Advanced Contracts, Tendering and Public Procurement
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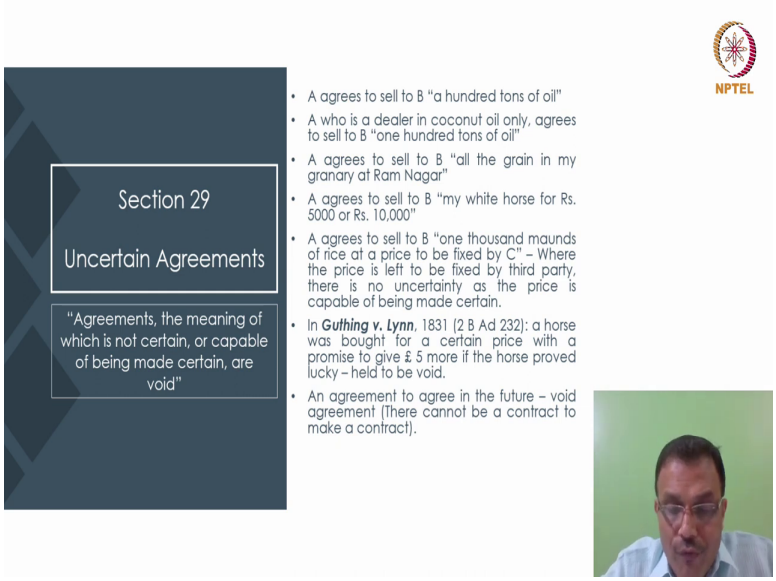
Lecture 20
Void Agreements - Part 03



Two provisions that are critical for concluding the understanding of the fundamentals of contracts are Section 29 and Section 30.

Section 29 among other things says that uncertain agreements are void. What amounts to uncertain agreements needs to be understood. Certainty of the parties, subject matter of the contract and the role and obligations of each of the parties is critical for enforcement of contract.

Uncertain agreements are generally left to the discretion of the judges. Generally, such contracts are void. Uncertain agreements are uncertain in terms of understanding what are the obligations between the parties. Unless you understand what are the obligations between the parties, the court does not have a role to enforce it.

For example, if A agrees to sell B 100 tons of oil, generally, we would say this is okay. So, what is the nature of this agreement? Why should it be held to be void? If the 100 tons of what type of oil is something that cannot be made out, it would amount to an uncertain agreement. On the other hand, if suppose, A the seller is only dealing with one particular kind of an oil, then selling or agreeing to sell 100 tons of oil is quite certain, because he only trades with that oil. But if A is trading with different 10 sets of oil and there is no agreement about which type of oil, it makes it an uncertain agreement.

In some of these circumstances, a certainty is not arrived at between the parties. Courts may not be in a position to help the parties to arrive at one that could be declared void. Suppose A who is a dealer of coconut oil agrees to sell 100 tons of oil. This is quite certain as he can only sell coconut oil and the agreement is quite certain. As there is certainty in the agreement, it can be enforced. However, if A agrees to sell all the grains at his warehouse at Ram Nagar, there may not be certainty about the phrase 'all grains.' It could be packed or unpacked, it could mean rice, wheat, jowar or any other grain. Moreover, 'all grains' does not give a clear picture about the quantity of grains either. This is why contract law under Section 29 clearly states that it is important that the parties agree on the terms and conditions of the contract. Courts cannot come to rescue and make a contract for the parties if they haven't made a proper one for themselves.

The courts do not have a role to add things in the contract for creating certainty in the agreements as well. If A agrees to sell B his only white horse for either 5000 rupees or 10,000 rupees, there is an uncertainty on the consideration which would probably make it an uncertain promises and cannot be enforceable under Section 29.

To consider another example, if A wants to buy a horse, which would be lucky for her and agrees to pay 5 pounds more if it proves to be so, there is an uncertainty surrounding why horses would be lucky for A, in which circumstances it would be lucky for her, what does luck actually mean, whether luck is to be ascertained with reference to A's professional life or personal life, etc. So, promises like these are definitely not enforceable because of the uncertainty of the variables.

Section 29 has certain important implications in both traditional and contemporary contexts. If there is agreement to have an agreement in the future, that in itself will create a lot of uncertainty. There cannot be a contract to make a contract. Such kinds of agreements cannot be enforced because the certainty of the same has not been established at present.

One of the aspects of certain or uncertain agreements which has contemporary significance is the lock in and lock out agreements. Though these two agreements look identical, they are not necessarily the same.

In a lock in agreement, parties essentially agree to keep on trying to negotiate until it is complete. This is generally done in good faith out of parties' desire to ensure that the negotiation does not fail. Therefore, the parties lock themselves in to not give up until they succeed in the negotiation. In lock in agreements and lock out agreements, parties have to clearly state the purpose behind the agreement at the preliminary stage of negotiation which ensures that till the purpose is accomplished, there is no option of going out. It might appear as if it restrains the parties or attracts Section 27 as the freedom of trade is being infringed.

Moreover, negotiations have so many details that have to be agreed upon. At this point of time, a lock in agreement may show that there is no complete agreement between the parties and that they probably are not going to be enforced. How much time can be fixed as the lock in period? If no such time is fixed, can the parties be expected to endlessly keep on negotiating and not venturing out for doing something else? These challenges still continue to remain. In the UK, it is established that incomplete agreements are not going to be enforceable. A lock in agreement that does not have a time stipulation to lock in can be considered to be an incomplete element, because time is the essence of every contract. The duration of time for which the parties have to be locked in has to be mentioned and should be a reasonable time if there is no such stipulation. If no reasonable time has been fixed, it amounts to incompleteness or uncertainty about the purpose behind such locking agreements and can be held to be challenging Section 29 of the Contract Act.

