Advanced Contracts, Tendering and Public Procurement
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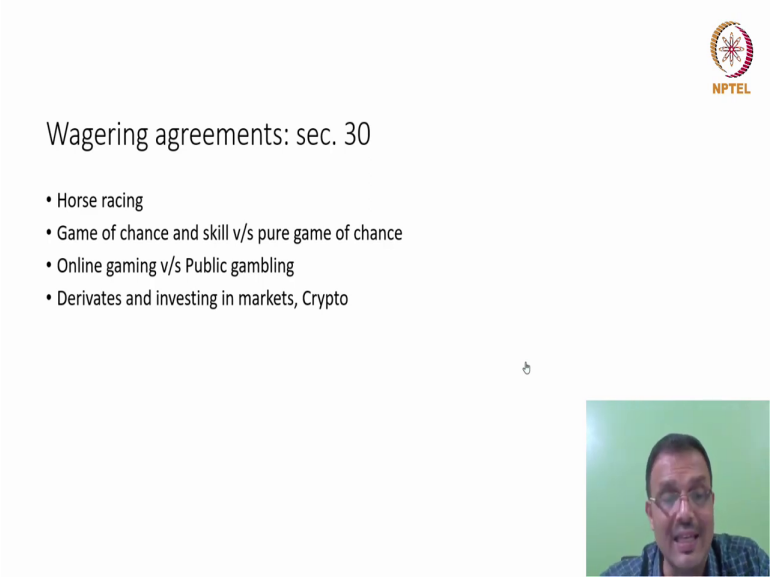
Lecture 21
Void Agreements - Part 04



Section 30 of the Indian Contract Act states that wagering agreements are unenforceable in India. This provision says that a person who has entered into a wagering requirement cannot bring suit or cannot sue in the courts of law in India.

Wagering agreements refers to agreements which can be considered to be uncertain, based on the kind of chance that people place on outcomes in a contract. Betting, horse racing and gambling can all be considered to be wagering agreements. It can be said that wagering agreements can touch the post position of illegality. Illegality holds that certain kinds of activities are not only prohibited but also are punished which finds mention in statutes like the Indian Penal Code, the State Police Legislations or the Public Gambling Act, which

However, in the Indian Contract Act, there is no clear mention about whether wagering agreements are considered to be illegal, because that is not what Section 30 attempts to do. The contract law merely states that no suit can be filed for enforcement of these illegal activities.

Section 30 also enumerates certain exceptions. It is to be appreciated that the Indian Contract Act was drafted by Britishers and was enacted during British era. Therefore, horse racing was categorized as an exemption and would not be considered as a wager. So, if any subscription of 500 rupees is promised towards the price of horse racing, it can be enforced.

Even after independence, Courts have held that if a game involves any skill, or is a combination of skill and chance, any kind of promises or exchange of promises or agreements in relation to that game can be enforced and will not be covered under Section 30.Section 30 does not prohibit promises to pay the price of games of chance. However, the courts cannot enforce such promises.

In this context, it is pertinent to note that the courts in India have adjudicated on whether a game of chess, carom or cards can be considered to be wager. The courts have held that in games like chess, carom and rummy, an element of skill is involved. They are not to be considered as gambling, betting or wagering.

Nowadays, there are a lot of online gaming platforms in the market. Matters involving gaming and gambling, fall within the ambit of State List and not that of the Union List. Online games may be prohibited in States which find it problematic whereas other States may not have such policies.

Betting has been perceived to be against public policy because it encourages people to waste their money, gamble their money, invest their money into something that they may lose over a period of time. It has been considered social evil. However, it is also a cultural and customary practice in this country in certain communities where gambling is permitted during certain days. States like Goa and Sikkim have made an exception for casinos as it promotes tourism and is good for their economy. These are permitted vis-à-vis police statutes or some special laws. However, the enforceability of the same in a court may pose problems, because if it is considered as amounting to wagering, a promise or an agreement with the casinos may not be enforceable at courts. The courts in Goa maybe inclined to interpret it because it has been legalized. But the legalizing of the same, again, will open up challenges in other states where such kind of gambling is not permitted.

At one point of time, lotteries were a common factor in India, again, bringing social issues and issues of public order. The lotteries that existed in most states where governmental lotteries and was perceived to benefit social welfare. A lot of States have now done away with the system of lotteries.

