

Advanced Contracts, Tendering and Public Procurement
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Formation of Contract: Legality of Object & Public Policy – Part 04



B. Modern test of Public Policy

TYPES OF ANTI-COMPETITIVE AGREEMENTS

- ▶ Tie-in-agreement
- ▶ Exclusive supply agreement
- ▶ Exclusive distribution agreement
- ▶ Refusal to deal
- ▶ Resale price maintenance

- Anti Competitive agreements
 - Horizontal v/s vertical
- Employment bond
- Surrogacy Agreements

SURROGACY AGREEMENTS

Parties	Compensation	Parentage
<ul style="list-style-type: none"> • Intended Parents (person or persons for whom the baby is being carried) • Surrogate (also known as Gestational Carrier) • Surrogate's Husband (if the Surrogate is married) 	<ul style="list-style-type: none"> • Payment amounts for each month • Additional compensation for medical procedures, tests, etc. • Terms and conditions of compensation 	<ul style="list-style-type: none"> • Secure Intended Parents' Custody • No contact by Surrogate or non-interference once baby is delivered

The last aspect of the discussion under Section 23 of the Indian Contract Act is on employment bonds. This would give an idea of the vastness and coverage of section 23, as it covers every other aspect of public policy dimension. It gives the mandate of intervening in unfair contracts or unreasonable contracts on the grounds of public policy.

Employment bond, or what many would see in the market as indemnity bond is a contract between an employer and an employee, where the employee has to give an undertaking that he will work for the employer for a minimum duration of a time. It could range between 1 year, 3 years, 5 years or even beyond that. This kind of a clause in a contract is quite common. It is equally visible in private sector employment contracts and public sector employment contracts. The issue of employment bond arises from the fact that an employer tries to use his bargaining power, which is a higher bargaining capacity, to determine the terms and conditions of employment.

One of the justifications for an employment bond is the high rate of attrition in employment today. According to the Springboard Theory, an employee joins his first employer and he uses it as a springboard. So, he makes a jump, he takes a leap and actually joins someone else. First employment is just the first window of opportunity to open for a person. He can 'Springboard' from there and actually go on to join rivals or competitors. Hence, employers feel aggrieved as they have spent so much of time in recruitment. For instance, in the public

sector undertaking recruitments, a considerable amount of time is spent in the recruitment process itself, in the form of examination and interview. More importantly, once the recruitment process is completed, there is a training that is usually given to employee. A lot of money is invested in training, which may range between one month to one year. Hence, if the employee leaves and joins rival or competitor that will actually be disadvantageous to the company or to the employer. Hence, employers feel the necessity to have this bond. They feel that it is reasonable to have this bond so that in lieu of whatever they have done so far in investing on the employee skill or in his enhancement of his knowledge and training, the employee is duty bound to work with them for a minimum duration of 3 years or 5 years. This is also based also on a justification that an employer and an employee share a fiduciary relationship. It is a relationship of trust, confidence and loyalty.

Secondly, employment bond is also justified by employers on the ground that every employee who joins an organization gets to know a lot of trade secrets. They get access to lots of price sensitive material and information. They are privy to the marketing and business strategy. So, a company's trade secret often gets compromised when key employees leave an organization. This effects business and is advantageous to competitors. Hence, a lot of innovative clauses have been designed today in employment contracts and this clearly is a public policy matter.

Why is this a public policy matter? Recall that during the Industrial Revolution, there were a lot of labor strikes that took place because many of these companies and industries engaged in unfair labour practices. Employers and industrialists exploited labor and that is why we have seen, not only in India but world over thanks to the interventions of International Labor Organizations, a lot of labor movement and enactment of labor laws. These legislations are pro-labor legislations. All the labor legislations are a result of the fact that employers tendency to abuse their bargaining capacity to have unfair trade and unfair contracts with their employees is well-known.

One of the major challenges to employment bonds is reasonability. Should a company which is very large enough and has thousands and lakhs of employees start making this employment bond applicable for every category of employee be allowed to freely to exploit? Secondly, who decides who gets to decide whether the employment bond should be for 1 year or for 6 years? Most often, the employers get to decide. However, shouldn't any such tenure or term be reasonable to the extent of protecting the employers' interest, and also balancing the interest of the employees.

Employees feel concerned about employment bond as they feel that their freedom to gain employment, freedom of livelihood, freedom of choice and freedom to change their employer, gets adversely affected by an employment bond. In the Constitution of India, we have article 19 (1) (g), which guarantees every citizen the freedom of trade, occupation and business. While article 19 (2) in the Constitution definitely talks about reasonable restrictions, and public policy is one of those reasonable restrictions, here your freedom is getting restricted contractually. There should be an evaluation of whether the restriction is necessary, to what extent it is necessary and to what extent it can be actually tempered down. Hence, public policy in employment is a very critical factor and employment bond of the current context are critical.