Lock in is only for negotiation, a kind of a bargain and is not for a contract or for delivery. So, a deadlock provision cannot probably resolve the issues that may emerge. The purpose of the lock in agreement has to be determined and arrived at through a specific clause, failing which the court may not be able to enforce it.

Lock out agreements or exclusive agreements on the other hand, are agreements where the parties agree to deal exclusively with each other and lock out any third party who may intervene in the contract.

Because of the nature of these contracts, it may seem that it restrains the freedom of contract and may lead to them being challenged before courts. As a follow up to lock in and lock out agreements, the parties can give or issue a letter of intent. This can be done so as to have negotiations in the future as well. If those agreements do not work at this point of time, a second opportunity may be given.

In the common law, these two kinds of agreements have been already tested. In the Walford versus Miles case of 1992, Miles owned a company which carried on the business of photography. In 1986, they decided to sell his business, and received a 1.9-million-pound offer from a third party. In the meantime, Walford also entered into negotiations with Miles. While Walford negotiated, he expressed his interest to buy by offering a higher price of 2 million pounds. In a telephonic conversation between the parties, it was decided that Walford would provide a letter of comfort from his bank for a specific day confirming that the bank had offered them a loan facility to enable to meet this transaction, which would terminate the negotiation with a third party. Unfortunately, Miles went back on his word and he sold the business and the premise to a third party who was giving him only 1.9 million pounds. The offer from Walford to Miles of providing a comfort letter so that he would not negotiate with a third party is kind of a lock out agreement.

In the absence of stipulations regarding consideration and time, such an agreement is not going to be enforceable. In this case, Miles's sale to a third party is valid because what Walford did was not supported by consideration, or a time constraint within which the letter of comfort would be provided. Therefore, if negotiations are to have some legally binding effect, then there ought to be consideration and a fixed time frame within which the restraint in dealing with third parties would have effect.

In an Indian case, a franchisee agreement was entered into by Dilip Chhabria's DC Design and Swift Initiative Private Limited in 2015, with a five-year lock in period. Such kinds of exclusive franchise agreements are considered valid. DC design awarded the franchisee contract to Swift Initiative for five territories namely Lucknow, Noida, Gurgaon, Ludhiana, and Chandigarh. So, DC design was the franchisor and Swift Initiative was the franchisee which was given this exclusive right to operate in these five territories. It was a lock in agreement for five years for five territorial areas. It could be terminated only by serving a notice. The Swift Initiative did not honor the franchisee contract as they could not open further showrooms and some of the showrooms which were opened got shut down. So, Dilip Chhabria decided that he will open his own showroom in one of these territories but Shift Initiative went to the court for an injunction claiming an exclusive right to open the show rooms. The Court examined whether the exclusivity granted to a franchisee would bind the franchisor as well. The court ruled that it does not bind the franchisor and is applicable against other franchisees alone.

So, exclusivity does not mean that the franchisor cannot do his own business in those territories. It only meant that in these territories, the franchisor will not have any other entity apart from the one that was given this franchise and that only Swift Initiative will have that exclusivity. However, the court noticed that in this case that Swift Initiatives were yet to operate or open shops. Hence, they were actually in default of the contract could not object to the showroom that was being opened by DC designs. So, this kind of a lock in period of five years is not entirely going to be enforceable if the franchisee does not work out his own way of dealing with this contract.

The last case on Section 29 is that of Imperial Tobacco Limited versus Oberoi Mall Private Limited. This case dealt with an ordinary lease agreement and lease plus amenities agreement that was to be granted to ITC Limited in Oberoi Mall. ITC had its own hotel business and took the premises of Oberoi Mall on lease.They entered into a lease agreement and an amenity agreement because amenities agreement is about the use of common space in the mall. A hotel inside a mall expects the hotel guests to use the mall facilities as well. When they entered into this contract, there was a lock in period of 60 months, or five years, as was seen in the previous case.

The petitioners did not establish their business as they had second thoughts over it. Oberoi Mall forfeited the security amount and sought to recover unpaid rent for the period of 60 months as a lessee has to pay the rent for the property that he uses. The unpaid rent and amenities charges were to be levied for the lock in period.

The principle or rule of unjust enrichment applies to every kind of contract where one party is prohibited from profiteering from any kind of a breach from the other party. Although damages can be claimed, it is always subject to the test of reasonability and one cannot claim more than what it is due to him.

In this case, Oberoi Mall could always find a new lessee. If ITC does not establish itself in the property of Oberoi mall, they can lease it to someone else. If an old tenant leaves, he will be replaced by a new tenant. Here, Oberoi Mall intended to claim rent in addition to forfeiture

of security deposit while a new tenant was already paying them rent. This amounted to recovery of damages in a penal character.

The Supreme Court had to decide whether this could also amount to unjust enrichment. In this case, the lock in period was of 60 months, which meant that the contract had a minimum duration of 60 months during which the parties had an obligation towards each other for that the locking time. If the locking time is not respected, honored or breached, the parties cannot claim that there was a minimum duration of time for which the rent or the lease amount has to be paid. Unjust enrichment is prohibited in India. It is a rule which decides to permit what is agreeable as damages and what is not agreeable as damages.