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A CRITICAL ANALYSIS ON LAW OF CONTRACTS: WITH SPECIAL REFERENCE TO RESTRAINT TO TRADE.

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1. INTRODUCTION-

The concept of agreements and contracts have existed in the society way before laws and rules came into picture. Contracts and agreement trace its existence through the notion of social- contract theory as propounded by Thomas Hobbes, John Locke and Jean Jacques Rousseau.

Foreshadowing Hobbes, Locke and Rousseau, Socrates argues through the laws that he is obligated to follow because he himself is the one who has entered into an agreement in respect to obligation to laws. After reflecting on his life in Athens, Socrates comes to the conclusion that, by voluntarily deciding to live there; he automatically comes into an agreement with the state/sovereign to abide by their laws. This contract is thus renewed on daily basis as he continues to reside within the territory of the sovereign for 70 years of his life.

Fast forwarding to the renaissance period and afterwards, the ideals that each of the contract theorist apply in their own theories have varied radically on the position of certain elements; despite that, the one thing that unifies the social contract theorists is a common belief that de jure civil authority can be justified by a theory that explains how human beings have moved on from the State of Nature to a Civil State by entering into a social contract with each other.

2. RESEARCH OBJECTIVES-

- To analyze the role of judiciary in resolving contract disputes
- To make a comprehensive study on restraint to trade Legislation
- To evaluate the problems faced by the parties due to the dilemma provided by section 27

3. RESEARCH METHODOLOGY-

This paper has been encircled by the researcher using the doctrinal and analytical method. Both descriptive and exploratory analysis have been used. The primary source of research includes legislations, directions, case laws, reports published by the parliamentary standing committee, draft policies and rules. The secondary sources will include books, research articles, law commission reports and websites. All the sources have been appropriately recognized.

4. RESEARCH QUESTIONS-

- 1) Whether section 27 of the Indian contracts act provides uncontestable immunity?
- 2) Whether the parties are able to get the judicial remedy within reasonable time?
- 3) Whether the provision in relation to restraint to trade has been able to achieve its objectives?

5. WHAT IS A CONTRACT?

In layman terms a contract can be defined as an agreement coupled with the aspect of enforceability by law. Thus, a contract is an agreement which is enforceable by law or has legalbacking.

Essentials of a valid contract

1. Offer: When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

2. Acceptance: When the person to whom the proposal has been made signifies his assent thereto, the offer is said to be accepted. Thus, the proposal when accepted becomes a promise.
3. Intention to create a legal relationship: for a contract to be binding, both the parties must have the intention to create a legal relationship thus leading to an agreement.
4. Legal intent: the parties to a contract must have a legal intent so come forth into a contract. That is the objective of the parties must not be in violation to law or shall not be illegal.
5. Competency: the parties to the contract must be competent according to the law.
6. Consideration: When, at the desire of the promisor, the promisee or any other person has done or abstained, from doing or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

6. AGREEMENT IN RESTRAINT TO TRADE

Section 27 of the Indian contracts act 1872, deals with the restraint to trade.

- 1. Every agreement through which one is restrained from carrying out any lawful profession, business or trade of any kind is to that extent be void**

An exception to section 27 of ICA is **Saving of agreement not to carry on a business of which the goodwill is sold. Regarding that such limit appears to the court reasonable, regard being held to the nature of the business.**

the provision regarding the restraint to trade has been lifted from David D. Field's draft code for New York which was based upon the old English doctrine of restraint to trade, as prevailing in the ancient times. In the process of drafting of section 27 of the Indian contracts act, the high courts in India held that the test of reasonableness along with the provision of the restraint being partial or reasonable is upheld by a case governed under section 27 of the ICA, unless it falls within the exception thus provided.

The courts; thus establish a clear demarcation and intelligible differentia so as to decide what falls within the scope and blanket of exception to section 27.

Legal stance in respect of section 27 Ica, 1872

7. CASE LAWS ASSOCIATED WITH AGREEMENTS

IN RESTRAINT OF TRADE-

a. AIR 1995 SC 2372 Para no.22 and 23:-

"22. While construing the provisions of Section 27, the High Courts in India have held that neither the test of reasonableness, nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27, of the Contract Act, unless it falls within the exception. The law commission in its 13th report has recommended that the provision should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public. No action has, however been taken by parliament on the said recommendation.

23. We do not propose to go into the question, whether reasonableness of restraint is outside the purview of Section 27 of the Contract Act and for the purpose of the present case, we will proceed on the basis that an inquiry into the reasonableness of the restraint is not envisaged by Section 27. On that view instead of being required to consider two questions as in England, the courts in India have only to consider the question whether the contract is or is not in restraint of trade."

b. AIR 2006 Supreme Court 3426 - para no.57:-

"The legal position with regard to post contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallized in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness, nor the principle of restraint being partial is applicable, unless it falls within the express exception engrafted in Section 27. "

c. **AIR 1980 Supreme Court 1717:-**

"25. While the Contract Act, 1872, does not profess to be a complete code dealing with the law relating to contracts, we emphasise that to the extent the Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law dehors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English Law. The provisions of Section 27 of the Act were lifted from Hon. David D. Field's Draft Code for New York based upon the old English doctrine of restraint of trade, as prevailing in ancient times. When a rule of English Law receives statutory recognition by the Indian Legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the analogous provision comes to be construed narrowly, or, otherwise modified, in order to bring the construction within the scope and limitations of the rule governing, the English doctrine of restraint of trade.

