kind of agreement cannot be enforced as it is unfair and against public policy. The doctrine of public policy can be summarized thus Public policy or Policy of Law is illusive concept. It has been described as untrustworthy guide, variable quality, uncertain one and unruly house. The primer duty of court of law is to enforce a law is and to uphold its sanctity. But in certain cases the court may release them of their duties on a rule founded on what is called the public policy, but the doctrine is extended not only to harmful cases but also to harmful tendencies. It is a branch of common law to be applied by the court as a situation demand to save the public from possible harm.

Power of removal simpliciter in contract of employment

A term in a contract of employment being offered by a Government corporation providing for the removal of a permanent employee without inquiry has been regarded by the Supreme Court as unreasonable. The Supreme Court has gone further still to lay down that in all its affairs, including economic and contractual affairs, the State and its instrumentalities have to observe the mandate of Article 14 of the Constitution and offer equal opportunities and make a fair and a reasonable selection of the party, including the selection of a District Government Counsel, on whom contractual benefits are going to be conferred.

The Supreme Court in the case of Percept D'Markr (India) Pvt. Ltd. Vs. Zaheer Khan and Anr. MANU/SC1412/2006 held that a restrictive convent

extending beyond term of contract is vide and not enforceable it was described that if there is any condition in any contract which has to be enforced beyond the period of contract than it cannot be enforced.

Statutory power to exclude unreasonable terms

The principle of excluding unreasonable clauses has now found statutory recognition in the [English] Unfair Contract Terms Act, 1977. The Act provides that in respect of any loss caused by the breach of contract, any restricting or excluding clause shall be void unless it satisfies the requirement of reasonableness. A term will be regarded as reasonable if it is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made."

Fairness in Government contracts

The Supreme Court in its decision in *Delhi Science Forum* v *Union of India* stated:

"Many administrative decisions including decisions relating to awarding of contracts vested in a statutory authority or a body constituted under any administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds: (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations *(iii)* decision has been taken without following the prescribed procedure which is imperative in nature." The burden of proof is on the person who questions the validity of the Government decision.

7. Exemption clauses and third parties

One of the basic principles of the law of contract is that a contract is a contract only between the parties to it and no third party can either enjoy any rights or suffer any liability under it. This should apply to standard form contracts also. The effect would be that where goods are supplied or services rendered under a contract which exempts the supplier from liability and a third party is injured by the use of them, the supplier is liable to him notwithstanding that he has purchased his exemption from the other party to the contract. If, for example, a contractor agrees to maintain and repair a lift in certain premises under contract with the owner which exempts him from liability, that exemption would not avail the contractor against a person who is injured owing to bad repairs. If this were not so, the life and security of millions of people would be in the hands of the two parties to a contract. They would then make law not only for themselves, but also legislate for countless others. Obviously, therefore, in *Haseldine* v *C A Daw & Son Lid,* the above-mentioned lift case, the defendants were held liable for the tort of negligence. GODDARD LJ reminded the contractor "that the duty to the third party does not arise out of contract, but independently of it".

Just as a third party is not affected by the terms of a contract, so also a third party cannot claim the advantage of them. If, for example, a sea-line

company exempts itself from any liability to its passengers for the negligence of its employees, a passenger injured by the negligence of an employee will nevertheless be entitled to sue the negligent employee. In another case, a shipping company limited its liability to a fixed amount for any loss of or damage to goods. The stevedores in England agreed with the company to handle cargo subject to the same condition, but the plaintiff had no knowledge of this agreement. His consignment having been lost through the negligence of the stevedores, they were held not entitled to the protection of the limiting clause.

A different result followed where the exclusion clause not merely protected the carrier, but also his agents and contractors and the stevedores contracted to unload the ship as agents for the carrier. They were accordingly held not liable for damage caused to the plaintiffs machinery through their negligence in the act of unloading. Now under the [English] Unfair Contract Terms Act, 1977, a clause which excludes liability for negligence would be enforced only if it is reasonable in the circumstances of the case.

Looking at this state of the law the transport companies began to draft their exclusion clauses so as to provide that neither they nor their employees would incur any liability. In two such cases, in both of which two free pass holders of a bus company were injured, one through the negligence of the driver and the other of the conductor, they were allowed to proceed against the negligent employees, in the one case because the free pass was a license and not a contract and the driver was not a party to it and in the other because it was a contract and was void under Section 151 of the [English] Road Traffic Act, I960.

The only way of conferring the benefit of exception clauses upon employees or sub-contractors, etc., seems to be the principle of vicarious immunity or implied contract as suggested by the House of Lords in *Elder, Dempster & Co* v *Paterson Zochonis & Co.* In this case the plaintiff contracted with a charterer and the latter hired a ship from the ship owner for carriage of oil casks. The bill of lading as drawn between the plaintiff and charterer exempted both the charterer and ship owner from consequences of bad stowage. The oil was lost in circumstances covered by the exception clause. The plaintiff sued both of them, but they were held not liable, either because the bill of lading became an implied contract between the plaintiff and ship owner or because the ship owner was acting as an agent of the charterer.