The jurisprudence on wagering agreement is not uniform in India. It varies from State to State, from game to game and from skill to skill. Therefore, the courts also grapple with issues surrounding what is permissible and impermissible from time to time.

In derivatives, share market, stock exchanges or in commodity trading, the money that is offered may amount to wagering. In a wager, people come together to put money or something equivalent to money into something which is not sure or certain or into something that is in the future and is not within the control of both the parties or predictable. In the backdrop of this definition, stock market is also one form of gambling. However, this has been legitimized through State action. Therefore, legitimizing of wagers through state action is one of the mechanisms to bring in enforceability of these kinds of contracts.

Today, a similar debate is going on with crypto currency or crypto assets. Here also, there is nothing of a physical tangible asset and is again a gamble. Cryptocurrencies and crypto trading are all matters that the government would be keen to regulate, especially because of the challenges to law and order that are there from a cross border or a trans-border perspective. In the digital age, the real challenge is to look at regulation of entities that are beyond the territories of India and to look at regulation vis-a-vis trading partners. The State is also duty bound to protect innocent citizens or investors who may actually lose money over a period of time. The craze behind cryptocurrency and crypto trading reminds one of the popularity enjoyed by chit funds in 1980s. They were promoted as small savings. However, many of these companies defrauded participants and were eventually closed down. Citizens must be therefore, cautious to look into government regulations before entering into any kind of wager. What is to be borne in mind is that contracts and agreements of wager are not encouraged by the Indian Contract Act, unless they are permitted by the special legislation as the case may be.

Sections 31-36 of the Indian Contract Act deal with contingent contracts, i.e., contracts that are contingent of some event. If the event happens, then the contract can be enforced. Its significance can be understood from the recent pronouncements of the Supreme Court of India, which has dealt with force majeure clauses in a contract. Force majeure clauses are those clauses that include the grounds of frustration that may creep in to a contract. It could be because of an Act of God such as an earthquake, tsunami, cyclone, unprecedented rainfall, etc. Or it could be due to act of men or act of nature, both combined together, which necessitates the distinction between this majeure and force majeure. Majeure is an act of God whereas Force majeure involves acts beyond the control of parties.

The Supreme Court has said that in Force majeure scenarios, an event which may impact the contractual promise happens. So, it is something that is contingent, where promise may not

continue on the happening of an event. If the event does not occur, the promise has to continue. The Supreme Court's holding that the force majeure clause is a contingent kind of an event has assumed great amount of significance.

The Indian Contract Act is essentially based on the law of obligations. The perfect law of obligation that the Indian Contract Act states and puts forward are in a Chapter quite later in the Indian Contract Act from Sections 68-72, which are called as quasi contracts. They have enabled judges to impose obligations even in the absence of an agreement.

We have seen that as per Sections 64 and 65 of the Indian Contract Act, courts can intervene irrespective of whether it finds an agreement to be void or voidable. If the contract is voidable, damages can be claimed and the court can set aside the contract. The principle of unjust enrichment and restitution applies in both voidable, and void agreements. So, no person can actually unjustly enrich from void agreements.

There can be cases where there is no contract but the relationship between the parties resembles a contractual one even though there is no contract. It is pertinent to look into Section 68 which states that in case an incapacitated person, and that incapacitated person such as a minor, a person of unsound mind, or any other individual has been supplied with goods, they have an obligation to pay for it irrespective of whether the contract that is entered into is valid or void. Although incapacitated persons cannot make a contract, goods would have to be supplied to them as they have to live and they have the right to food, clothing and shelter. The goods that are supplied to an incapacitated persons are the necessities of his life. They would have to pay for those goods that are supplied. So, incapacitated persons have an obligation irrespective of the contract being valid, existing or voidable, to actually pay for those goods that are supplied to them and the goods that they have utilized. This is where the law of obligation comes in and law of obligation is quite higher to the contractual obligation.

Even an incapacitated person cannot unjustly enrich or make use of the goods while the contract by virtue of which the goods were given has been held to be void. They are not personally liable to pay and their estate or property is going to be held accountable for payment.

These are called quasi contracts for the simple reason that since the term quasi means semi, partial, half, it refers to a semi contract and not a full contract. So, it looks to be like a contract because look, giving goods to a minor is nothing but a contract. But because he is minor because he is about less than 18 years of age, the courts and the law does not recognize that kind of a contract. Therefore, it resembles a contract and has obligations that the law enforces.