Till the Courts intervened, the employment bonds stipulated conditions such as an employee has to mandatorily work for a minimum duration of 3 years and if he wishes to leave within those 3 years, he has to pay 3 lakh rupees. This 3-lakh rupee as compensation to be paid in case of the breach of the bond is kind of an exit clause. To escape the bond, he has to pay 3 lakhs. The employee ultimately ends up compensating the employer for his breach of contract. This is like a weapon, a stick or a warning pill that employers keep with them, so that they know how to enforce some kind of a loyalty from their employees.

Critics of employment bond have said that this is nothing but modern day bonded labor. In the earlier form of bonded labor there used to be iron chain around employees and laborers and they were forced to do bonded labor. In the modern type of bonded labor, the contract still binds chain around the employees asking them to work with them for 3 years. If you read contract law clearly this kind of 3 lakhs is supposed to be what we call as anticipated loss or pre-estimated loss and it is not actual loss.

What you lose when an employee leaves before 3 years is based on foresight or calculation, such as the amount that is spent on recruitment, training etc. and is a pre estimate. To a large extent pre-estimations of losses or damages in contract are called as liquidated damages. This is covered under Section 74 of the Indian Contract Act. If one applies liquidated damages to employment bond, it ought to be reasonable. If it is not reasonable, what you have anticipated or pre estimated will not be enforced by the courts.

The Courts have said that any kind of exit arrangement in which the employee has to pay to the employer ought to be reasonable and proportionate. Proportionate, because there are possibilities that employees may leave, say after 6 months have lapsed from the three-year

bond time. How much should a person who was going to leave after 6 months pay as compared to a person who serves 2 and half years of the bond time? Can it be said that both have to pay 3 lakh rupees. Courts have been unequivocal in holding that unless the rule of proportionality is applied in the contract, the amount that is just blanketly arbitrary and one sided as mentioned in employment bond is not going to be enforced or recovered as damages under contract law.

If it is regarded as liquidated damages, the rule under Section 74 applies which is why companies have been very clever enough to design the contract in a manner where they call it as the indemnity bond. Then it is a contract of indemnity, which gets covered under Section 124 of the Indian Contract Act. Indemnity is also kind of a promise to cover your loss. It makes it incumbent upon an employee to cover the risks that may arise from his recruitment and any such loss that may occur due to his early exit from the company. This is an assurance that an employee ought to have given under an indemnity bond which gets covered under Section 124. Once it is indemnity, it gives the employer a broader right to recover many things that cannot probably be done under Section 74. Indemnity covers the right to recover damages, costs and any other indirect loss that may be accrue due to the loss of the employee. So, the employers prefer to call it an indemnity contract simply because of the fact that the broader aspect of the right to recover in indemnity is advantageous to them.

In the law of damages, there is this rule of remoteness which lays down that you cannot recover remote damages. In the law of damages there is this proportionality rule that has come into place and hence there is disadvantages there. Even if you call it indemnity, cover it under a different section of the Indian Contract Act so that you can get broader rights, you can only get direct losses. This would rather make the employee far more accountable and liable for any kind of a breach of the bond and the enforceability of the same becomes far more effective. This is why companies and contract lawyers call the employment bond as an indemnity bond.



7. Void Agreements

- 1. Agreement in restraint of marriage: sec. 26
 - Pre-nuptial agreements



Under the Indian Contract Act, Section 26 says agreement in restraint of marriage is considered to be void. Section 26 is lays down that contracts and agreements that will affect the rights of people to get married cannot be made. Restraining someone's choice to get married is void.

We do not have a modern contemporary case law to explain section 26. Consider that there is a contract between two widows who have lost their husband that if either one of them get married, they will lose their rights over the deceased husband's property. If one of them decides to get married she will lose her succession rights to her first husband's property. Such kinds of agreements have been evaluated by the courts to see whether it attracts Section 26 because it is restraint to marriage. There is also a question that once you are going to marry for the second time, you can inherit your second husband's property. So, is it fair, that the continuing widows gets to keep the entire property of the first deceased husband? Or should this agreement be treated as restraint of marriage? Restraint to marriage means that an agreement probably restrains from getting married. It is a promise undertaken by someone that they won't get married. Hence, this is an agreement and a contract. The drafters of the Indian Contract Act had to clearly state that marriage is a personal choice of parties and that there cannot be any contract that restraints such personal choices. So, commercial agreements and contracts have no business to enter into the choice of marriages. That is probably the message that comes from Section 26.

It would be appropriate to discuss the issue of pre-nuptial agreements under two sections of the Indian Contract Act. First is Section 23, which talks about agreements opposed to public policy. Second is Section 26 which talks about agreements in restraint of marriage.

There are three aspects in a marriage; the marriage itself is a contract, there can be an offer and an acceptance and there can be consent in marriage. Moreover, the definition of fraud under the Indian Contract Act and the Hindu Marriage Act seems to be almost similar. Marriage can probably look like a contract, but you will notice that once special legislations were enacted like the Hindu Marriage Act, the Muslim Marriage Act and Christian and so on and so far, then marriage is governed under those special laws and it may not be covered under the contract law. So, divorce is not considered breach of contract. So, marriage is outside the domain of contract.