26. It has often been pointed out by the Privy Council and this Court that where there is positive enactment of Indian Legislature the proper course is to examine the language of the statute and ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law - or the English Law upon which it may be founded. In **Satyabrata Ghosh v. Mugnee Ram Bangor, 1954 SCR 310** Mukherjee, J., while dealing with the doctrine of frustration of contract observed that the Courts in India are to be strictly governed by the provisions of Section [56](#) of the Contract Act and not to be influenced by the prevailing concepts of the English Law, as it has passed through various stages of development since the enactment of the Contract Act and the principles enunciated in the various decided cases are not easy to reconcile. What he says of the doctrine of frustration under Section [56](#) of the Contract Act, is equally true of the doctrine of restraint of trade under Section 27 of the Act.

27. Now, so far as the present case is concerned, the law is to be found in Section [27](#) of the Contract Act, 1872 which reads :

"27. Agreement in restraint of trade void - Every agreement by which any one is restrained from

exercising a lawful profession, trade or business of any kind is to that extent void.

Exception 1 :- One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any other person deriving title to the goodwill from him, carries on a like business there in; provided that such limits appear to the Court reasonable, regard being had to the nature of the business".

The section is general in terms, and declares all agreements in restraint void pro tanto, except in the case specified in the exception.

28. *The question whether an agreement is void under Section 27 must be decided upon the wording of that section. There is nothing in the wording of Section 27 to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to the section.*

29. *A contract, which has for its object a restraint of trade, is prima facie, void. Section 27 of the Contract Act is general in terms and unless a particular contract can be distinctly brought within Exception 1 there is no escape from the prohibition. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon them the meaning which they appear plainly to bear. This view of the section was expressed by Sir Richard Couch C.J. ,in the celebrated judgment in **Madhub Chunder v. Rajcoomar Doss (1874) 14 Beng LR 76** at pp. 85-86, laying down that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void".*

8. WHAT IS GOODWILL-

An important aspect that needs to be kept in mind is the type and nature of goodwill.

Goodwill of a business is deemed to be an independent asset, though intangible, is different from a tangible asset.

According to the Black's law dictionary, tangible and intangible assets have been defined differently.

Intangible Asset: Any non-physical asset or resource that can be amortized or converted to cash. Such as patents, Goodwill and computer programs or a right to something such as services paid for in advance.

Tangible Asset: Any asset that has a physical existence and is capable of being assigned a value.

In simpler terms any asset the value of which is known or can be known or can be weighed in monetary terms. The term "goodwill" has been defined by the Hon'ble Division Bench of the Bombay High court in judgment reported in AIR 1957 Bombay 111, wherein in para no.8, it washeld that "the goodwill of a business is inclusive of positive advantages, such as carrying on the commercial undertaking at a particular place and in a particular name and also its business connections, its business prestige and several other intangible advantages, which a business may acquire.

9. CONCLUSION-

If we analyze the current legislations and provisions relating to agreement in restraint of trade, a fair conclusion can be derived that the provision for agreement in restraint to trade is very stringent and strict. There is no scope for ambiguity so as to what can be covered within the scope of section 27 of Indian Contract Act. The lawmakers have derived the concept from the English common law. In the context of Indian needs the provision as of the date is able to equate the parameters of disputes and is able to resolve them. The loophole comes into play as to when there is uncertainty regarding what shall be constituted as a transaction involving goodwill. The exception to section 27 is when the goodwill of a certain property is sold, section 27 is void. Goodwill is defined as an intangible asset, thus the jurisprudential transfer of property implies that the buyer than shall have the sole right to have beneficial interest upon the property unless stated otherwise,

BIBLIOGRAPHY

JOURNALS

1. McNair, A. D. (1924). Agreements in Restraint of Trade. *Economica*, 11, 176–185.
2. Whiteman, P. G. (1966). Agreements in Restraint of Trade. *The Modern Law Review*, 29(1), 77–82.
3. “No Restraint of Trade.” *Scientific American*, vol. 79, no. 25, 1898, pp. 388–388.

JSTOR,WEBLIOGRAPHY

- 1. <https://www.m.economictimes.com>
- 2. www.ipindia.nic.in
- 3. <http://www.dipp.ic.in>
- 4. <https://www.lexology.com>
- 5. <https://www.mondaq.com>
- 6. <https://www.mymodernmet.com>
- 7. www.cgpdtrcruitment.in
- 8. <https://www.currentaffairs.gktoday.in>
- 9. <https://www.livelaw.in>
- 10. <http://www.bananaip.com> weekly trademarks news
- 11. <https://www.inta.org>