The [English] Unfair Contract Terms Act, 1977

The [English] Unfair Contract Terms Act, 1977, which came into force on February 1, 1978, improves or affects some of the principles established by the courts in reference to business contracts. Only a brief view of the Act can be attempted here.

The Act provides, for the first time, a statutory definition of the term "negligence" which is applicable both to tort and breach of contract cases. In the terms of the definition, negligence means :—

(a) breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) breach of any common law duty to take reasonable care or exercise reasonable skill (but not a stricter duty); or

(c) breach of the duty of care imposed by the Occupiers' Liability Act, 1957.

The second important effect of the Act is that any clause in a contract which excludes or restricts liability for death or personal injury resulting from negligence shall be absolutely void.

The third noteworthy provision of the Act is that in regard to other types of loss, not being death or physical injury, any restricting or excluding clause shall also be void unless it satisfies the requirement of reasonableness. The test will be deemed to be satisfied if the term is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". It means that reasonableness depends upon the unfairness of the terms in the light of the circumstances which ought to have been either known to or to be in the contemplation of the parties.

A chartered surveyor who gave a negligent mortgage valuation of a bungalow upon which the plaintiff relied in purchasing the property was held liable in spite of a clause excluding his liability in the matter. The clause was found to be not reasonable in the circumstances.

The third important provision of the Act is concerned with the protection of the consumer and those who have been subjected to a standard form contract. The Act says that a person who deals with a consumer on his own standard terms, will not be allowed to claim the protection of any clauses restricting or excluding liability if he himself commits breach; nor he can claim substantially different performance as equivalent to performance. He can, however, take advantage of such terms if they are reasonable.

The fourth important part of the Act extends the scope of the Supply of Goods (Implied Terms) Act, 1973. This Act does not permit in reference to consumer sales the liability for breach of implied conditions and warranties to be excluded. This will now apply to all contracts under which possession of or property in goods passes from one person to another, for example, contracts of renting or leasing of appliances. In non-consumer contracts the exception clauses will be subjected to the test of reasonableness.

A plant hire company hired out an excavator to the plaintiff together with the first defendant, a driver, for use in building work consisting of an extension to the plaintiffs factory. A condition was that the drivers were to be regarded for all purposes as the servants or agents of the hirer who alone will be liable for the consequences of the operation by them. An accident occurred

as a result of the driver's negligence, causing considerable damage to the plaintiffs factory.

Going by the substance and effect of the term, rather than by its form, the court held that the term had the effect of excluding the common law duty in tort. It had the effect of excluding liability which fell within the purview of the Act and was, therefore, not fair and reasonable. The court relied upon the speech of Lord BRIDGE in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd:*

In considering the requirement of reasonableness, the court must entertain a whole range of considerations, put them in the scales on one side or other and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right.

8. Scope & Application of the Contract Act

The Contract Act merely provides certain elementary conditions under which the contract becomes binding on the parties: it does not provide any particular form or condition. The parties may agree to a particular form or condition. The parties may agree to a particular form or condition or mode in which the contract is to be made. A particular form in which a contract is to be executed not provide any particular form or condition. The parties may agree to a particular form or condition or mode in which the contract is to be made. A particular form in which a contract is to be executed has been provided by the Constitution of India. The Railways Act, 1890, s. 72 also provides for a particular mode or form in which a contract has to be entered into. This does not mean that the Contract Act stands superseded either by the Constitution or by the Railways Act. The essential object of the contract of sale is the exchange of property for a money price. There must be a transfer of property, or an agreement to transfer it, from one party, the seller, to the other party, the buyer, in consideration of a money payment or a promise thereof by the buyer. The scheme of the Coffee Act 1942 is to provide for a single channel for sale of coffee grown in the registered estates. The Act directs the entire coffee produced except the quantity allotted for internal sale, if any, is to be sold to the Coffee Board through the modality of compulsory delivery and imposes a corresponding obligation on the Coffee Board to compulsory purchase on the coffee delivered to the pool. In the nature of the transactions contemplated under the Act mutually assent either express or implied is not totally absent. Coffee growers have a volition or option, though minimal or nominal to enter into the Coffee growing trade. Coffee growing was not compulsory. If any one decides to grow coffee or continue to grow coffee he must transact in terms of the regulation imposed for the benefit of the Coffee growing industry. Section 25 of the Act provides the Board with the right to reject the coffee if it is not up to the standard. Value to be paid as contemplated by the Act is the price of the coffee. Fixation of price is a matter of dealing between the parties. There is no time fixed for delivery of coffee. Con sensuality is not

totally absent in the transaction. Therefore, it was held that it was a contract for sale between the coffee grower and the Coffee Board and not acquisition of property.

The Supreme Court in the case of Ramnath International Construction Pvt. Ltd. Vs. union of India (UOI) and Anr. MANU/SC/8802/2006 held that if these is any kind of delay attributable either to contractor or the employer or to both and the contractor seeks and obtains extension of time for executing on that account, he will not be entitled for any kind of compensation on ground of delay on the basis of a provision in the contract which debar compensation on the ground of delay.