Similarly, you will notice that if there is a divorce, then can there be some kind of a settlement agreement between husband and wife for maintenance. Such kinds of arrangements between a husband and wife for maintenance can be an agreement enforceable at law. So, there can be a mediation and a settlement agreement and it can be made enforceable at law. There are some elements of contracts that can be brought in to post marriage arrangements.

Now, pre-nuptial agreement is before marriage. In the United States or even in the Europe and in UK, it is quite a common practice among celebrities to have pre-nuptial agreements. In the United Kingdom, there have been some very interesting cases of pre-nuptial agreements and the challenges of its enforceability. Now, while pre-nuptial agreements exist in US, UK and Europe, the question in India is, can we consider any of these as enforceable? Because, there is a lot of sanctity that is involved with marriages. There are religious and customary practices that govern marriages. Should it be governed to the Indian Contract Act?

Marriages are spiritual, they can be attached with religion or it can be under the Special Marriage Act as well. You can go and register in marriage, but we think that it is a social life or social circumstances. So before that, can the husband and wife or the parties and partners to a marriage have something called a pre-nuptial agreement? This is possible. It is nothing but a partnership, a kind of an arrangement that the parties would want to make before marriage, because there are many advantages attached to pre-nuptial agreements.

Pre-nuptial agreement anticipates breakdown of marriage. For many of us, it may look like there is a distrust that is already created by making such an agreement. But it is the job of a

contract to anticipate risk and that in case there is breach, these are the liabilities and these are the obligations between the parties.

If there are two celebrities, who have their own property that they made before marriage and their intention is very clear that they do not want to merge the assets and properties that they made before marriage as matrimonial property. They do not want to merge it after marriage. So, they want to keep it separate. Now, after marriage, whatever property and assets and cash or whatever they flow, that will be considered as a matrimonial property to which both parties have valid equal share. A pre-nuptial agreement works pretty well in those circumstances, because breakdown of marriage is some kind of a purpose that people can definitely anticipate as they go forward. You might have seen that with various celebrities, politicians and others who have undergone divorce, the immediate rescue part has been the pre-nuptial agreement that is in place.

A pre-nuptial agreement also restricts the discretion of the judges in deciding issues of maintenance.

When maintenance cases are decided by the judiciary, they might be guided by principles such as 50 percent of the salary 50 percent of assets, of whatever is earned by the earning member in the partnership should be shared with the other partner. Pre-nuptial agreement can actually look at it from a very interesting perspective of trying to cap that kind of maintenance that the judges would want to decide. Maintenance may be agreed at, say 30 percent of the last drawn salary, or it could be a lump sum alimony that has to be granted. Alimony is a lump sum amount and maintenance is probably a regular kind of payout. Even the Indian courts today do not give maintenance because that is a continuous kind of a duty and obligation that has to be monitored by the courts of law, sometimes it may be difficult to even enforce it. So, one-time alimony payment is what is generally the courts insistence even in India.

Pre-nuptial agreements also deal with issues of custody of children. When divorce occurs, it is important that the best interest of the child be taken care. This is the principle in India and usually it is considered that for a child of below five years it is in its best interest that it is with the mother. After the five-year rule, it depends upon the economic and social conditions of the partners, who the child should be with and who has the responsibility to take care of the child's education and other expenses as well. A pre-nuptial agreement can actually bring in clarity on those aspects as well.

Finally, Pre-nuptial agreements are very clear on division of property and assets between the partners. The agreement has been found to be quite useful that judges have just implemented the provisions of the agreement, whenever divorce has taken place. And hence, divorce is faster, it is easier, and it is far more clear when it happens, especially in Western countries.

Now, coming back to India there are so many things that are attached to pre-nuptial agreement that may not be enforceable in India. The arguments are that in India, the situation is such that the legislature has drafted key legislations to protect the rights of women in marriages such as the legislation that grants and guarantees maintenance to women in marriages. As discussed in Section 23, anything that is forbidden by law, anything that defeats the provision of any maintenance law cannot be prescribed under the pre-nuptial agreement. If it is done so, the pre-nuptial agreement will be opposed to public policy. So, if the public policy guarantees women to have a statutory right to maintenance, pre-nuptial agreements cannot abdicate, waive or diminish those rights. Similarly, in terms of divorce, we have clear regulations as regards child custody, child maintenance, so on and so forth. Again, pre-nuptial agreements have to be in tandem to the statute and to the provisions of law.

So, anything that the law assures to a child or to women, a pre-nuptial agreement will have to adhere to those kinds of statutes and law. In case it is not adhering to the same, the pre-nuptial agreement will be opposed to public policy under Section 23. Pre-nuptial agreements can be made enforceable in India by keeping the statutory rights and provisions in place. If parties still desire to have one, such an agreement can be drawn, and it can be drawn so as to not attract void agreements. It can be drawn to ensure that the parties can make this agreement as an enforceable one, keeping the public policy public interest and statutory provisions that exist in India.