The Indian Contract Law is supposed to be a law of private obligations and private remedies. It is supposed to be a law based on agreements and obligations accepted between the two parties. Therefore, it is not externally imposed obligations and largely deals with private obligations and voluntarily accepted obligations. However, as far as quasi contracts are concerned, the obligations under Section 68 are externally, legally or statutorily imposed and has to be complied with irrespective of whether one accepts it or not. Therefore, Section 68 enables incapacitated persons to be held accountable for the goods that are supplied to them as necessities of life. They would have to reimburse the person who was supplied. The Indian Contract Act uses the terminology ‘reimbursement’ and does not state that price or damages have to be paid. Reimbursement clearly involves just the cost of those goods and nothing more than that.

The second provision under quasi contracts puts an obligation on a finder of lost goods. Section 71 says that if anyone finds lost goods, they have an obligation to find the true owner of these lost goods and return the goods back to that person, irrespective of whether the true owner has claimed the goods or not. This finder comes across the goods on his own, without deriving any instruction or authority from the true owner.

According to law, nobody has an authority to keep someone else's product. In civil law, there is an obligation to find who the actual owner is and return it back.

The finder can incur a maximum of two-thirds of the cost of the goods found as the expenses in finding the true owner, for that is all that he can recover. He has the right to be reimbursed up to two-thirds the economic value of that lost goods, in case he has incurred expenses in

finding the true owner which is a limitation imposed under Section 169 of the Indian Contract Act.

In other words, if a person is in possession of someone else's property, he has an obligation of a bailee. This is an involuntary contract of bailment. Obligations for taking care of the goods and incurring expenses to take care to find the true owner can be imposed according to the contract of bailment subject to the ceiling of two-thirds of the economic value of the goods.

If the true owner cannot be found, the bailee is entitled to exercise right to sell the goods. This is only exercisable when the true owner cannot be found out. For instance, in railways, ports and airports, there can be lots of unclaimed goods. Here, the Port authority, the Airport authority or the Railway, as the case may be, has an obligation under Section 71 as the finder of lost goods. The contract would have been to make the goods reach from place A to place B. If in the final destination b, no one has arrived to pick it up, the one who has the custody of the goods would be the fighter of lost goods.

The next provision that needs to be looked into in quasi contracts is Section 72. This has been probably widely used in recovering tax that has been overpaid to the Income Tax Department. Section 72 provides that if any money has been paid by mistake or miscalculation, in excess of what was stipulated under the contract, then there is an obligation to pay back the additional money that has been paid. The law of unjust enrichment applies in such situations. There are several judgments where the Income Tax department and the government were asked to return the money back under Section 72. Tax is not paid necessarily through a contract or an agreement. Therefore, Section 72 applies to even those relationships that are not contractual but resembles a contract. The government has been asked to give the refund under Section 72 so as to ensure that it does not unjustly enrich from taxpayer’s money.

Under quasi-contracts, if someone’s services are being enjoyed, which is a non-gratuitous act, there would be an obligation to render payment. For instance, if an elderly person is being visited by someone regularly to take care of him, feed him and provide medicines, this can be a non-gratuitous act, and there would be an obligation to pay. Regardless of whether a specific promise was made to him or not, whether a contract existed between the elderly person and him or not, if he is visiting and looking after the elderly person regularly, he would be entitled to recover the expenses incurred vis-à-vis Section 72.

The purpose behind the Sections in this chapter of quasi-contracts are to bring in obligations in those kinds of relationships in which no specific promises were made and there is no enforceable contract. When principles such as justice, equity and good consciousness, principle of unjust enrichment and the law of restitution are considered, the courts, as courts of equity, may expect the party which has benefited from the supply of goods or the party who has someone else's product or the party who has the extra money to give it back.

In quasi contracts, cases related to employment can also be filed. For example, the Indu Mehta case, or the P.C Bagla case are instances where the court has ruled that government cannot recover the salaries of employees whose employment has been subsequently declared as illegal. Here, the government has enjoyed the services of the employees for the time period during which they have worked. The employees worked non-gratuitously during the course of the employment. Having benefited from the non-gratuitous work of the employees, government cannot recover the money that has been paid to them in exchange for their work.