The Supreme Court again in the case of Ambica Construction Vs. Union of India (UOI) MANU/SC/5180/2006 it was held that in a case where No Claim Certificate is required to be submitted by a contractor once in the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the work was yet to be completed and there is noting to indicate that the works as undertaken by the contractor had been finally measured and NOC had been issued. On the other hand Arbitrator concluded that the NOC was given under duress and coercion. The Court made it further clear having regard to the case of Rashmi Constructions, it can no longer be said such a clause for NOC would be a bar to a contractor raising claim which are genuine even after the submission of NOC.

9. Contempt of court and Law of Contract

It is true that the Law of Contempt of court is essential for keeping the administration of justice pure and undefined. It is also well to remember that our society is also interested in the fulfilment of man's expectations under a contract. To that end, we have a Law of Contract in our country assigning an unlimited and undefined area. Each should have a viable area so that justice may hold high her head and contract is not cribbed and cramped. The above principle was laid down by the Supreme Court in the case of *K.T. Chandy v Mansa Ram Zade* where die Chairman of the Hindustan Steel Ltd. served a notice on any employee that his performance and conduct have not been good and that he was not proved useful for the company. As such he was advised that he may try for alternate job elsewhere and then he may be released from the company at his request on payment of the amount required under the bond executed by him on *pro-rata* basis as a very special case taking into account the period of service that may be rendered by him at the time of release. Soon thereafter the employee filed a suit for declaration that the said notice was illegal, bad, *mala fide* and also for mandatory injunction and for permanent injunction restraining the Chairman from giving effect to his notice. He did not ask the court to grant an interim injunction restraining the Chairman and the company from terminating his service during the pendency of the suit. As there was no impediment of terminating the employee's service according to the terms of the contract, company gave the employee notice of termination with immediate effect and payment of 3 (three) months pay in lieu of notice. The order terminating the employee's service does not

threaten the employee to withdraw the whole or part of his suit. The mere circumstances that one or more of the reliefs claimed in the plaint have become infractuous on account of the termination order would not establish contumacy. The employee was free to amend his plaint and ask for a relief against the termination order. As the Chairman had a right under the contract to terminate the service of the employee, there was no question of contempt of court in the facts of that case.

10. Contract with Government

Articles 298 and 299 of the Constitution of India empower the Government to enter into contracts in exercise of its executive power in the prescribed manner on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. Under Art. 300 the Government of India may sue or be sued by the name of the Union of India and the Government of a State. After the Union of India or the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by legally valid contract which determines rights and obligations of the parties *inter se*. No question arises of violation of Art. 14 or any other constitutional provision when the State or Union or its. agents purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract. When a contract is sought to be terminated by the officers of the State, purporting to act under the terms of an agreement between the parties such action is not taken in purported exercise of the statutory power at all. The only question which normally arises in such cases is whether the action complained of is or is not inconsonance with the terms of the agreement. The relevant term was one to be performed locally and by the insured. The contract of insurance itself was in a form devised by the broker and was part of an operation which the underwriters themselves were clearly keenly interested. Both the history of the negotiations and the form of documents shows that in essence the insurance and the re-insurance were back-to-back. The follow-settlements clause, however, much emasculated by the claims control clause, cannot be ignored. Furthermore, the rights given by the under-writers by the claims control clause included the right to negotiate with the insured with reference to an insurance company, which was indubitably governed by Norwegian Law. As a matter of construction of the re-insur-ance contract and by seeking to ascertain the presumed intention of the parties the watch clause has to be given the same effect as it is given in the underlying insurance contract. In the context of the present case this solution is the only one that makes commercial sense. The underwriters were held to be correct in their contention that the question of waiver by the underwriters would be governed by the English Law.

In nutshell, by the above discussion it is clear that the court always took a sharp & strict view over standard form of contracts. Where ever and whenever the court took a chance to disregard such kind of contract, the court never hesitated to take action. The court has further ruled in several cases, cited above, that standard form of contract as far as possible should provide reasonable notice of its terms in bold and different language. Notice of unusual terms should be exhibited specifically along with contemporaneous with contract. There should be no term and condition which is against the basic spirit of the contract which is finally departing from the contract itself. There should be no unfair or unreasonable term in the contract which is against the public policy. If there is any kind of exemption clause it should be construed very strictly so that no one can enjoy benefit unreasonably. No third party should enjoy any right or suffer any liability under it. The Court has further made it clear that such kind of contracts should be interpreted liberally in favour of second party and strictly against the first party. The Court has further made clear that such kind of contracts should a reimbursement or insurance clause so that the sufferer may get the relief straight way. There should also be a clause in such kind of contracts that the execution of such kind of contracts should be registered as per law and the reimbursement or the insurance or the compensation clause, in case of breach of such kind of contracts, should be directly enforceable through court as it were a decree of a court. The basic purpose of the court is that the weaker party should not be put under heavy pressure and the stronger should not get undue advantage. The court has always tried to maintain the balance in case of crisis among standard form of contract.

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